

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311386

TRAVIS ALEXANDER		CLAIMANT
HILAND DIARY		RESPONDENT
OLD REPUBLIC INSURANCE COMPANY, CRAWFORD & COMPANY, INSURANCE CARRIER/TPA	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED FEBRUARY 15, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by NEAL HART, Attorney, Little Rock, Arkansas.

Respondents No. 1 represented by MELISSA ROSS, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 22, 2005, in Fort Smith, Arkansas. The deposition of Dr. Chris Alkire was taken on October 24, 2005, and has been admitted as Respondents' Exhibit No. 3.

A pre-hearing order was entered in this case on August 3, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that the issue of the claimant's entitlement to additional temporary total disability benefits covered the period of October 21, 2004 through a date yet to be determined. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On April 30, 2003, the relationship of employee-employer-carrier-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$415.00 for total disability and \$311.00 for permanent partial disability.
3. On April 30, 2003, the claimant sustained a compensable injury to his right shoulder.
4. There is no dispute over the payment of medical expenses accruing to date.
5. There is no dispute over the payment of temporary total disability benefits prior to November 5, 2004.
6. The respondents have accepted and paid permanent partial disability benefits for a permanent physical impairment of 8% to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional medical expenses as recommended by Dr. Alkire.
2. The claimant's entitlement to additional temporary total disability from October 21, 2004 through a date yet to be determined.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

“Claimant has suffered a wage loss disability in an amount to be determined at trial. Claimant needs additional medical treatment and additional diagnostic studies performed on his shoulder. Claimant is entitled to payment of a statutory attorney’s fee on all controverted benefits. Claimant re-entered his healing period on October 21, 2004.”

In regard to these issues, the respondents #1 contend:

“Respondents contend that all appropriate benefits have been paid with regard to this claim. Respondents further contend that claimant suffered an independent intervening incident that caused new objective findings that account for his current need for medical treatment. Additional medical treatment is not reasonable and necessary associated with the compensable injury. In the event claimant is seeking permanent disability in excess of his rating, respondents contend the Second Injury Fund would be responsible for the same.”

In regard to these issues, the Second Injury Fund contends that it has no interest in regard to the current issues.

DISCUSSION

I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant’s entitlement to the payment of expenses incurred for additional medical services for the claimant’s continuing right shoulder difficulties by Dr. Chris Alkire. The burden rests upon the claimant to prove that these recommended medical services represent “reasonably necessary medical services” for his admitted compensable right shoulder injury of April 30, 2003.

In order to meet this burden, the claimant must first prove that these recommended medical services are necessitated by or

connected with his admitted compensable right shoulder injury. Secondly, the claimant must show that these medical services have a reasonable expectation of accomplishing the purpose or goal for which they are intended. This purpose or goal is not limited to active medical treatment that is intended to resolve or improve the physical damage caused by the compensable injury, but also extends to medical services reasonably necessary to accurately determine the nature and extent of the injury, medical services necessary to stabilize the injury, and medical services to improve or alleviate the symptoms and disability produced by the injury.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that the medical services provided and recommended by Dr. Alkire were necessitated by or connected with the compensable right shoulder injury of April 30, 2003. There is no evidence presented to indicate that the claimant experienced difficulties with his right shoulder or sought medical treatment for any difficulties with his right shoulder prior to the employment related incident of April 30, 2003. There is also no evidence presented to show that the claimant experienced any new accident or specific trauma to his right shoulder following this employment related incident. It was the expert medical opinion of Dr. Alkire, an orthopaedic surgeon and the claimant's primary treating physician for his compensable right shoulder injury, that the claimant's continuing difficulties with his right shoulder and the additional damage to this shoulder (shown by subsequent objective testing), were related to or connected with the

claimant's initial compensable injury (D.20).

I recognize that the respondents contend that the additional damage to the claimant's right rotator cuff as noted in the May 12, 2005 arthrogram and MRI of the claimant's right shoulder, required the occurrence of a "new" injury to the claimant's shoulder that must have occurred after his initial release from treatment for his compensable right shoulder injury. However, there is no actual evidence that any such injury occurred. In his deposition, Dr. Alkire indicated that the defect shown on these studies was to exactly the same tendon that was torn in the employment related accident of April 30, 2003. He further stated that the location of this tear is only about 1 cm. (slightly over 1/3 of an inch) from the location of the initial tear from the injury on April 30, 2003. He noted that until the recommended surgery is performed, he cannot be entirely certain of the cause of this recently detected damage. In his deposition, he indicates that this additional tearing could simply represent a failure of the surgical repair of the initial tear or an aggravation of this previously damaged tendon by the claimant's day-to-day activities of normal life. While Dr. Alkire acknowledged that a third possibility was a "new" specific trauma injury, this would be contrary to the histories available to him.

Clearly, if the new tear is merely a failure of the prior surgical correction of the initial tear, then any difficulties attributable thereto are the result of the initial compensable injury. If the new tear is the result of an aggravation of the initial compensable injury by the claimant's day-to-day activities

of normal life, then there is still a causal connection between the initial compensable injury and this subsequent tear, Home Insurance Company v. Logan, 255 Ark. 1036; 505 S.W. 2nd 25 (1974). Clearly, the evidence presented, including the claimant's essentially continuous complaints with his right shoulder following the initial compensable injury, supports the likelihood or probability of these first two possible causes for the newly observed tear. None of the evidence presented supports the probability or likelihood of a "new" specific traumatic incident or accident as the cause of this newly observed tear.

After consideration of all the evidence presented, it is also my opinion that the greater weight of the credible evidence establishes that the surgical intervention recommended by Dr. Alkire has a reasonable expectation of accomplishing its intended purpose of repairing the physical damage to the claimant's right rotator cuff and thereby reducing his symptoms and physical limitations. This procedure is of a type and nature commonly recognized by the general medical community as being appropriate for the proper medical care of rotator cuff tears, such as that experienced by the claimant. Obviously, Dr. Alkire feels that the recommended services are medically appropriate for this purpose or he would not have recommended such treatment. It cannot be presumed that a medical expert, such as Dr. Alkire would recommend medically inappropriate or unnecessary treatment modalities.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that the additional medical

services recommended by Dr. Alkire, including surgical intervention, represents “reasonably necessary medical services” for his compensable right shoulder injury of April 30, 2003. Specifically, I find that these medical services were necessitated by or connected with this compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they were intended. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

II. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The remaining issue concerns the claimant’s entitlement to additional temporary total disability benefits from October 21, 2004 through a date yet to be determined. Again, the burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must prove that he continued within his healing period from the effects of his compensable injury, throughout this entire period. He must further prove that he also continued to be rendered totally disabled from performing all forms of regular gainful employment, as the result of the effects of this compensable injury, during this entire period.

The duration of the healing period is medical question and must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until a claimant has achieved the maximum benefit of time and medical treatment in the improvement or resolution of the actual physical damage caused

by the compensable injury. Once the underlying physical damage resolves or stabilizes (at a level where nothing further in the way of time and medical treatment offers a reasonable expectation of improvement), then the healing period has ended. The mere continuation of symptoms is not sufficient, in and of itself, to extend the healing period. A claimant may also re-enter a healing period for a compensable injury, if his actual physical condition worsens or destabilizes, so that additional medical services once again become necessary.

After consideration of all the evidence, particularly the medical evidence, I find that the healing period from the effects of the compensable injury initially ended on June 4, 2004. At that time, Dr. Roshan Sharma opined that the claimant had reached maximum medical improvement (MMI), in regard to his right shoulder injury, and assessed a permanent physical impairment of 7% to the person as a whole for this injury. The medical record indicates that the claimant's last actual treatment for his compensable right shoulder injury was by Dr. Alkire. This treatment was provided on April 29, 2004. At that time, Dr. Alkire noted that the claimant's difficulties with his right shoulder had improved sufficiently to stop ongoing active treatment. In his reports and deposition, Dr. Alkire further concurred with Dr. Sharma's opinion that the claimant had achieved MMI from his compensable right shoulder injury by June 4, 2004.

However, the greater weight of the credible evidence (particularly the medical evidence) establishes that the claimant

re-entered his healing period from the effects of his compensable right shoulder injury on or about October 21, 2004. On that date, the claimant was again seen by Dr. Alkire for his right shoulder complaints. On the basis of the physical examination performed at that time and the claimant's increased complaints, it was Dr. Alkire's opinion that additional testing of the claimant's right shoulder was necessary to accurately assess the etiology of the claimant's increased difficulties. This testing included an MRI and an enhanced MRI arthrogram of the right shoulder. Clearly, these tests would be commonly recognized as medically appropriate to accurately diagnose the etiology of the claimant's increased right shoulder complaints. Although Dr. Alkire continued to recommend this testing, the respondent's refusal to authorize such a procedure prevented this testing from actually being performed until May 12, 2005. The testing objectively showed a further tear of the supraspinatous tendon, in relatively close proximity to the initial surgically corrected tear that was produced by the compensable injury of April 30, 2003. Following this testing, Dr. Alkire again recommended a surgical repair of this tear of the claimant's right rotator cuff. Such a procedure would be necessary and appropriate to stabilize this joint and reduce the claimant's complaints and limitations.

Finally, it is my finding that the claimant's second healing period will continue until the claimant has achieved maximum benefit and recovery from the currently recommended surgical intervention.

In regard to the claimant's actual disability status, on and after October 21, 2004, the evidence shows that the claimant was experiencing a multitude of conditions and difficulties, all of which had a detrimental effect on his ability to obtain regular employment. However, the only difficulties and limitations that have been shown to be attributable to his compensable right shoulder injury may be considered in determining his entitlement to additional temporary total disability benefits. The various difficulties and limitations from the claimant's other non compensable conditions are not to be considered in determining if he was totally disabled for the purposes of awarding temporary total disability benefits. Thus, the fact that he may have also been rendered concurrently totally disabled, as a result of these non compensable conditions, would not prohibit him from being entitled to temporary total disability benefits for total disability resulting from his compensable right shoulder injury.

Considering the claimant's compensable right shoulder difficulties alone and giving no consideration to any concurrently disabling conditions, the greater weight of the evidence shows that the claimant was restricted from engaging in any employment activities requiring significant use of his dominant right arm from October 21, 2004 through a date yet to be determined. Considering the claimant's advancing age, limited education, and previous work experience, these physical limitations would significantly limit him in obtaining regular employment in the open job market. The fact that the claimant was continuing to receive ongoing active

medical treatment for his compensable shoulder injury and additional corrective surgery was recommended would further make it highly unlikely that he could obtain a regular gainful employment in the open job market. I would also note that there is no evidence that during this period the respondent made any attempt to provide or obtain for the claimant an employment position that would be within his current limitations and restrictions from the compensable right shoulder injury. After consideration of all the evidence presented, it is my opinion that the claimant has proven that the claimant's compensable right shoulder difficulties have caused him to be totally disabled from performing regular gainful employment for the period commencing October 21, 2004 and continuing through a date yet to be determined.

In summary, the claimant has proven all of the elements necessary to entitle him to additional temporary total disability benefits for his compensable right shoulder injury during the period of October 21, 2004 through a date yet to be determined. Thus, the respondents are liable for additional temporary total disability benefits during this period.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 30, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
3. On April 30, 2003, the claimant earned wages sufficient

to entitle him to weekly compensation benefits of \$415.00 for total disability and \$311.00 for permanent partial disability.

4. On April 30, 2003, the claimant sustained a compensable injury to his right shoulder.
5. The difficulties which the claimant has experienced with his right shoulder on and after October 21, 2004 represent a continuation or recurrence of his compensable right shoulder injury of April 30, 2003. The evidence fails to show any independent intervening new event or cause of these difficulties sufficient to relieve the respondents from liability for continued benefits.
6. The medical expenses provided to the claimant and recommended to the claimant for his right shoulder complaints by Dr. Chris Alkire, on and after October 21, 2004, represent reasonably necessary medical expenses for the claimant's compensable right shoulder injury of April 30, 2003. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.
7. The claimant was once again rendered temporarily totally disabled, as a result of the effects of his compensable right shoulder injury, for the period beginning October 21, 2004 and continuing through a date yet to be determined. Specifically, the claimant has proven by the

greater weight of the credible evidence that he re-entered and continued with his healing period from the effects of his compensable right shoulder injury for the period beginning October 21, 2004 and continuing through a date yet to be determined and was also totally disabled by this compensable injury during the same period.

8. The respondents have controverted the claimant's entitlement, at their expense, to any additional medical services recommended by Dr. Alkire. The respondents have also controverted the claimant's entitlement to any temporary total disability benefits on and after October 21, 2004.
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant additional temporary total disability benefits for the period beginning October 21, 2004 and continuing through a date yet to be determined.

The respondents shall also be liable for any medical services recommended or provided to the claimant by Dr. Chris Alkire for his compensable right shoulder difficulties, on and after October 21, 2004. This liability shall be subject to the limitations set out by the Commission's medical fee schedule.

The respondents shall pay to the claimant's attorney the

maximum statutory attorney's fee on the additional controverted temporary total disability benefits herein awarded. One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these benefits.

All benefits herein awarded which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge