

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F500962

MICHAEL LORE, Employee	CLAIMANT
GREAT PLAINS COCA COLA BOTTLING, Employer	RESPONDENT #1
AIG CLAIM SERVICES, INC., Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 6, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by MELISSA ROSS, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas, although not participating in hearing.

STATEMENT OF THE CASE

On June 7, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 8, 2006, and a pre-hearing order was filed on March 6, 2006. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed between the claimant and respondent #1 at all relevant times.
3. The claimant sustained a compensable injury to his left shoulder on July 29, 2004.
4. The claimant was earning sufficient wages to entitle him to compensation at the

weekly rates of \$423.00 for total disability benefits and \$317.00 for permanent partial disability benefits.

5. Respondent has paid some permanent partial disability benefits based upon a 7% rating.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment, including surgery as recommended by Dr. Tomlinson.
2. Temporary total disability benefits.
3. Attorney fee.

At the time of the hearing claimant clarified his request for temporary total disability benefits to include the period of August 6, 2005 through March 5, 2006.

The claimant contends that he is entitled to additional medical treatment for his compensable left shoulder injury. This includes surgery as recommended by Dr. Tomlinson. Claimant also requests temporary total disability and an attorney fee.

The respondents contend that the claimant was released as having reached maximum medical improvement on June 28, 2005. His recent MRI (at the request of his change of physician doctor, Dr. Tomlinson) shows a full thickness tear. As such, respondents contend that there is a new injury to the shoulder and that they should not be liable for benefits. Respondent also notes that the claimant had pre-existing problems with his left shoulder prior to July 29, 2004. In addition, respondent requests credit for any unemployment benefits claimant received during any period of temporary total disability awarded.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 8, 2006, and contained in a pre-hearing order filed March 6, 2006, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury.

3. Claimant has also failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits as a result of his compensable injury.

FACTUAL BACKGROUND

The claimant is a 53-year-old man who has been driving a truck for approximately 23 years. In October 2001 the claimant began driving a "snappy truck" for the respondent. Claimant's job duties required him to drive a truck to various locations and fill vending machines with drinks and snacks.

Claimant testified that on July 29, 2004 he was pushing a cart of soda when his arm jerked while attempting to control the cart. Claimant testified that he developed immediate pain in his left shoulder area and reported the incident to his supervisor. Claimant was sent by the respondent to Dr. Berestnev who first evaluated claimant on November 30, 2004 and diagnosed claimant's condition as a left rotator cuff tear. He provided medications, work restrictions, and instructed claimant to follow up in one week. Dr. Berestnev's note of August 6, 2004 indicates that claimant was improving and that his rotator cuff tear was healing. Dr. Berestnev ordered physical therapy and continued claimant's medications and work restrictions. At the time of claimant's visit on August 13, 2006 his condition was better and according to Dr. Berestnev's note claimant no longer wanted to proceed with physical therapy but instead requested a release to return to

regular duties. As a result, Dr. Berestnev released claimant to his regular duties.

The medical records indicate that claimant continued to have complaints of pain in his left shoulder and as a result he again returned to Dr. Berestnev who ordered an MRI scan and referred claimant to Dr. Powell, an orthopaedic surgeon. Dr. Powell performed surgery on claimant's left shoulder on January 14, 2005 to repair a left shoulder rotator cuff tear and impingement with a biceps partial tear and labral fraying. Following claimant's surgery he continued to be evaluated by Dr. Powell and underwent physical therapy. Dr. Powell eventually released claimant to return to work with restrictions in April 2005. Claimant returned to work for respondent with restrictions and he was eventually released by Dr. Powell on June 28, 2005 as having reached maximum medical improvement. Dr. Powell ordered a functional capacities evaluation and impairment rating and indicated that claimant could return to work within the restrictions determined by the evaluation.

The functional capacities evaluation report of July 7, 2005 indicates that claimant could return to a job in the medium category with a lifting restriction of 20 pounds on the left side. Claimant was also provided a permanent physical impairment rating in an amount equal to 7% to the body as a whole which was accepted and paid by the respondent.

Claimant testified that after his release by Dr. Powell he continued to work for the respondent for approximately two weeks before he was terminated. Thereafter, claimant filed for and began receiving unemployment compensation benefits.

Claimant testified that after his surgery some of his pain was relieved but that his range of motion problems involving his left shoulder continued. Claimant filed for and received a change of physician order to Dr. Tomlinson from the Commission. Claimant underwent his initial evaluation by Dr. Tomlinson on November 23, 2005 at which time Dr. Tomlinson's impression was a recurrent rotator cuff tear. Dr. Tomlinson subsequently ordered an MRI scan which was read as showing a full thickness rotator cuff tear. As a

result, Dr. Tomlinson has recommended surgery to repair this tear.

The respondent accepted claimant's injury as compensable and paid some compensation benefits including permanent partial disability benefits based upon the 7% impairment rating. However, respondent has denied liability for any subsequent left shoulder problems following his release by Dr. Powell as having reached maximum medical improvement in June 2005. As a result, claimant has filed this claim contending that he is entitled to additional medical treatment for his compensable injury; specifically, the surgery recommended by Dr. Tomlinson.

ADJUDICATION

A claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment. *Dalton v. Allen Engineering Company*, 66 Ark. App. 201, 989 S.W. 2d 543 (1999). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury; specifically, I find that claimant has failed to prove by a preponderance of the evidence that his left shoulder problems subsequent to his release by Dr. Powell in June 2005 are causally related to the original compensable injury.

Following claimant's compensable injury he was initially evaluated by Dr. Berestnev, a general practitioner. However, when claimant's left shoulder problems continued claimant was sent for an MRI and to Dr. Powell, an orthopaedic surgeon, for further evaluation. Dr. Powell diagnosed claimant's condition as a torn rotator cuff and a partial biceps tear. Dr. Powell performed surgery to repair the torn rotator cuff and the biceps tear on January 14, 2005. Following his release by Dr. Powell claimant sought medical treatment from Dr. Tomlinson, an orthopaedic surgeon, who ordered an MRI scan.

According to Dr. Tomlinson, claimant currently suffers from a full thickness rotator cuff tear of the left shoulder. The question arises as to whether or not this tear is causally related to claimant's compensable injury.

In a letter to respondent's attorney dated February 20, 2006, Dr. Tomlinson indicated that he could not determine the cause of the rotator cuff tear.

Thank you for your letter regarding Mr. Michael Lore. I have read your letter. I don't see a question. However, I am going to assume that you are asking me if the MRI findings of 12/07/05 are new findings or old findings and I can't comment on the causation of the findings associated with the MRI scan. I can tell you, though, that the patient has a full thickness rotator cuff tear and it is my medical opinion that she [sic] should have it fixed. (Emphasis added.)

The medical records do not indicate that claimant was evaluated by Dr. Tomlinson subsequent to that letter nor did claimant undergo any additional testing. However, for reasons unexplained, Dr. Tomlinson in a letter to claimant's attorney dated March 29, 2006 no longer indicated that he could not comment on the causation of the rotator cuff tear but instead stated that it was a continuation of the claimant's original compensable injury.

As per my history on November 23, 2005, Mr. Lore stated that he had persistent pain and stiffness of his shoulder since the time of his injury [sic] on 1/14/05. He did not relay any message of a new injury following his surgery and therefore, I believe his current shoulder problems would most likely be related as a continuum of his work related injury.

I find it impossible to reconcile Dr. Tomlinson's opinion in this case. In the letter of February 20, 2006 Dr. Tomlinson indicates that he cannot state whether the rotator cuff tear is a new finding or an old finding. However, in his letter just one month later Dr. Tomlinson opines that the rotator cuff tear is a continuum of claimant's work related injury and presumably not a new finding.

It should be noted that there is no indication that claimant's current rotator cuff tear is the direct result of a failure of Dr. Powell's surgery in January 2005. Indeed, the MRI scan referred to by Dr. Tomlinson indicates that the tear occurred at the supraspinatus and infraspinatus tendons. There is no indication that these two particular tendons were torn at the time of claimant's original surgery in January 2005. Dr. Powell's medical reports do not mention any tearing of those two particular tendons and his operative report does not mention any tear of those two particular tendons. If tears of those tendons had existed prior to the surgery in January 2005, it would have been revealed on the prior MRI scan or Dr. Powell would have discovered them at the time of the surgical procedure in January 2005.

In short, claimant has the burden of proving by a preponderance of the evidence that his current rotator cuff tear is causally related to his original compensable injury. Here, claimant underwent surgery which was performed by Dr. Powell in January 2005 and he was released as having reached maximum improvement by Dr. Powell in June 2005. Several months later in November 2005 claimant sought additional medical treatment from Dr. Tomlinson who has diagnosed a rotator cuff tear. In a letter to claimant's attorney dated March 29, 2006 Dr. Tomlinson indicated that it was his opinion that claimant's rotator cuff tear was a continuation of claimant's work-related injury. However, Dr. Tomlinson had previously indicated in a letter to respondent's attorney dated February 20, 2006 that he could not comment on the causation of the rotator cuff tear. Given this conflicting testimony, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that his current rotator cuff tear is causally related to his original compensable injury.

Based upon this same evidence, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary total disability benefits subsequent to his release by Dr. Powell on June 28, 2005.

ORDER

Claimant has failed to prove by a preponderance of the evidence that his subsequent left shoulder problems in the form of a rotator cuff tear and the recommended surgery by Dr. Tomlinson is causally related to his original compensable injury. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE