

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501098

LARRY ROBERTS	CLAIMANT
WHIRLPOOL CORPORATION	RESPONDENT
GALLAGHER BASSETT SERVICES, INC. INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 12, 2006

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by TOM HARPER, JR., Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 18, 2006, in Fort Smith, Arkansas. The deposition of Dr. Arthur Johnson was taken on June 29, 2006, and has been admitted as Claimant's Exhibit No. 3. A pre-hearing order was entered in this claim on October 11, 2005. This pre-hearing order set out certain stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. However, prior to the commencement of the hearing, the parties announced that they had agreed on additional stipulations. Those stipulations were read into the transcript of the hearing at its commencement.

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

1. On September 10, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.

2. On September 10, 2004, the claimant was earning wages sufficient to entitle him to weekly compensation rates are \$453.00 for total disability and \$340.00 for permanent partial disability.
3. On September 10, 2004, the claimant sustained a compensable injury to his left shoulder and arm.
4. There is no dispute, at present, over benefits attributable to the claimant's compensable left shoulder and arm injuries.
5. The respondents have controverted all benefits attributable to any alleged compensable injury to the claimant's neck or cervical spine.
6. On October 13, 2004, the claimant completed a form ARN, which reported that he had sustained an employment related injury to his left arm and shoulder on September 10, 2004.
7. On January 31, 2005, the claimant reported to the respondent that he sustained an injury to his low back in the employment related incident on September 10, 2004.
8. On February 7, 2005, claimant's present counsel sent a letter and a form AR-C to the Commission, alleging that the claimant had received a compensable low back injury in the accident on September 10, 2004.
9. On September 9, 2005, the claimant's present counsel filed, on the claimant's behalf, a pre-hearing questionnaire alleging that the claimant received

employment related injuries to his left shoulder, left arm, and cervical spine in the employment related accident on September 10, 2004.

10. By letter dated September 12, 2005, to the respondent's attorney, the claimant's present counsel indicated that he was amending the claim to include an alleged cervical injury, which occurred in the employment related accident on September 10, 2004.

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

1. whether the claimant also sustained a compensable injury to his neck or cervical spine on September 10, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from January 26, 2005 through a date yet to be determined, and attorney's fees for his neck or cervical spine difficulties.
3. The effect of the notice provisions on any benefits attributable to the claimant's neck or cervical spine difficulties prior to September 12, 2005.

In regard to these issues, the claimant contends:

- a. The claimant contends that the injury that he sustained on September 10, 2004 was not limited to his shoulder and left upper extremity but rather included his spine. The claimant contends that he filed an ARC asserting an injury to his back and that claim should have actually asserted injury to his spine. The claimant contends that

it has now been determined that his actual medical problem involves his cervical spine; thus, the claimant contends that the pain in his shoulder and left upper extremity was simply a symptom of the injury to his cervical spine.

- b. The claimant contends that he is entitled to temporary total disability benefits from January 26, 2005 until a date yet to be determined and reasonable and necessary medical treatment.
- c. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend that claimant did not receive any of the injuries alleged and further that the notice of claimant's alleged cervical injury was not given until after September 9, 2005.

DISCUSSION

I. COMPENSABILITY OF THE CLAIMANT'S CERVICAL DIFFICULTIES

The central issue to be addressed concerns the question of whether the claimant sustained a compensable physical injury to his neck or cervical spine in the admitted employment related accident or incident on September 10, 2004. The burden rests upon the claimant to prove all of the elements necessary to establish this alleged compensable injury.

The first of these necessary elements are contained in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires that the claimant prove by medical evidence the actual existence of the physical injury to his cervical spine, which is alleged to be compensable. Further, this subdivision requires the actual

existence of this physical injury or damage must be supported by “objective findings,” as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

After consideration of all the medical evidence presented, I find that the claimant has satisfied the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D). As early as the St. Edwards emergency room records of September 10, 2004, the potential existence of a neck or cervical injury or damage was diagnosed. A cervical MRI, which was performed on September 16, 2004, was interpreted as objectively demonstrating the presence of cervical spinal stenosis with canal stenosis, most pronounced at C7-T1, bilateral degenerative facet disease, and neuroforaminal narrowing. The interpretation of this study also recommended additional testing to determine if the neuroforaminal narrowing was due to arthritic spurring or disc protrusions. A second MRI, which was performed on January 26, 2005, objectively demonstrated the presence of spinal canal stenosis at C7-T1 with anterolisthesis of C7 on T1, facet hypertrophy, ligamentum flavum hypertrophy, and canal narrowing at this level. Finally, a third MRI study was performed on the claimant’s cervical spine, on May 13, 2005. This study was performed both without and with radioactive enhancement (gadolinium). This study was interpreted as showing spondylitic spurring, disc protrusions at C5-6 and C6-7 levels, mild canal stenosis at these levels, a grade I to II anterolisthesis of C7 on T1 with uncovered disc, a moderately large disc protrusion, a

posterior element hypertrophy, and significant cord compression with myelomalacic change in the cord. Additional facet arthritic change was also noted at this level. Further objective evidence of ongoing radicular or neurological difficulties of a cervical origin, in the form of muscle atrophy involving specific muscles of the claimant's left hand, were noted by Dr. Jeffrey Medlock (on January 2, 2005) and by Dr. Arthur Johnson (on May 13, 2005). Based upon all of these objective findings, the claimant was ultimately diagnosed as suffering from a C6-7 herniated cervical disc and grade I spondylolisthesis with spinal stenosis and cervical cord myelomalacia at C7-T1 by Dr. Arthur Johnson (Respondent's Exhibit No. 1, page 46). Dr. Johnson is a competent board certified neurosurgeon with particular expertise in the area of medicine associated with these types of cervical difficulties.

____Next, the claimant must prove by the greater weight of the credible evidence that his medically established and objectively documented cervical injury or damage satisfies the definitional requirements for a "compensable injury" which are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury or damage must arise out of and occur in the course of the employment.
- (2) The physical injury or damage must be caused by a specific incident.
- (3) The physical injury or damage must be identifiable by time and place of occurrence.

- (4) The physical injury or damage must cause internal or external physical harm to the claimant's body.
- (5) The physical injury or damage must require medical services or result in disability.

In order to satisfy the first three of these requirements, the claimant must prove by a preponderance of the evidence the existence of a causal relationship between his cervical difficulties on and after September 10, 2004, and the specific employment related incident of September 10, 2004. He need not prove the existence of this causal relationship to a mathematical or absolute certainty. All that is necessary is that he prove that the existence of this causal relationship is likely or probable. Further, it is also unnecessary for him to prove the specific employment related incident was the sole or even the "major" cause of his cervical damage and resulting difficulties. He need only show that it was a substantial contributing cause.

The claimant testified that, on September 10, 2004, he was moving a large heavy a cart, when one of the wheels of the cart fell into a hole. while he was jerking and pushing on the cart to free the wheel from the hole, he experienced a sudden and immediate pain in his entire left upper extremity from his shoulder to his hand. He testified that this pain continued to worsen, so that he sought medical treatment at St. Edwards emergency room later that same day. The history of the onset of his difficulties given in his testimony, substantially coincides with the history recorded at St. Edwards emergency room on September 10, 2004. The description

also substantially coincides with that subsequent given on the notice of injury completed on September 13, 2004.

At least some of the claimant's symptoms at the time of his emergency room visit were such that they were potentially indicative of a radicular or neurological defect originating in the claimant's cervical spine. At the time of this initial evaluation, the emergency room physician recommended a CT scan or MRI scan of the cervical spine to investigate the possibility of a herniated disc with a resulting radiculopathy.

The claimant was subsequently seen by Dr. Thomas Cheyne (the company physician) on September 14, 2004. Again, Dr. Cheyne apparently felt that at least some of the claimant's left upper extremity symptoms could reasonably be radicular in nature and emanating from an injury or defect involving the claimant's cervical spine. He, too, recommended a cervical MRI study and neurological evaluation to investigate this possibility.

Although the claimant has subsequently complained of various other difficulties, primarily involving his mid and lower back, he has continued to exhibit symptoms with his left upper extremity, which have consistently been diagnosed as being attributable to radicular or neurological difficulties resulting from a defect involving the cervical spine.

Clearly, the incident of September 10, 2004, as described by the claimant, could reasonably produce sufficient stress or trauma on the claimant's cervical spine to result in the herniation of his cervical disc at C6-7. The greater weight of the credible evidence

shows that the claimant's symptoms, which were indicative of the occurrence of this herniated disc, first occurred contemporaneously or within a reasonable period of time after the described incident. These are primarily the sensory loss in his left hand.

It must also be noted that the greater weight of the expert medical evidence offered in regard to the existence of a causal relationship between the September 10, 2004, employment related incident and the claimant's cervical difficulties supports such a causal connection. This evidence is contained in the expert medical opinion of Dr. Arthur Johnson.

In his report of December 28, 2005, Dr. Johnson stated:

"The patient stated that this pain (in his left arm, shoulder, and hand) occurred as the result of an injury that occurred at work in September of 2004. I have reviewed the patient's emergency room report dated 09-10-04 and the patient did present with pain in the left shoulder and left arm and also pain going to the fingers as well. The occupational report performed on 09-11-04 also conformed the same history with pain in the left arm and numbness. These findings in the left arm are problems that can be definitely linked to cervical disc herniation, as the patient's pain appears to be radiating from the shoulder all the way down into the arms and fingers. If this was an isolated shoulder problem usually, the pain would be more isolated to the shoulders and would not have any radiation into a radicular pattern in the extremity. It is therefore my opinion that the patient's problems are related to the accident and that the cervical disc problems that occurred were a result. Also, the history of the battery charger dropping into the hole in the concrete floor and being difficult to get out and the patient could not remove this is an acceptable mechanism of injury as well."

In his deposition, Dr. Johnson attributed the claimant's

difficulties with his left upper extremity, on and after September 10, 2004, to a combination of cervical defects at the C6-7 and C7-T1 areas, which resulted in impingement of both the spinal cord and the exiting nerve roots at these levels. It is his opinion that the claimant's difficulties were the result of the combination of these defects. One of these defects he identified as a subluxation or spondylolisthesis at the C7-T1 level, which he considered to be degenerative in origin and developed over an extended period of time. The second of these defects was in the form of a herniated nucleus pulposus or herniated disc at the C6-7 level. He opined that the increased compression or pressure on the exiting nerve roots by this second defect produced the claimant's radicular symptoms in his left upper extremity. It is this defect that he believed has been likely caused by the employment related incident of September 10, 2004.

As previously noted, Dr. Johnson is a competent board certified neurosurgeon with particular expertise in the area of medicine associated with cervical difficulties, such as those experienced by the claimant. He is also the claimant's primary treating physician for these difficulties and has previously seen and evaluated the claimant on numerous occasions, including the corrective surgery that was performed on May 17, 2005. He has also personally viewed and interpreted the various diagnostic tests. His opinion in regard to the existence of a causal relationship between the claimant's difficulties with his left upper extremity and his employment related incident of September 10, 2004, are

consistent with all of the other evidence presented. There is no indication that any of the opinions of Dr. Johnson are based upon any material mistake of fact or lack of information necessary to reach his conclusions. I find his opinion in regard to this matter to be stated within a reasonable degree of medical certainty and persuasive.

In reaching this decision, I have not ignored the report of Dr. J. K. Smelz. However, I simply find that the opinions of Dr. Johnson to be entitled to greater weight and credit. First, I would note that Dr. Smelz has never personally examined or evaluated the claimant. It would also appear that his knowledge of the various tests and studies performed on the claimant are based solely upon a review of the radiologist's interpretations without any opportunity to personally examine the actual studies. I would also note that Dr. Smelz is a physiatrist, not a neurologist, neurosurgeon, or even orthopaedic surgeon. There is no evidence that he has any particular expertise in the diagnosis or treatment of cervical injuries, particular herniated discs. Most particularly, I find that the various conclusions and opinions of Dr. Smelz are not supported by or consistent with the evidence presented.

Dr. Smelz begins by assuming, simply because no specific radicular patterns were expressly identified, that none of the claimant's left upper extremity symptoms were radicular in nature. However, it is obvious what whatever findings and symptoms were observed by the emergency room physician on September 10, 2004,

led him to reasonably believe that the claimant's left upper extremity complaints could also have a radicular component. As Dr. Smelz was not present at this evaluation, his opinion concerning the absence of radicular symptoms during the evaluation would be highly speculative and not entitled to any weight and credit. Dr. Smelz also overlooks the fact that when the claimant was evaluated by Dr. Cheyne (the company physician) on September 14, 2004, Dr. Cheyne also observed symptoms that led him to believe that at least some of the claimant's left upper extremity complaints could reasonably have a cervical origin.

Dr. Smelz' interpretation of the various MRI studies are far less credible than those made by Dr. Johnson. As shown by the statements of these physicians, Dr. Johnson was the only one to personally review the actual studies. Dr. Smelz would also appear to discount even the possibility that the claimant's large focal disc protrusion or herniation could be traumatic in origin. While this degeneration can increase the susceptibility of protrusions and herniations, usually some form of direct stress or trauma (however minor) is the actual precipitating factor. Dr. Smelz also appears to disregard the fact that the May 13, 2006 MRI was performed with and without radioactive enhancement, making it a more reliable study. This fact is bolstered by the remarks made by the radiologist, in interpreting the September 16, 2004 study, that indicated more precise follow up testing should be performed to determine if the nerve root impingement was due to arthritic changes or to a disc herniation.

Dr. Smelz further questioned whether the claimant was actually ever experiencing any actual neurological difficulties with his left upper extremity. In this regard, he appears to totally overlook the muscle atrophy involving the claimant's left hand that was observed by both Dr. Medlock and Dr. Johnson, which would coincide with or be consistent with the defects noted on the MRI studies. It would appear that Dr. Smelz is no great proponent of MRI studies and feels that radiculopathies can only be established by nerve conduction studies. A conclusion I find somewhat contrary to the general consensus of the medical community in this area.

Dr. Smelz' skepticism concerning whether the claimant ever actually experienced any difficulties, at all, with his left upper extremity appears to be based on the claimant's various complaints with his lower extremities and lower back. In light of the obvious objective evidence of physical defects and damage involving the claimant's cervical spine, the radicular complaints involving his left upper extremity cannot be discounted, merely because the claimant may be exhibiting some unsubstantiated complaints with other portions of his body.

Dr. Smelz also places significance in the fact that no atrophy was noted in the claimant's hands at the time of the emergency room evaluation. It requires no medical training to recognize that muscle atrophy of a radicular origin would not appear within hours of the injury producing such damage. Rather than discount the opinion of Dr. Johnson, the lack of atrophy at the time of the emergency room evaluation would support the conclusion that

denervation had not been present for any period of time prior to September 10, 2004.

Dr. Smelz further goes on to emphasize the importance of a lack of thorough investigation of the claimant's bladder complaints and lower extremity complaints which would appear to have absolutely no bearing on whether or not the claimant sustained a compensable cervical injury of the type diagnosed. Finally, Dr. Smelz observes that the claimant's continued complaints, after his surgery, are not consistent with the radiculopathy or spinal cord injury. In this regard, he may well be accurate. However, this would not be entirely unusual, as the surgical procedure performed by Dr. Johnson was intended to alleviate or remove any such complaints. Finally, Dr. Smelz appears to totally overlook the possibility that the claimant's left upper extremity complaints could have been a combination of two injuries occurring in the September 10, 2004 incident. One, a compensable injury to the claimant's left shoulder and arm in the form of a muscular strains and the other to the claimant's cervical spine, in the form of a herniated disc. It is my opinion that the greater weight of the evidence not only shows that this double injury was not only reasonably possible, but was highly probable.

Therefore, after consideration of all the evidence presented, it is my opinion that the claimant has proven that the specific employment related incident of September 10, 2004, was the most probable or likely cause of the subsequently documented cervical disc herniation and his resulting radicular difficulties with his

left upper extremity. Therefore, this medically established and objectively documented condition arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, and is identifiable by time and place of occurrence. Thus, the claimant has satisfied the first three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

It is obvious from the claimant's testimony concerning the nature and magnitude of the symptoms produced by his employment related cervical injury that this injury caused internal physical harm to this part of his body. Even more important, this actual physical harm (in the form of a disc herniation with resulting nerve root impingement) is objectively demonstrated on numerous radiographic studies and on visual observations made by Dr. Johnson during the corrective surgical procedure. Thus, the claimant has satisfied the fourth definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

Clearly, the very nature of this injury (a herniated disc with nerve root impingement) would reasonably necessitate medical services. It is further apparent that this type of injury is permanent in nature and, under the Commission's official rating guide, carries a specific percentage or degree of permanent physical impairment. Thus, this injury has reasonably required medical services and has resulted in disability. This satisfies the final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has established by medical evidence which is supported by objective findings, the actual existence of the physical injury to his cervical spine, which he alleges to be compensable. I further find that the claimant has proven by the greater weight of the credible evidence that this cervical injury arose out of and occurred in the course of his employment with this respondent, was caused by a specific incident, is identifiable by time and place of occurrence, resulted in internal physical harm to his body, required medical services, and resulted in disability. Thus, he has proven that on September 10, 2004, he also sustained a "compensable injury" to his cervical spine, in the form of a herniated nucleus pulposus.

II. BENEFITS

Next, it becomes necessary to determine the nature and extent of benefits to which the claimant is entitled as a result of his compensable cervical injury. The burden rests upon the claimant to prove his entitlement to the specific benefits he seeks.

The first matter is the claimant's entitlement to "reasonably necessary medical services" for this compensable injury. In order for medical services to represent "reasonably necessary" medical services, the services must be necessitated by or connected with the compensable injury. These services must also have, at the time they are rendered, a reasonable expectation of accomplishing the purpose or goal for which they are intended.

After consideration of the evidence presented, it is my opinion that the medical services rendered the claimant by and at

the direction of Dr. Jeffrey Medlock and Dr. Arthur Johnson for the claimant's radicular difficulties in his left upper extremity were necessitated by or connected with the claimant's compensable cervical injury of September 10, 2004. Clearly, all of the services provided by these physicians toward this end were intended to either accurately diagnose the nature and extent of the claimant's compensable injury and resulting radicular difficulties, to improve or alleviate the actual physical damage caused by this injury or to reduce or alleviate the symptoms and complaints that this injury was producing. The type of services provided were of a nature and duration commonly recognized by the general medical community in this area as being appropriate to accomplish these purposes. Further, the greater weight of the evidence presented shows that these medical services not only had a reasonable expectation of accomplishing their intended purpose, at the time they were rendered, but did in fact actually do so (at least, to some extent).

Thus, the medical services provided to the claimant for his cervical injury and resulting radicular difficulties by and at the direction of Dr. Medlock and Dr. Johnson represent "reasonably necessary medical services" for the claimant's compensable cervical injury. Under 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.

However, it would appear that the claimant has received extensive medical services, by and at the direction of these

physicians, for his various low back, bowel, bladder, and lower extremity complaints. The greater weight of the evidence presented fails to show that, if any of these complaints actually exist, these complaints would be related to the claimant's compensable cervical injury or his admittedly compensable left upper extremity injury. Therefore, any medical services rendered to the claimant for these complaints would not be necessitated by or connected with a compensable injury and cannot be made the liability of the respondent herein.

Next, is the matter of the claimant's entitlement to temporary total disability benefits for his compensable cervical injury. In order to be entitled to these benefits, the claimant must prove that he continued within the healing period for the effects of his compensable cervical injury and was rendered totally disabled from performing regular gainful employment as the result of the effects of this injury.

The issue of the duration of the healing period is a medical question and must be proven by the greater weight of the credible medical evidence presented. The healing period from the effects of the compensable injury continues until the underlying physical damage caused by the compensable injury has resolved or at least stabilized. Once this underlying physical damage resolves or stabilizes, at a level where nothing further in the way of medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of symptoms and limitations are not sufficient, in and of themselves, to extend the

healing period.

In the present claim, the medical evidence shows that the claimant underwent a decompression and cervical fusion on May 17, 2005. The medical evidence further shows that the claimant was seen in follow up by Dr. Johnson on June 28, 2005, August 2, 2005, and December 15, 2005. In his report of December 15, 2005, Dr. Johnson noted that the claimant is to return for follow up in approximately one year and that during this time he is to continue conservative treatment, including physical therapy. X-rays taken at the time of the appointment, were noted to show good position of the "hardware" and the interbody fusion at C6-7 and C7-T1. There is no evidence presented regarding the claimant's treatment after December of 2005. In his deposition, Dr. Johnson was uncertain as to when the claimant would achieve maximum healing or maximum medical improvement from his compensable cervical injury. However, in the absence of complications a cervical fusion is generally complete in 12 to 18 months following surgery. It would also appear that in regard to maximum healing, Dr. Johnson is not only considering healing from the compensable herniated disc, but also from the spondylolisthesis or subluxation and cord impingement that he expressly opines not to be related to the employment accident of September 10, 2004. However, after consideration of all the medical evidence presented, I find that the claimant has proven by the greater weight of this evidence that he has continued within his healing period from the effects of his compensable cervical

injury from September 10, 2004 through a date to be determined, but no later than the date of the hearing on July 18, 2006. Thus, the claimant has satisfied the first requirement for his entitlement to temporary total disability benefits from January 26, 2005 through a date yet to be determined.

In regard to actual total "disability" the evidence shows that the claimant is almost 57 years old. For the previous 36 years he has been an employee of the respondent. Based solely on the claimant's testimony, concerning the restrictions and limitations he is now experiencing, it would be essentially impossible for the claimant to obtain any type of regular gainful employment in the open job market. There is no indication that the respondent has offered the claimant any limited or light duty employment position that would comply with the various restrictions and limitations he describes. However, the restrictions and limitations described by the claimant would far exceed those normally expected to result from a herniated cervical disc. Numbness over his entire body, bowel and bladder dysfunction, a loss of balance, and a numbness and inability to use his legs are not normally associated with the type of cervical injury disc herniations. In his deposition, Dr. Johnson appeared to attribute most of the claimant's described difficulties, including his alleged inability to walk, to his cervical injury. He stated that such residual symptoms are not unusual when there has been significant damage to the spinal cord itself. However, in his earlier reports he appears to question the validity of many of these symptoms. It must also be noted that the

actual impingement on the spinal cord (in the cervical area) was shown to be due to the degenerative changes and the associated spondylolisthesis. In his deposition, Dr. Johnson again expressed this opinion and indicated that the compensable disc herniation only increased the compression on the exiting nerve roots in the C6-7 areas. This would only affect the claimant's upper extremities. However, in his reports of August 2, 2005, and December 15, 2005, Dr. Johnson appears to disregard the degenerative component of the claimant's cervical defects and stated that the claimant sustained a "severe compression" of the cervical spinal cord in the employment related accident of September 10, 2004. In fact, in the report of December 15, 2005, Dr. Johnson erroneously stated that the claimant had experienced cervical stenosis from a "severe compression fracture of the cervical spine secondary to a fall at work."

In the absence of objective findings to substantiate the claimant's lower extremity complaints and various other difficulties (other than his left upper extremity), I have significant concerns in regard to their actual validity. I also find that the greater weight of the evidence fails to prove a causal relationship between these subjective complaints and the claimant's compensable cervical injury.

However, even if the claimant were experiencing the normal limitations and restrictions that are commonly imposed in cases of herniated cervical discs and resulting cervical fusions, he would be excluded from heavy lifting, repetitive lifting, working at or

above shoulder level, frequent twisting or bending of the neck, and working with the head or neck in a twisted or flexed position for extended periods. These restrictions, coupled with the fact that the claimant continues under active medical treatment, would make it highly unlikely that he could obtain regular gainful employment in the open job market. Therefore, I find that the claimant has proven that his compensable cervical injury has resulted in his actual total disability (on a temporary basis) from January 26, 2005 through a date yet to be determined. This would satisfy the second element for his entitlement to temporary total disability benefits during this period.

III. NOTICE

The final issue to be addressed concerns the effect of Ark. Code Ann. §11-9-701 on the claimant's entitlement to benefits for his compensable cervical injury prior to September 12, 2005. Ark. Code Ann. §11-9-701(a)(1) provides:

“Unless an injury renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee should report the injury to the employer on a form prescribed or approved by the workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.”

After consideration of all the evidence presented, it is my opinion that the claimant is not barred from receiving any benefits for his compensable cervical injury by the foregoing section of the Act. As early as September 11, 2004, the respondent's had actual

knowledge that the claimant was experiencing symptoms with his left upper extremity and that these symptoms could be due to a “pinched nerve” in the claimant’s neck (Respondent’s Exhibit No. 1, page 7). By September 13, 2004, (at the latest), the respondent had actual notice that the claimant was contending that these symptoms were the result of an employment related injury on September 10, 2004. The respondent also had actual knowledge that this employment related injury resulted in symptoms involving his left upper extremity, in the form of “left arm pain/numbness” (Respondent’s Exhibit No. 1, page 7). By September 14, 2004, the respondent had actually knowledge that the claimant’s symptoms could be reasonably attributable to a radiculopathy from a cervical injury, as this potential diagnosis was noted by Dr. Cheyne (the company physician) in the claimant’s company maintained medical record (Respondent’s Exhibit No. 1, page 8). By September 22, 2004, the respondent was aware that there was objective evidence of nerve root impingement at various levels of the cervical spine, including the C6-7 level. This information is clearly contained in Dr. Cheyne’s September 22, 2004, notation in the claimant’s company maintained medical record and the results of the MRI study that was performed at the request of Dr. Cheyne on September 16, 2004 (Respondent’s Exhibit No. 1, pages 8-9). It is also clear from the radiologist’s interpretation of the MRI study that some or all of the neuroforaminal narrowing and potential pressure on the exiting nerve roots could reasonably be the result of a disc protrusion.

The obvious purpose of Ark. Code Ann. §11-9-701 is to give an

employer notice of an alleged injury so that they can adequately and expeditiously investigate the claim for its validity, while memories are still sharp and events are recent. However, this notice provision only requires that the claimant provide notice of his injury, as he knows it. In the present case, the evidence shows that immediately after the claimant's injury of September 10, 2004, the respondent employer had the same knowledge of the claimant's injury as that possessed by the claimant. The respondent was fully aware of the time, place, and detailed description of the alleged incident or accident. The respondent was also well aware of the exact symptoms which the claimant was experiencing with his left upper extremity. Finally, the respondent's were aware that these symptoms could reasonably be radicular in nature and the result of pressure or compression on the exiting nerve roots in the claimant's cervical spine. The respondent employer has continued to have essentially the same knowledge and information concerning the claimant's compensable cervical injury as that possessed by the claimant. I find that the claimant's failure to give formal notice of an injury to his neck or cervical spine is excused and does not bar his claim for any benefits for this injury under the exception contained in Ark. Code Ann. §11-9-701(b)(1)(A).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On September 10, 2004, the relationship of employee-self

insured employer-third party administrator existed between the parties.

3. On September 10, 2004, the claimant was earning wages sufficient to entitle him to weekly compensation benefits of \$453.00 for total disability and \$340.00 for permanent partial disability.
4. On September 10, 2004, the claimant sustained a compensable injury to his left shoulder and arm.
5. There is no dispute, at present, over the claimant's entitlement to benefits attributable to the compensable left shoulder and arm injuries.
6. On September 10, 2004, the claimant also sustained a compensable injury to his cervical spine, in the form of a herniated disc at C6-7. The claimant has established by medical evidence, supported by objective findings, the actual existence of this physical injury or defect. He has further proven by a preponderance of the evidence that this physical injury or defect arose out of and occurred in the course of his employment, was caused by a specific incident, was identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability.
7. The medical services rendered to the claimant for his compensable cervical injury (in the form of a herniated disc) by and at the direction of Dr. Medlock and Dr. Johnson represent reasonably necessary medical services

within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondent is liable for the expense of these services, subject to the medical fee schedule established by this Commission.

8. The claimant was rendered temporarily totally disabled, as a result of the effects of his compensable cervical injury, for the period beginning January 26, 2005, and continuing through a date yet to be determined, but no earlier than the date of hearing.
9. The claimant is not barred from receiving any of the benefits for his compensable cervical injury by the provisions of Ark. Code Ann. §11-9-701, in that the evidence shows that the respondent had at all times actual knowledge that was equivalent to that possessed by the claimant of the claimant's compensable cervical injury of September 10, 2004.
10. The respondent has denied the occurrence of any compensable injury to the claimant's neck or cervical spine and has controverted his entitlement to any benefits for such an injury.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondent shall pay to the claimant temporary total disability benefits for the period beginning January 26, 2005, and

continuing through a date yet to be determined, but no earlier than the date of hearing.

The respondent shall be liable for the expenses incurred by the claimant as a result of reasonably necessary medical services rendered him for his compensable cervical injury by and at the direction of Dr. Medlock and Dr. Johnson. This liability is subject to the medical fee schedule established by this Commission.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. One-half of this attorney's fee shall be in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondent from such benefits.

The set off provided by Ark. Code Ann. §11-9-411 shall apply to any benefits herein awarded which have also been compensated under any group policy of insurance or group benefit plan.

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