

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308758

DOUGLAS WARHURST, EMPLOYEE	CLAIMANT
SYSTEM CONTRACTING CORP., SELF-INSURED EMPLOYER	RESPONDENT #1
INTEGRATED CLAIMS MANAGEMENT, INC., TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED OCTOBER 17, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 2, 2006, at Blytheville, Mississippi County, Arkansas.

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney At Law, Jonesboro, Arkansas.

Respondent #1 represented by the HONORABLE MARK MAYFIELD, Attorney At Law, Jonesboro, Arkansas.

Respondent #1 represented by the HONORABLE DAVID L. PAKE, Attorney At Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits.

On April 5, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record

as Commission Exhibit #1. It is the position of Respondent #2 that the claimant has returned to work and is working full time at a different occupation and that evidence has not been developed regarding his present earnings. Further, Respondent #2 denies that there are disabilities or impairments which would warrant second injury fund liability.

The parties are in agreement that a finding of compensability of the claimant's neck complaint would serve to hold in abeyance the issues of wage loss/permanent partial disability and second injury fund liability. However, an adverse ruling regarding compensability of the neck claim paves the way for a ruling on the wage loss and second injury liability issues.

The testimony of Douglas Warhurst, the claimant, and Tommy Lollar, coupled with medical reports and other documents, to include the record of the prior hearing of August 6, 2004, comprise the record in this claim.

DISCUSSION

Douglas Warhurst, the claimant, with a date of birth of June 23, 1963, has an eleventh grade education, however only completed the tenth grade. The claimant, who is left hand dominate, commenced his employment with respondent on June 4, 2001, as a millwright. Claimant continuously worked for respondent from January 2001 until his March 20, 2003, accident. Claimant asserts that he earned \$18.00 per hour and typically worked at least a 40-hour work week.

On March 20, 2003, claimant sustained an accidental injury while discharging employment duties for respondent. In describing the mechanics of the March 20, 2003, accident, claimant testified:

We had a shut down. And I stepped up on a low line and I

slipped off the low line and fell into the hole head first. (T. 14).

Claimant's testimony reflects, with respect to his symptoms growing out of the accident:

Yes, sir. I had a laceration to the finger, a broke finger. And went to the doctor; went home that night; tried to go to sleep. My shoulders were bothering me severely. I came in the next day and reported it to my foreman, told him what was going on. He told me he would talk to the safety coordinator and make him aware of it. I told him there might not be nothing to it but I just wanted to let somebody know that I was having problems. And it got no better. (T. 14-15).

Claimant ultimately came under the care of Dr. Henry Stroope, a Jonesboro orthopedic surgeon, relative to his shoulder complaints growing out of the accident. Claimant underwent two (2) left shoulder surgeries under the care of Dr. Stroope attributable to the March 20, 2003, accident.

Claimant previously under cervical disc surgery under the care of Dr. Edward Cooper, a Jonesboro orthopedic surgeon, on June 17, 1998, prior to his employment by respondent. While the claimant was employed by McGill's Auto Sales in 1998, the cervical disc injury and surgery was not work-related. The claimant estimates that he earned \$450.00, per week in his employment with McGill's Auto Sales. The claimant maintains that he did not have any physical limitation prior to the 1998 neck injury. Claimant asserts that he is unaware of any medical restrictions or limitations being placed on his employment activities upon his release to return to work following the 1998 cervical surgery.

The testimony of the claimant reflects that following his release to return to work after the 1998 cervical disc surgery he worked for Goodyear as a service manager. Claimant estimates that his weekly earnings at Goodyear was \$500.00. Claimant remained in the employment of Goodyear for a period of approximately one (1) year. Claimant later secured employment at American Greetings performing factory work for approximately two (2) years. Thereafter

claimant commenced his employment with respondent.

Claimant maintains that from his perspective he was physically capable of performing his assigned job duties at the time he began his employment with respondent and did not have any restrictions or physical limitations. Regarding his job duties with respondent, claimant's testimony reflects:

I was a millwright. What we do we repair, if the machine breaks down, we do a shutdown to repair all the machines. A lot of heavy lifting, a lot of physical labor. (T. 19-20).

Claimant lifted 25-pounds on a regular basis in the discharge of his employment duties.

Following the claimant's left shoulder surgery relative to the March 20, 2003, accident, he returned to the employment of respondent on November 8, 2005. Regarding his job duties upon his return to the employment of respondent on November 8, 2005, claimant testified:

I thought I was going back to my job. At the time, he told me there was no openings. He had to fill my job because I was out so long. He told me if they had an opening, he would put me back. He put me in the shop - - (T. 22).

Claimant was placed in the employment position of shop hand at the time of his November 8, 2005, return to the employment of respondent, however at his same rate of pay, \$18.00 per hour, however he was working more hours than in his regular job. Claimant's job duties as a shop hand included operating a backhoe, doing some welding and other assigned tasks. Claimant characterized his job duties as a shop hand to be less strenuous than his regular duties as a millwright. Claimant was laid off by respondent on January 19, 2006.

Claimant estimates that respondent employed 20 to 30 other employees in January 2006, however he was the only millwright assigned as a shop hand. The testimony of the claimant

reflects that respondent employed at least eight (8) millwright workers.

Medical treatment relative to the claimant's left shoulder injury growing out of the March 20, 2003, accident was rendered primarily by Dr. Stroope. On September 14, 2005, Dr. Stroope recommended an MRI scan of the claimant's cervical spine, which was accomplished on September 21, 2005. (CX #1, p. 12-13). Regarding the symptoms or complaints that he was experiencing at the time the cervical MRI scan was recommended, claimant's testimony reflects:

That I come out of my second surgery, I was still having severe pain down my arm. And it was a burning sensation. And I was losing feeling in my hand. And he told me that, he told me he needed another MRI to find out what's going on. He was feeling there was something else going on. (T. 25).

Following the cervical MRI scan claimant returned to Dr. Stroope on September 28, 2005.

Claimant denies that he had neck pain which required medical treatment following his recovery from his 1998 cervical surgery by Dr. Cooper. Likewise, claimant denies that he experienced neck pain following his first left shoulder surgery growing out of the March 20, 2003, accident. Claimant asserts that it was not until his second left shoulder surgery that he again experienced pain in his neck. Claimant denies that he sought treatment for neck pain from any practitioner of the healing arts (physician, nurse practitioner or chiropractor) following his treatment by Dr. Cooper in 1998 through the second surgery by Dr. Stroope in 2005.

The testimony of the claimant reflects that the neck symptoms that he experienced following his second left shoulder surgery were similar to those he experienced prior to the 1998 cervical surgery by Dr. Cooper. In describing the similarities claimant testified:

It started off just my shoulder kind of burned moving down in my hand. And a couple, a month later started having headaches. Then it continued to get bad, real bad. (T. 27).

Claimant asserts that he brought his neck symptoms to the attention of Dr. Stroope following the second left shoulder surgery:

I asked him. I told him I said I'm not getting any better. I still, I'm hurting in my arm. I've got a burning sensation. I'm losing feeling in my hand. And that's when he told me there's something else going on, and we needed to do an MRI. (T. 32).

The testimony of the claimant reflects that a September 28, 2005, injection on the left side near his subacromial space by Dr. Stroope did not help in alleviating his symptoms. Claimant was referred to a neurosurgeon by Dr. Stroope during the September 28, 2005, visit. Claimant was provided the name of the neurosurgeon and an appointment was made, however he did not see the neurosurgeon because respondent-employer denied. Claimant did not return to Dr. Stroope for either his neck or left shoulder complaints following the September 28, 2005, visit.

Claimant testified that he continued to experience the same complaints presently as he did at the last time he was seen by Dr. Stroope on September 28, 2005, when he was referred to a neurosurgeon. Regarding the symptoms, claimant's testimony reflects:

Like I say, I've got severe headaches every day, every other day. Some days they aren't as severe. The burning, the throbbing, the strength of loss in my hand is every day. And it's pretty tough to deal with. (T. 32-33).

The testimony of the claimant reflects that between his first left shoulder surgery and the second left shoulder surgery he experienced pain in his arm which went down into his left hand as well as discomfort in his neck, however he attributed it as products of the surgery.

Claimant denies having severe headaches between the time of March 20, 2003, injury and his second left shoulder surgery. Further, claimant denies having any sort of significant headache problems at any time prior to the March 20, 2003, shoulder injury. Claimant acknowledged that

when he was 14 years old he got shot in the back of the head with a shotgun and suffered severe migraine headaches. Claimant added that the migraine headaches have continued from childhood through his adult life. Claimant distinguishes the migraine headaches from those experienced since the second left shoulder injury:

The headaches I have now, they are severe. I don't have have them like the migraines do. Migraines have more sound, light, vomiting, and just kind of like maintain - - (T. 41).

It's [headaches following second surgery] a severe pain from the back of my head to the top of my head. My migraines, it's my whole head and my eyes, and just real sick. (T. 42).

Claimant testified that he has taken medication [Advil, BC's] for the headaches that he has experience since the second left shoulder surgery that he previously took for his migraines, however it has no impact on them. (T. 42).

The testimony of the claimant reflects that respondent-employer secured his medical release to return to work. The record reflects the presence of a November 7, 2005, correspondence from the Dr. Stroope to Mr. Mike Rector with respondent, setting forth the claimant's anatomical rating relative to the left shoulder injury. (CX. #1, p. 15). Once the released was obtained claimant returned to work for respondent on Tuesday, November 8, 2005.

Regarding the termination of his employment by respondent-employer on January 19, 2006, the testimony of the claimant reflects:

Okay. The 19th was on a Thursday I think. It was 5:00 in the morning we had to be at work. We was working 50 hours a week. Mr. Henson came in that morning earlier. I think it was something like 15 or 20 after 5:00. I hear him across the intercom calling me to his office. I went in to his office. I said jokingly, when I walked in I said, I hope you're not laying me off like that. And he giggled. And I sat down, and we went to talking. And he said well, he says I hate to do it, but I've got

to lay you off. I said Don, I said, why are you laying me off? And he says, I'm doing what I'm to do. He said I had a job in Hickman, and I was hoping to get to put you over there. But it doesn't look like it's coming through. I've got more people in the shop than I usually do. And he said - - I told him, I said well, I was told they was going to put me back as a millwright when they had an opening. I said a week before that we had we had an opening, and they had a guy over there working for a week trying to learn the job and getting trained to go over there and do my job that I was trained to do. And he said well, I don't know about what you and Mr. Lollar talked about, but I know I was told to lay you off. And I said well, I've got more seniority that probably most of these people in the shop. And I said, I don't feel like that's fair. He said well, it ain't my call. I'm doing just - - I'm doing my job. And I said well, you do what you have to do. I'll do what I have to do. I left it at that. (T. 34-35).

Claimant testified that during a conversation with Mr. Lollar following his return to work in November 2005, he was led to believe that he would be returned to the millwright position with respondent. The testimony of the claimant reflects that he later learned through an advertisement in the Blytheville Courier News that respondent was advertising for workers, to include millwrights, after he was laid off. Claimant testified that after he was laid off he did not anticipate that he would ever be called back to work for respondent.

The testimony of the claimant reflects that while he performed his assigned job duties for respondent between November 8, 2005, and January 19, 2006, he encountered difficulty doing so. Specifically, claimant recites that swinging a hammer, raising arm up to a certain degree and holding it for a long period of time caused him problems. All of the afore activities were things he was required to do occasionally in his employment with respondent-employer. While on the one hand claimant testified that due to the residuals of his March 20, 2003, injury he was unable to perform his millwright job at respondent-employer, he had to go back and perform the job or he wouldn't have a job. (T. 74). The testimony of the claimant reflects his perseverance at

performing the job duties of a millwright if allowed to return to the position subsequent to November 8, 2005, in relation to the residuals of his injury:

I would have performed my job until they got this matter resolved to the best of my ability. I'm not looking for a handout. I'm willing to do my job. And I had to provide for my family. So I did what I had to do. (T. 77).

Although able to perform the assigned job duties in the shop, claimant was concerned that his hourly rate would be reduced to that of other shop employees. As a consequence, he wanted to be restored to the position of a millwright. Claimant asserts that if he had been placed in the millwright position that opened up while he was in the shop, "I would have done my job". (T. 79).

Between January 19, 2006, and May 2006, claimant received unemployment benefits in the amount of \$382.00, per week. The testimony of the claimant also reflects that he worked for Schick Steel doing a shut down for one week. Following the claimant's January 19, 2006, lay-off by respondent-employer he secured employment in early May 2006 at Elite Operations out of Steele, Missouri as a foreman. Claimant testified that he does not perform manual/physical labor in his employment capacity with Elite Operations, and that he earns \$15.00 per hour for a 40-hour work week.

The testimony of the claimant reflects that he is unable to perform the physical activities, relative to his left shoulder, that he performed prior to his March 20, 2003, compensable accident. Specifically, claimant asserts that he is unable to raise his left arm above shoulder level for a sustained period of time or to lift significant weights. Claimant note that there is a significant reduction of strength in his left upper extremity as compared to his pre-injury status. The claimant's income has decreased in his current employment position in light of his reduced

hourly rate as compared to when he was employed by respondent. (T. 38-39).

Claimant acknowledged that the 1998 cervical disc surgery entailed a fusion, and that the injury requiring the procedure was the product of a fall from a six foot ladder. Claimant concedes that a few months prior to the March 20, 2003, work-related accident he was involved in a motor vehicle accident. Claimant's truck was rolled several times in the motor vehicle accident. Claimant also suffered a work-related injury to his knee in the employment of respondent-employer prior to the March 20, 2003, accident and was continuing to receive medical for same for pain management at the time of the accident.

Claimant asserts that with the exception of some stiffness, following the 1998 cervical disc surgery he did not have any problems with his neck. Claimant's testimony reflects that following the surgery he had the ability to turn his neck to the right or left without any problems. Claimant testified, on cross-examination, that it would surprise him that the records of Baptist Memorial Hospital reflects that he was seen on four (4) different occasion following his 1998 surgery by Dr. Cooper for complaints of neck problems. While acknowledging that he may have sought medical treatment for migraine headaches between 1998 and 2003, claimant denies that he sought treatment relative to his neck during that period. In short, claimant asserts that if he went to the emergency room for medial treatment it would have been for a migraine or something related to his neck.

Regarding the March 20, 2003, injury, claimant acknowledged that the same was a fall where he ended up landing on his hands. Claimant added that he was trying to break his fall with his hands. Claimant's initial apparent injury from the March 20, 2003, accident was to his fingers and hands.

Claimant again noted that after his second surgery on his left shoulder he experienced

symptoms of burning sensation down his left arm and into his hand along with a loss of strength. Claimant added that he relayed his complaints to Dr. Stroope who later had the MRI scan of the cervical spine performed. Claimant acknowledged that he provided a deposition in March 2006, however denied that he relayed that he had experienced the burning sensation in his left arm going back to March 2003. (T. 51). Claimant explained his deposition response by noting that the pain in the arm was present since the shortly after the fall, but that the burning sensation did not occur until after the second left shoulder surgery. (T. 51-52).

During the claimant's March 2006 deposition, he testified that he experienced headaches similar to those he suffered in 1998 "the last couple of weeks". Claimant testified that he did not tell Dr. Stroope about his headaches because at the time he did not have them. Claimant is uncertain how much time elapsed following the second left shoulder surgery before he first notice the burning sensation in his left arm. Which was followed by the numbness and loss of strength and a corresponding recommendation by Dr. Stroope of a cervical MRI scan.

Regarding his current employment with Elite Operations, claimant acknowledged that he had more responsibility than he had in his former employment with respondent-employer. With respect to his prospects for advancement and great pay with his current employer, claimant's testimony reflects:

I don't know at this time. It's a small company trying to grow in the steel mill business. We're taking on more work to hire more people. And I think maybe, you know. (T. 60).

Claimant testified that when he was first employed by Elite Operations he had a four (4) man crew, however due to changes he now has a two (2) man crew. Claimant is planning to hire two more people.

The 1998 cervical disc surgery of the claimant at C6-7 on the right was for symptoms that

he was having in his neck and right arm. Once the surgery was performed claimant 's right arm pain disappeared and has not returned. Claimant acknowledged that during the 1998 time period he did not have any symptoms in his left arm. The 1998 cervical disc surgery was for a non-work related injury and claimant never received a anatomical rating from a physician as a result of same. Claimant's testimony reflects that his treating physician relative to the 1998 neck surgery never advised him of any permanent physical restrictions to observe as a result of the surgery.

As a result of a 2002 work-related left knee injury in the employment of respondent-employer claimant underwent three (3) knee surgeries. Two of the knee surgeries were performed by Dr. Glenn Dickson, a Jonesboro orthopedic surgeon, and the third was performed by Dr. James Mullholand, a Little Rock orthopedic surgeon. Claimant testified that he has not seen a medical report for either of his treating physicians assessing an impairment rating relative to his knee injury.

Claimant did not undergo a pre-employment physical at the time of his employment by respondent-employer in 2001. Claimant was physically capable of lifting the maximum allowable weights in his employment with respondent-employer at the time he commenced his employment with same. Physical tasks performed by the claimant in his employment as a millwright in the employment of respondent-employer included substantial bending, climbing, hammering, and physical labor. Claimant, who is left hand dominate, swung the hammer with his left side.

Claimant is not aware of any physician placing permanent physical restrictions on him relative to his migraine headaches, which had their onset following a shooting accident. Upon entering the work force as an adult claimant suffered from intermittent migraine headaches,

however was never denied a job due to any physical reason, to include the headaches. Claimant was never released for a job, prior to his 2003 injury, due to a physical reason.

Claimant's testimony reflects that while he was earning \$17.00, per hour at the time of his March 20, 2003, injury, between the time of his first left shoulder surgery and the second shoulder surgery his hourly rate increased to \$18.00, which is what it was at the time of his lay-off in January 2006. Claimant also noted that his longest work week while in the employment of respondent-employer was a 50-hour work-week which occurred while he was assigned to the shop. Claimant's testimony reflects that since his January 19, 2006, lay-off by respondent-employer the hourly rate for millwright workers at respondent-employer is now \$20.00. Claimant's longest work-week in his current employment with Elite Operations has been a 48 hour work-week.

Tommy Lollar, area manager of respondent-employer for eight years, testified that he was familiar with the circumstances under which the claimant returned to the employment of respondent-employer in November 2005. Respondent-employer has a headquarters in El Dorado, Arkansas, where some of the human resource functions are handled. Regarding the claimant's assignment to job duties in the shop, Mr. Lollar testified:

We had a, we did not have the position available at MYS, but we had, well we thought we were going to have one at TARA. So since Doug was released to come back to work, I told him to bring his paperwork. And we would return him back to work. hopefully at TARA. (T. 84).

Mr. Lollar explained that the claimant is classified as "multi-crafted":

Well, mainly as far as being multi-crafted in millwright, they do a lot of work at Nucor but as far as being a true fabricator, I wouldn't classify him as one of those. (T. 84).

Mr. Lollar testified that at the time the claimant was laid-off other employees were laid-off as well. Regard the number of employee laid-off, Mr. Lollar's testimony reflects:

One prior to the week, two. And there was going to be another one the same day. But he was qualified to go to Nucor Hickman as a fabricator. So that's where he was sent. (T. 86).

Mr. Lollar acknowledged that a week prior to the claimant's lay-off another employee, Victor Reed, was placed in a millwright position at assigned to Nucor Amato, which was at the request of the custom. The testimony reflects that Mr. Reed actually went to work for Nucor in Jackson, Mississippi. Mr. Lollar testified that following the afore, Nucor requested another millwright from respondent-employer, and specified Jason Hyde.

Mr. Lollar testified that he was not aware whether Nucor has some special relationship with either Victor Reed or Jason Hyde, but rather Nucor would call in people that they requested respondent-employer would try and respondent-employer would comply. Respondent-employer is the employer of both Victor Reed and Jason Hyde, not Nucor. Mr. Lollar testified that while most of the time respondent selected who it hired, "Nucor does select who we hire at times". (T. 88). The testimony reflects that Victor Reed was hired just prior to the claimant's lay-off and Jason Hyde was hired just after the claimant's lay-off. Mr. Lollar explained with respect to the relationship of respondent-employer and Nucor:

Yes. They [Nucor] would say we would like to try this gentlemen. We're going to send him over and fill out an application. (89).

Mr. Lollar maintains that the afore employees are considered employees of both Nucor and respondent-employer.

Mr. Lollar acknowledged that respondent-employer did place the advertisement which

was run in the local newspaper regarding employment positions, to include millwrights, on February 23, 2006. (CX. #1, p. 23). Mr. Lollar maintains that respondent did not have a millwright position available at the time the advertisement was run. Mr. Lollar testified that the advertisement was done through the home office and not by his office in Blytheville. Mr. Lollar does not dispute that the advertisement reflects that respondent-employer was “now hiring pipe fitters, welders, operators, millwrights, superintendents and foremen in the Blytheville area”. The testimony of Mr. Lollar reflects that the home office, El Dorado, constantly put ads in the paper “to keep our job pool up”, whether they are hiring or not. (T. 91).

The medical in the record reflects that at the time of the claimant’s February 28, 2005, followup visit for his open left AC joint resection he was given an injection of Depo-Medrol and Lidocaine between the clavicle and the acromion and placed on a physical therapy program. The file note of April 18, 2005, relative to a followup visit of the claimant to Dr. Stroope, which was approximately three months post open distal clavicle excision of AC joint arthropathy, reflects, in pertinent part:

PHYSICAL EXAMINATION: On examination today, he is really non-tender over the AC joint area. He does seem to have some mild crepitanace with internal rotation and forward elevation to shoulder height and above. Gentle glenohumeral rotation with arm at shoulder level does not reproduce any crepitation or pain. . . .

PLAN: As the patient is still hurting significantly, I believe that we must rule out a rotator cuff tear even though he had a pervious negative MRI. Therefore, we will go ahead and schedule his for a repeat MRI of his left shoulder to make sure that we’re not dealing with a concomitant rotator cuff tear and we will see him back after that is completed. . . (CX. #1, p. 2).

The MRI of the claimant’s left shoulder was performed on April 27, 2005. Claimant was seen in followup by Dr. Stroope on May 2, 2005. After discussing the results of the MRI scan, and

physical examination of the claimant, the May 2, 2005, office note of Dr. Stroope reflects, in pertinent part:

In my opinion, Mr. Warhurst is having mechanical impingement upon the rotator cuff causing his symptoms and he has not responded to physical therapy, rotator cuff strengthening or even steroid injections. In my opinion, the only option at this point is arthroscopic subacromial decompression to hopefully alleviate the pain and get the patient back to work. He states that he is very motivated to getting back to work and would like to have his surgery so that he can recover and get on with his life. I would highly recommend that he undergo subacromial decompression done by arthroscopic technique. . . (CX. #1, p. 4).

On June 10, 2005, the claimant underwent arthroscopic left shoulder subacromial decompression under the care of Dr. Stroope. (CX. #1, p. 5-8). Claimant was seen on June 20, 2005, by Dr. Stroope in followup to the June 10, 2005, surgery. Dr. Stroope returned the claimant to physical therapy on the overhead pulleys at the time of the June 20, 2005, visit.

The claimant was again seen by Dr. Stroope on July 13, 2005. The file note relative to the visit, reflects, in pertinent part:

. . . He is now five weeks postoperative. He is doing well today and states he has made a lot of ground since he was last here. He is still having some soreness with overhead elevation of his arm and with strengthening, but otherwise he feels like he is markedly improved.

PHYSICAL EXAMINATION: Clinically he still lacks about 15 degrees of forward elevation. He has full external rotation now. He is less tender now over the greater tuberosity.

PLAN: The plan is to teach him some rotator cuff strengthening Theraband into forward elevation and external rotation and we will see him back in four weeks. Hopefully he can be dismissed if he continues to improve. (CX. #1, p. 10).

On August 29, 2005, the claimant was again seen by Dr. Stroope. The file note reflects that while the claimant was complaining of some pain, it seemed to be getting some better. The

physical examination of the claimant during the August 29, 2005, visit reflects:

He is nontender about the incision site and has good external rotation power and is nontender over the greater tuberosity. Stressing the rotator cuff does causes some impingement symptoms and he may just be having some secondary impingement secondary to disuse. (CX. #1, p. 11).

Claimant was provided an injection of Depo-Medrol, lidocaine and Marcaine and physical therapy.

The September 14, 2005, office note relative to the claimant reflects, in pertinent part:

Mr. Warhurst is seen in followup today for his AC joint arthropathy of his left shoulder. On presentation today, he is still bitterly complaining of pain but now states that he is having pain that goes below the elbow and down into his hand.

PHYSICAL EXAMINATION: Clinically he is still tender over the greater tuberosity and has pain with elevation of his arm to shoulder height and above. The injection which I gave him on his last visit helped significantly but it wore off in about a week. He would like for that to be repeated today and in addition to that I believe that we should absolutely look at his cervical spine with a repeat MRI as he has had a fusion at one level in the past and now his pain seems to be radicular in nature down his arm and below the elbow, which is not consistent with intrinsic shoulder pathology. Therefore, I believe that his cervical spine must be investigated to adequately elucidate the cause of his continued shoulder pain. If that is negative and he doesn't have any significant cervical spine disease, then I would request a second opinion from Dr. Charles Pearce in Little Rock regarding his continued shoulder pain and dysfunction. (CX. #1, p. 12).

The cervical MRI scan was performed on September 21, 2005. The MRI scan report reflects, in pertinent part:

C3-C4, there is minimal disc bulge with no significant canal or foraminal narrowing.

C4-C5, there is a posterior disc bulge with accompanying bony spondylosis which effaces the anterior dural sac and causes a mild canal stenosis. There is a moderate degree of bony narrowing of the left neuroforamen and a mild degree right neuroforaminal narrowing.

* * *

Mild to moderate degenerative disc space and uncovertebral hypertrophy causing a mild canal stenosis at C4-C5 and a moderate neuroforaminal narrowing on the left at C3-C4 and C4-C5. (CX. #1, p. 13).

On September 28, 2005, claimant was seen in followup by Dr. Stroope relative to his left shoulder pain. The file note reflects, in pertinent part:

ASSESSMENT: Left shoulder pain with impingement syndrome status post acromioplasty and distal clavicle excision doing reasonably well and I believe that his continued pain syndrome may be primarily coming from his cervical disease.

PLAN: Therefore, I believe that the patient should be seen by a neurosurgeon to try to place him on some sort of treatment program that will hopefully eradicate his pain syndrome and maybe even avoid surgical decompression. We will go ahead and re-inject his left subacromial space again today as he requested that and hopefully this will give him some relief as far as impingement is concerned. (CX. #1, p. 14).

In a report of November 7, 2005, Dr. Stroope assessed the extent of the claimant's anatomical impairment relative to the left shoulder injury and surgeries based on the 4th Edition of AMA's Guides to the Evaluation of Permanent Impairment, at 15% to the whole person. (CX. #1, p. 15).

In a March 24, 2006, response to an inquiry from claimant's attorney, Dr. Stroope noted of the claimant in pertinent part:

. . . In fact, he had a surgical procedure on the shoulder, but postoperatively continued to complain of shoulder pain. Therefore, I felt that his cervical spine must be ruled in or out as the cause of his continued shoulder pain. I obtained an MRI scan of his cervical spine that did show some neuroforaminal encroachment at C3, 4 and 5 on the left of a moderate severity. This could lead to some left shoulder pain. I do not typically treat neck pain nor cervical spine disease nor do I do cervical spine surgery. It is difficult for me to know whether or not the cause of the issue with his neck problems. (CX. #1, p. 16).

On June 17, 1998, the claimant was admitted to St. Bernards Regional Medical Center

under the care of Dr. R. Edward Cooper, Jr., and underwent an anterior cervical decompression and fusion at C6-C7 using left anterior iliac crest bone grafting. (CX. #1, p. 17-20). Prior to the June 1998 cervical disc surgery, on May 12, 1998, claimant underwent a CT of his cervical spine with contrast at St. Bernards Regional Medical Center. The radiology report relative to the CT scan reflects, in pertinent part:

C3-C4 shows a small central bulge only.

C4-C5 shows a midline to left sided disc herniation. There is effacement at the left side of the thecal sac and left C4 nerve root. The cord may be flattened or compressed. (R1, X1, p. 1-2).

As noted above, incorporated in and made a part of this record is the record of the prior hearing of August 6, 2004. A Form AR-3, Physician's Report, of December 29, 2003, by Dr. Joseph Yoa, a Blytheville orthopedic physician, reflects under the description of the March 20, 2003, accident, "at work fell into a 5 foot hole onto his head. He attributes the fall to his left knee giving away at work". (JX. #1, p. 23-24, August 6, 2004, hearing transcript). Also from the August 6, 2004, hearing transcript, the June 23, 2003, initial evaluation report of Dr. James Schrantz relative to the claimant reflects, in pertinent part:

HISTORY: Mr. Warhurst is a 39-year-old gentleman injured at work with stepping off a beam onto the ground and had sharp pains and swelling and burning in the left knee. One and a half months later, he was seen by the company doctor and referred to Dr. Dickson who performed surgery. He failed to recover from the March surgery and in May of that same year Dr. Dickson repeated surgery. He continued to have difficulty and went to Dr. Mulhollen in Little Rock. A third surgery was carried out in June of 2002. We do not have yet the reports from any of those surgical procedures. The patient only is aware that he was told that just give it time and that he would get well. He continues to have difficulty with the knee. (JX. #1, p. 6, August 6, 2004 hearing transcript).

The above-mentioned compensable left knee injury was sustained on February 2, 2002. (CX. #1,

August 6, 2004 hearing transcript).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provision and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent, to include February 2, 2002, and March 20, 2003, the employment relationship existed between the claimant and Respondent #1.
3. On March 20, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits at the maximum applicable rate.
4. On March 20, 2003, the claimant sustained injuries to his shoulders and the fingers of his right hand, arising out of and in the course of his employment. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he suffered an injury to his cervical spine arising out of and in the course of his employment on March 20, 2003.
5. Respondent #1 shall pay all reasonable hospital and medical expenses arising out of the injury of March 20, 2003.
6. The claimant reached the end of his healing period on November 7, 2005, relative to his March 20, 2003, compensable injury, and sustained a permanent physical impairment in the amount of 15% to the body as a whole as a result of same.
7. Respondent #2, the Second Injury Fund, has no liability in this claim.
8. When the claimant's age, education, permanent restriction and limitations, and employment history are considered, the evidence preponderates that the claimant has sustained a

loss of earning capacity or wage loss disability in the amount of 10% in addition to his anatomical impairment.

9. Respondent #1 controverted the claimant's entitlement to the payment of workers's compensation benefits in this claim subsequent to August 25, 2003.

CONCLUSIONS

The claimant underwent cervical disc surgery on June 17, 1998, for a non-work related injury. After commencing his employment with respondent #1 on June 4, 2001, claimant sustained a compensable injury to his left knee on February 2, 2002, which ultimately resulted in at least three (3) surgical procedures and a period of pain management treatment. On March 20, 2003, claimant sustained injuries to the fingers on his right hand and both shoulders as a result of a fall attributable to a giving way of the left knee.

Claimant asserts that as a result of the March 20, 2003, accident he also sustained an injury to his cervical spine which requires medical treatment and for which respondent #1 is liable. Alternatively, claimant asserts that as a result of the acknowledged compensable injury to his left shoulder which has been the subject of two (2) surgical procedures resulting a 15% permanent physical impairment rating, he has sustained wage loss disability in excess of the anatomical impairment and is entitled to appropriate corresponding indemnity benefits.

Respondent #1 denies that the claimant suffered an injury to his cervical spine in the March 20, 2003, accident. Accordingly, respondent #1 denies that medical treatment regarding the claimant's neck complaint is related to the March 20, 2003, work-related accident.

Respondent #1 denies that the claimant has sustained wage loss disability or permanent partial disability in excess of his anatomical impairment growing out of the March 20, 2003, accident.

Respondent #1 content that in the event it is found that the claimant has indeed suffered a loss of earning capacity in excess of his anatomical impairment then responsibility for the payment of same lies with respondent #2, the Second Injury Fund. Respondent #2 denies that it has liability in this claim.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. To prove a compensable injury as a result of a specific incident which is identifiable by time an place of occurrence, a claimant must establish by a preponderance of the evidence: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury, and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4) (A) (i) (Rep.. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

The claimant is left hand dominate. Following his June 17, 1998, anterior cervical decompression, fusion at C6-7, with autogenous left anterior iliac crest bone grafting procedure under the care of Dr. R. Edward Cooper, claimant was released from medical treatment and returned to gainful employment. There is no evidence in the record to reflect that permanent medical restrictions were placed on the claimant's employment activities following his recovery

from the June 1998, cervical disc surgery.

The evidence does reflect that at the time the claimant was seen by Dr. Cooper prior to the June 17, 1998, surgery he provided a medical history of neck pain and severe headaches with an onset of symptoms of severe pain in the neck along the right side and radiating into the scapula and occasionally radiating down the right upper extremity. (R#1, X#1, p. 3). Prior to the 1998 cervical disc surgery a CT of the cervical spine was obtained on May 12, 1998, at St Barnards Regional Medical Center. The findings on the 1998 CT scan of the claimant cervical spine with respect the C3-C4 and C4-C5 discs are unchanged from those of the September 21, 2005, MRI scan, which was obtained at the directions of Dr. Stroope. (R#1,X#1, p.1; CX #1, p. 13).

The claimant did not register complaints of radiating left upper extremity pain with numbness prior to his second left shoulder surgical procedure, which was had on June 10, 2005. The afore symptoms served as the basis for the September 21, 2005, cervical MRI scan of the claimant per the recommendation of Dr. Stroope. Further, the results of the September 21, 2005, cervical MRI scan served as the basis for the September 28, 2005, neurosurgeon recommendation of Dr. Stroope. There are no objective findings of a cervical injury relative to the March 20, 2003, accident of the claimant. The findings which Dr. Stroope identify on the claimant's September 21, 2005, MRI scan of the cervical spine that "could lead to some left shoulder pain" were in place at the time of the May 12, 1998, CT scan of the claimant cervical spine. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that the sustained an injury to his cervical spine on March 20, 2003, arising out of his employment with respondent #1.

Prior to his employment by respondent on June 4, 2001, as a millwright, claimant had sustained an injury to his cervical spine which resulted in June 17, 1998, cervical surgery. There is no evidence to reflect that claimant was denied employment or required to quite a job due to residuals of the 1998 neck injury and subsequent surgery. Indeed, there is no evidence that the claimant experienced physical limitations or restrictions on his employment activity as a result of the 1998 injury and surgery. Claimant successfully discharged his assigned job duties in the employment of respondent #1 as a millwright from the date he commenced employment with same until February 2, 2002, when he sustained a compensable injury to his left knee.

While the claimant underwent at least three (3) surgical procedures relative to his compensable left knee injury of February 2, 2002, he had resumed his regular employment duties at the time of his March 20, 2003, compensable injury to left shoulder. There is evidence in the record to reflect that the March 20, 2003, injury was a product of the claimant's left knee giving way. At the time claimant commenced medical treatment relative to his March 20, 2003, left shoulder injury he was continuing to receive medical treatment, in the form of pain management treatment, with respect to his compensable left knee injury.

At the time of his March 20, 2003, compensable injury, claimant earned \$17.00 per hour as a millwright in the employment of respondent #1. Subsequent to his March 2003, injury claimant's hourly rate increased to \$18.00, as a millwright in the employment of respondent #1. Claimant was earning the \$18.00, per hour hourly rate at the time his employment with respondent #1 ceased on or about January 19, 2006.

The claimant reached maximum medical improvement relative to his March 20, 2003, left shoulder on November 7, 2005, and was assessed with a 15 % permanent physical

impairment to the body as a whole by his treating physician, Dr. Stroope, based on the 4th Edition of the AMA's Guides to the Evaluation of Permanent Impairment. Claimant is left hand dominate. Due to residuals of his March 20, 2003, compensable injury claimant is physically unable to lift significant weights or to maintain his left upper extremity elevated above shoulder level for prolonged periods of time.

When the claimant returned to the employment of respondent #1 on November 8, 2005, while he continued to be paid at the hourly rate of a millwright, \$18.00, he was not placed in a millwright position, but rather worked in the shop. There is credible testimony that the claimant was promised a millwright position once one became available, however respondent #1 filled available millwright positions with individuals with less seniority or experience than the claimant. Finally, on or about January 19, 2006, claimant was laid off by respondent #1.

Claimant discharged employment duties for respondent #1 from November 8, 2005, through January 19, 2006, after having reached the end of his healing period relative to the March 20, 2003, compensable injury on November 7, 2005. While the claimant continued to earn the \$18.00, hourly rate of a millwright throughout the duration of his employment by respondent #1, he performed employment duties less strenuous than those of a millwright. The evidence also reflects that the claimant worked more hours in the shop. Claimant acknowledged that he is uncertain if he could have continuously discharged the employment duties of a millwright, in light of the residuals of his compensable March 20, 2003, left shoulder injury, however maintains that he would have worked as long as he could.

The evidence reflects that millwright employees of respondent #1 currently earn \$20.00, per hour. While the claimant point to the fact that after his January 2006, lay off by respondent

#1, respondent # 1 placed an advertise soliciting individuals for positions as a millwright in the local newspaper in February 2006, and that respondent #1 employed another hired another employee as a millwright in February 2006, as evidence the his layoff was a pretext to terminate his employment, there is not a claim for indemnity benefits pursuant to Ark. Code Ann. §11-9-505 (a) (1) before the Commission. Claimant received unemployment benefits following his January 19, 2006, layoff and worked for a week doing a shutdown before securing employment with his current employer earning \$15.00, per her hour. Claimant works in a supervisory capacity.

The claimant, with a date of birth of June 23, 1963, has an eleventh grade education. While the claimant has sustained an injury to his neck which required cervical disc surgery in June 1998, there is no evidence that he experience physical restrictions or limitations on his employment activities prior to his June 4, 2001, employment by respondent #1 as a millwright. Claimant successfully discharged his assigned job duties as a millwright in the employment of respondent #1 through February 2, 2002, when he sustained a compensable injury to his left knee. Following the February 2, 2002, compensable left knee injury, claimant returned to the employment of respondent #1 as a millwright and continued discharging assigned job duties until March 20, 2003, when he sustained a compensable left shoulder injury.

The claimant underwent his first surgical procedural relative to the compensable March 20, 2003, left shoulder injury in January 2005, and a second procedure on June 10, 2005. Claimant did not return to the employment duties as a millwright in the employment of respondent #1. Claimant is left hand dominate and continues to experience physical restrictions and limitation relative to lifting with respect to the left shoulder. Claimant sustained injuries to

both shoulder in the March 20, 2003, accident as well as injuries to the fingers of his right hand. The evidence preponderates that the claimant is not physically capable of performing the demands of a millwright worker, nor is the claimant physically capable of performing his pre-injury physical activities with respect to lifting and prolonged positioning with relative to his left shoulder. When the claimant's age, education, work history, permanent restrictions and limitations are considered, the evidence preponderates that he has sustained a loss of earning capacity or wage loss disability in the amount of 10% over and above his 15% anatomical impairment.

In order for respondent #2, the Second Injury Fund, to have liability, three (3) prerequisites must be met: the employee must have suffered a compensable injury at his present employment; prior to that injury, the employee must have had a permanent partial disability or impairment; and the disability or impairment must combine with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 276 S.W.2d 539 (1988); *Arkansas Highway & Transportation Department v. McWilliams*, 41 Ark App. 1, 846 S.W.2d 670 (1993).

In the instant claim, the compensability of the claimant's March 20, 2003, left shoulder was ligated and found compensable. As a consequence of the March 20, 2003, compensable injury claimant sustained a permanent physical impairment in the amount of 15 % to the body as a whole. Claimant previously sustained an injury to his cervical spine which resulted in surgery in the form of a fusion at C6-7 in 1998. Claimant also suffered a compensable injury to his left knee on February 2, 2002, which resulted to at least three (3) surgical procedures. Nevertheless, the evidence preponderates that the claimant's current disability status is the product of the

March 20, 2003, injury alone. Claimant did not appreciate physical limitations or restriction of his employment activities or efforts prior to his employment by respondent #1 on June 4, 2001. Further the evidence reflects that the claimant's inability to discharged his pre-injury job duties as a millwright relate solely to residuals of the March 20, 2003, left shoulder compensable injury. Respondent #2, the Second Injury Fund, has no liability in this claim. Respondent #1 controverted the payment of workers's compensation benefits in this claim subsequent to August 25, 2003.

AWARD

Respondent #1 is hereby ordered and directed to pay permanent partial disability benefits to the claimant at the maximum applicable rate for a compensable injury occurring in 2003, to correspond with a 25 % permanent partial disability, the same representing a 15% anatomical impairment and a 10% wage loss disability, as a growing out of the claimant's compensable injury of March 20, 2003. Said sums accrued shall be paid in lump without discount. Respondent #1 may claim credit for sums heretofore paid toward the afore obligation.

Respondent #1 is further ordered and directed to pay all reasonable and necessary medical, and other apparatus expenses, to include medical related travel growing out of the compensable injury of March 20, 2003.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the applicable rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Respondent #2 is herein dismissed from this claim.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge