

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508738

ROBERT NEWBY

CLAIMANT

ASSOCIATED BUILDING & DEVELOPMENT

RESPONDENT

BITUMINOUS CASUALTY CORP.
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 30, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondent represented by BETTY J. HARDY, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 15, 2007, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 17, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to both shoulders in July 2005.

4. The claimant is entitled to a weekly compensation rate of \$464.00 for temporary total disability and \$348.00 for permanent partial disability.

5. Medical expenses have been paid for the claimant's right shoulder injury.

6. Medical expenses have been paid to August 15, 2000, for the claimant's left shoulder.

7. The respondents accepted 12 percent impairment on the claimant's right shoulder and 7 percent on the claimant's left shoulder.

8. The respondents have paid for visits to Dr. Evans subsequent to August 15, 2006, those visits were on September 11, 2006, and October 24, 2006.

By agreement of the parties the issues to litigate are limited to the following:

1. Additional medical for the claimant's left shoulder.

2. Temporary total disability from August 16, 2000, to a date to be determined.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that as a result of the compensable injury to the left shoulder it has now been recommended that the claimant undergo surgery. The claimant contends that the recommended surgery is reasonably necessary and, therefore, the liability of the respondents. The claimant contends that he is entitled to temporary total disability benefits from August 16, 2006, until a date to be determined. The

claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant has been provided all appropriate benefits to which he is entitled for his right and left shoulders. Specifically, respondents have paid all benefits for the claimant's right shoulder and have paid workers' compensation benefits for the left shoulder until August 15, 2006. It is respondents' position that the claimant's request for additional treatment for his left shoulder and his request for additional temporary total disability benefits related to his left shoulder are not reasonably necessary nor causally related to the claimant's employment at Associated Building and Development Corporation. The respondents reserve the right to assert additional contentions as may become known through discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1 as well as the abstract of the respondents' medical evidence marked Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The parties have stipulated and the claimant testified that he sustained a compensable injury on July 16, 2005, while working for the respondent. The claimant testified that he was operating a

ninety pound jackhammer that had gotten stuck in a concrete floor. The claimant testified that he was holding this jackhammer with both hands. The claimant testified that when the jackhammer gets hung you have to keep it vibrating or you will never be able to get it unstuck. The claimant testified that as he was jerking on the jackhammer, he felt both his shoulders pull and there was just a real bad burning in both his shoulders. The claimant testified that he reported his accident to the respondent. The claimant testified that he was initially seen by Dr. Balis and was then referred to Dr. Deneke who then referred him to Dr. Evans, an orthopedic surgeon. The claimant testified that Dr. Evans did surgery on his right shoulder and that he was able to return to work on December 12, 2006. The claimant agreed that he continued to work for the respondent up until August 15, 2006.

The claimant testified that he has continued to have pain in his left shoulder since July 16, 2005, noting that he cannot lift anything out in front of him plus his shoulder hurts all the time. The claimant testified that he has not sustained any new injury to his left shoulder since July 2005. The claimant testified that he has done physically demanding work all of his adult life noting that he has operated a jackhammer on and off since he was a teenager. The claimant testified that he currently is 63 years old. The claimant agreed that the medical records indicate that he has degenerative changes in his shoulders. The claimant testified that there have been times after a long day of hard work that his shoulders and other joints have ached and felt tired. The claimant

testified that after July 16, 2005, the pain was more severe, it did not go away and he could not raise his arms above his shoulders. The claimant testified that he has had physical therapy for his left shoulder since his July 2005 accident but it has not done any good. The claimant testified that, in his opinion, he has been physically unable to work since August 16, 2006.

On cross examination, the claimant testified that he is a job superintendent for the respondent and on July 16, 2005, he was working with a crew. The claimant agreed that it is not a daily activity to run the jackhammer and in fact it was a rather rare need. The claimant agreed that his shoulders began to hurt real bad about 2:00 p.m. on July 16, 2005, but nothing like they hurt after he pulled up on the jack. The claimant testified that he had been to see his doctor on July 11, 2005, with complaints of pain in most all of his joints. The claimant testified that as a result of this doctor's visit, he was prescribed Celebrex and he had x-rays taken. The claimant testified that he did not know the results of the x-rays but would not disagree with whatever the medical records set forth. The claimant testified that when he saw Dr. Balis on July 18, 2005, he told him about operating the jackhammer. The claimant agreed that if the record set forth that he had surgery on his right shoulder in September 2005 he would not disagree. The claimant agreed that he was off work from July 2005 until December 2005. The claimant testified that after he returned to work for the respondent he continued supervising a crew of employees. The claimant explained that the only office type work he does is on the

job and that he reads blueprints to tell the crew members what to do and to make decisions as to who does what. The claimant testified that he is out on the job not in an office. The claimant agreed that his crew did most of the physical work up to August 15, 2006. The claimant testified that he was not terminated or fired by the respondent and it was his decision to stop going into work on August 15, 2006. The claimant agreed that he underwent a functional capacity evaluation in March 2006 which indicated that he could do medium category type work. The claimant agreed that none of his medical bills since August 2006 have been placed on group health insurance but he has tried to go ahead and undergo his surgery for his left shoulder under group health subsequent to August 2006. The claimant testified that he has not applied for social security, retirement, or disability.

On redirect examination, the claimant testified that he was ready to undergo surgery on his left shoulder because he is unable to work as he is right now. The claimant testified that once the surgery was not authorized by the respondent, he tried to get his surgery done under his group health insurance but was unsuccessful. The claimant testified that his treating physician, Dr. Evans, took him off work and that is why he has not been able to go back to work. The claimant testified that he has continued to be under Dr. Evans' care and that the doctor has not released him to return to work since August 15, 2006. The claimant testified that although he is a supervisor for the respondent he is an on the job hands on supervisor and although he does some paperwork and direct the other

crew members he does labor also. The claimant was asked when out on a job if something was not going right and the crew members were not performing the work as they should, how did the work get done? The claimant responded, "I do it myself and show them how to do it and then turn it back over to them."

On recross examination, the claimant testified that he did return to work in December 2005 and worked until August 15, 2006, doing his regular duties. The claimant testified that he did this work with a lot of pain.

The claimant was seen by Dr. Luc Balis on July 11, 2005, reporting that he has had joint pain for the past two weeks. It is noted that the claimant reports that the pain started in his knees and now has extended to his shoulders. After examination, Dr. Balis had the claimant undergo an x-ray of his right shoulder which was normal and the claimant was assessed with having arthralgia and shoulder pain. Dr. Balis recommended Celebrex. The x-ray report made on July 11, 2005, sets forth that there is some degenerative change at the acromioclavicular joint which is relevantly mild. Dr. Balis saw the claimant on July 18 due to the worsening pain in his shoulders and knees. Dr. Balis notes that they had obtained an ANA, RA, ESR, and CRP. Dr. Balis notes that these were normal or marginally elevated. Dr. Balis recommended that the claimant be seen by rheumatology. The claimant was seen by Dr. James Deneke on July 26, 2005, for his complaints of stiffness and pain all over. The claimant reports that his left upper arm hurts with use as well as at rest. After examination and review of the claimant's x-rays,

Dr. Deneke recommended medications for the claimant. Dr. Deneke continued to treat the claimant and on August 9, 2005, he recommended that the claimant undergo an MRI of both shoulders. The claimant underwent an MRI of his shoulders on August 10, 2005. This report sets forth that the claimant's left shoulder has a small partial tear of the rotator cuff near the junction of the distal supraspinatus with the infraspinatus tendons with degenerative hypertrophic changes in the AC joint. The claimant's right shoulder revealed arthritic changes in the AC joint, probable small partial tear of the anterior aspect of the distal infraspinatus tendon and probable tendinitis of the distal supraspinatus tendon. Dr. Jeffery Evans writes on August 18, 2005, that he has seen the claimant and has diagnosed him with bilateral rotator cuff tears as well as bilateral symptomatic acromioclavicular joint arthritis and has scheduled him for right shoulder arthroscopic rotator cuff tear and arthroscopic distal clavicle resection. The claimant had surgery on his right shoulder performed by Dr. Evans on September 7, 2005. Dr. Evans writes on September 19, 2005, that the claimant's right shoulder wounds are healing. The claimant reports that the respondent carrier is not going to pay for surgery on his left shoulder. Dr. Evans notes that the claimant has a partial tear of the left shoulder rotator cuff and symptomatic acromioclavicular joint arthritis as well. Dr. Evans notes that clearly these problems became symptomatic after running the jackhammer on concrete on July 16, 2005. Dr. Evans writes that it is his opinion that the claimant's left

rotator cuff tear was a direct result of the injury on that date and that the arthritis predated the injury but became symptomatic after the injury date. The claimant was seen by Dr. John Park on October 12, 2005, due to the rotator cuff tear on the right and a partial tearing on the left. Dr. Park notes that these are confirmed by MRI. Dr. Park writes that the claimant has undergone right rotator cuff surgery and is doing well. The doctor notes that the claimant's left shoulder remained significantly painful and he appears to have a mild to moderate adhesive capsulitis in the shoulder with passive range of motion. Dr. Park recommended treating the claimant's left shoulder with injections before considering surgery. Dr. Evans writes on December 12, 2005, that he is going to return the claimant to work without restrictions. The doctor notes that if the claimant's symptoms reoccur on the left side after he returns to full duty status, it would be the doctor's recommendation that he undergo left shoulder surgery. On January 26, 2006, Dr. Evans notes that the claimant is having problems with overhead work with his left shoulder as well as his left forearm and left hand are experiencing numbness. Dr. Evans recommended the claimant begin physical therapy again for his left shoulder in hopes that strengthening it will improve his symptoms. Dr. Evans notes that if the claimant's left shoulder does not settle down with the additional physical therapy, it is still his recommendation that he undergo surgery. By March 9, 2006, Dr. Evans notes that the claimant's left shoulder problems have not improved and he recommends surgery for the claimant's left

shoulder. The claimant underwent a functional capacity evaluation on April 5, 2006, which revealed that he had given a reliable effort with 51 of 51 consistency measures within expected limits. The evaluator, Doin Dahlke, writes that the claimant demonstrates the ability to perform work at the medium physical demand classification. Dr. Evans writes on May 9, 2006, that he has been asked to assign the claimant a permanent impairment rating as to his shoulders. Dr. Evans notes that the claimant would be put on permanent restrictions of no work at or above shoulder level and it is still his recommendation as well as that of Dr. Park that since the claimant failed conservative therapy including injections and physical therapy on his left shoulder, that he undergo surgery for this area. In a letter dated May 9, 2006, addressed to the respondent carrier, Dr. Evans assessed the claimant with a 12 percent impairment to the right upper extremity noting again that the claimant has a permanent restriction with no working at or above shoulder level. At the claimant's request, Dr. Evans rated his left shoulder with a 7 percent left upper extremity impairment noting further that he has a permanent restriction of no work at or above shoulder level. Dr. Evans again notes that it is his recommendation that the claimant proceed with left shoulder surgery. On August 15, 2006, Dr. Evans notes that the claimant is still being bothered by his right shoulder but not to the degree that his left shoulder bothers him. Dr. Evans writes that he has given impairment ratings for the claimant's right and left shoulders but further notes that the impairment rating given for

the claimant's left shoulder is just an estimation and if his condition worsens that impairment could increase. Dr. Evans writes that he recommends that the claimant undergo an arthrogram of his left shoulder and the doctor took the claimant off work until his next appointment. The claimant was seen by Dr. Evans on September 11, 2006, where it is noted that they have not been authorized to go forward with surgery. Dr. Evans again recommended an arthrogram for the claimant's left shoulder and he was to remain off work until his next appointment. On October 24, 2006, Dr. Evans writes that the claimant is still having a great deal of pain in his left shoulder. The doctor notes that the claimant reports that his right shoulder is hurting a bit but not as much as the left. It is noted that the claimant reports that he is having to use his right shoulder more than he would like to because of his left shoulder pain. Dr. Evans notes that it is still his recommendation that the claimant undergo an arthrogram of his left shoulder and based on these test results to undergo left shoulder surgery. Dr. Evans continued the claimant on his permanent work restrictions. Dr. Evans writes on January 16, 2007, that the claimant is still having pain in his left shoulder. The doctor notes that the claimant has a hearing set for his workers' compensation case and if this does not work out he will proceed with his left shoulder surgery with private insurance. Dr. Evans writes that the claimant is not able to work due to his shoulders and he will await the outcome of the hearing so they will know how to proceed.

After a complete review of this matter, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his left shoulder. The medical records clearly set forth that the claimant sustained a tear to his rotator cuff for which several physicians have recommended surgery. It is not questioned that this claimant has some degenerative changes in his left shoulder but Dr. Evans has stated on more than one occasion that it was the claimant's work on July 16, 2005, using the jackhammer which has exacerbated the claimant's symptoms as well as caused his need for surgery. I further find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 16, 2006, to a date to be determined. The claimant was taken off work by his treating physician, Dr. Evans, and has continued to be kept off work at the recommendation of Dr. Evans as a result of his left shoulder problems. Therefore, the respondents should pay temporary total disability to this claimant from August 16, 2006, to a date to be determined.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained compensable injuries to both shoulders in July 2005.

4. The claimant is entitled to a weekly compensation rate of \$464.00 for temporary total disability and \$348.00 for permanent partial disability.

5. Medical expenses have been paid for the claimant's right shoulder injury.

6. Medical expenses have been paid to August 15, 2000, for the claimant's left shoulder.

7. The respondents accepted 12 percent impairment on the claimant's right shoulder and 7 percent on the claimant's left shoulder.

8. The respondents have paid for visits to Dr. Evans subsequent to August 15, 2006, those visits were on September 11, 2006, and October 24, 2006.

9. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his left shoulder. See discussion above.

10. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 16, 2006, to a date to be determined. See discussion above.

11. The respondents have controverted this claimant's entitlement to additional benefits.

12. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his left

shoulder. Therefore, the respondents should pay for all reasonable and necessary medical care for this claimant's left shoulder.

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 16, 2006, to a date to be determined. Therefore, the respondents should pay temporary total disability to this claimant.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

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

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

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE