

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F703322**

TIMMY HENSLEY, EMPLOYEE

CLAIMANT

**COOPER TIRE & RUBBER COMPANY,
EMPLOYER**

RESPONDENT NO. 1

**CENTRAL ADJUSTMENT COMPANY, INC.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

OPINION AND ORDER FILED NOVEMBER 12, 2021

Hearing conducted before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, on August 20, 2021, in Texarkana, Miller County, Arkansas.

The claimant was represented by the Honorable Gary Davis, Gary Davis Law Firm, Little Rock, Pulaski County, Arkansas.

Respondent No. 1 was represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

Respondent No. 2, represented by the Honorable David L. Pake, State of Arkansas, Death & Permanent Total Disability Trust Fund, Little Rock, Pulaski County, Arkansas., waived appearance at the hearing.

INTRODUCTION

In the Prehearing Order filed July 23, 2021, the parties agreed to the following stipulations, which they affirmed on the record at the subject hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including January 9, 2007, when the claimant sustained a compensable injury to his left shoulder.
3. The claimant's average weekly wage (AWW) was sufficient to entitle him to the

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2007 maximum weekly compensation rates for temporary total disability (TTD) and permanent partial disability (PPD) benefits.

4. The respondents accepted this claim as compensable; but they controvert the payment of the requested additional medical and indemnity benefits.
5. All parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 2; Hearing Transcript at 5). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the recommended surgery by Dr. Clayton Riley is related to, and constitutes reasonably necessary treatment for, the claimant's January 9, 2007, compensable injury;
2. Whether the claimant is entitled to corresponding to temporary total disability benefits;
3. Whether Respondent No. 1 is entitled to a dollar-for-dollar credit/offset for the disability pension benefits received by the claimant pursuant to *Ark. Code Ann.* § 11-9-411 (2020 Lexis Replacement);
4. Whether the claimant's attorney is entitled to a controverted fee on these facts.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 5).

The claimant contends he sustained admitted compensable injuries, including a compensable injury to his left shoulder on January 9, 2007. Dr. Clayton Riley has recommended left shoulder reconstruction surgery. Respondent No. 1 has denied responsibility for this recommended surgery, as well as the TTD benefits associated with it. The claimant reserves the right to pursue any and all other benefits to which he may become entitled in the future.

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Additionally, the claimant's attorney respectfully requests that any attorney's fees owed by claimant on controverted benefits paid by award or otherwise be deducted from claimant's benefits and paid directly to claimant's attorney by separate check; and that any Commission order direct Respondent No. 1 to make payment of attorney's fees in this manner. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3; T. 5).

Respondent No. 1 contends Dr. Riley's recommendation for a left shoulder arthroscopic extensive debridement, possible revision rotator cuff repair, possible labral repair, and other indicated procedures is neither related to, nor does it constitute reasonably necessary medical treatment for, the claimant's 2007 compensable left shoulder injury. There have been no physical changes to claimant's left shoulder since the last MRI of his left shoulder was performed on March 10, 2017, at which time Dr. Joel Smith opined additional surgery to the claimant's left shoulder was not warranted. After a physical examination of the claimant, Dr. Lawrence O'Malley opined the claimant's left shoulder is stable, and that the claimant is "grossly tender about the entirety of his shoulder with extreme weakness that cannot be explained by a very small tear in his rotator cuff. He has pain and weakness out of proportion." Consequently, Dr. O'Malley, like Dr. Smith, did not recommend any additional surgical intervention of the claimant's left shoulder as it would not provide him any medical benefit. Respondent No. 1 further contends the claimant is not entitled to any award of TTD benefits. Alternatively, if the claimant is awarded TTD benefits, Respondent No. 1 contends that, pursuant to *Ark. Code Ann.* Section 11-9-114 (2021 Lexis Replacement), they are entitled to a dollar-for-dollar credit/offset of \$316.18 per week, which is the weekly amount of

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the claimant's Cooper Tire disability pension of \$1,370.13 per month, which equals \$16,441.56 per year. Consequently, this statutory credit/offset would reduce the claimant's weekly TTD benefits, *if* the Commission awards any TTD benefits to the claimant herein, to \$171.82 per week. Respondent No. 1 specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3-4; T. 5).

Respondent No. 2 waived its right to appear at the hearing; defers to the outcome of the litigation; and specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 4; T. 5).

The record consists of the hearing transcript of the subject August 20, 2021, hearing, and any and all exhibits contained therein and attached thereto. Moreover, pursuant to the parties' mutual agreement, the record contains the hearing transcripts, and any and all exhibits contained therein and attached thereto, of any and all other prior hearings contained in the Commission's file in this claim, as well as any and all prior ALJ and Full Commission opinions and orders filed in connection with said hearings. (T. 6-8).

STATEMENT OF THE CASE

This claim has been the subject of at least three (3) prior hearings, and at least three (3) prior ALJ opinions filed on October 6, 2010; June 28, 2012; and November 20, 2013. All of these prior opinions are contained in the Commission's file and of course, as mentioned above, pursuant to the parties' mutual agreement have been incorporated by reference into the hearing record of this hearing. These opinions contain statements of the case that I hereby incorporate by reference herein.

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To briefly summarize relevant findings of fact and conclusions of law contained in these prior opinions, Respondent No. 1 has accepted injuries to both the claimant's right and left shoulders. The Commission has determined the claimant has sustained a 38% to the body-as-a-whole (BAW) impairment rating, as well as an additional 30% in wage loss disability – 15% attributable to his right shoulder injury, and 15% attributable to his left shoulder injury – for his right and left shoulder injuries. (ALJ's Opinion filed October 6, 2010, at 19). An ALJ's opinion filed June 28, 2012, found the claimant failed to prove the existence of extraordinary circumstances to justify his request for a lump sum payment of the 30% wage loss disability. (ALJ's opinion filed June 28, 2012, at 4). In an ALJ's opinion filed November 20, 2013, the ALJ found the claimant's request for surgery to correct a labrum tear in his left shoulder was related to, and constituted reasonably necessary care for, his 2007 compensable left shoulder injury. This opinion also awarded the claimant additional TTD benefits for the period of time he remained within a new healing period following this surgery. (ALJ's Opinion filed November 13, 2013, at 12).

The claimant, Mr. Timmy J. Hensley (the claimant), is 58 years old. He was employed with the respondent-employer, Cooper Tire (Cooper Tire), for some 25 years, during which time he sustained compensable injuries to both his right and his left shoulders in two (2) separate incidents. On December 12, 2006, he sustained a compensable injury to his right shoulder. Thereafter, on January 9, 2007, the claimant sustained a compensable injury to his left shoulder. Both the claimant's right and left shoulder injuries occurred as a result of his job repairing tires at Cooper Tire, part of which required him to pick-up and "throw" the tires on a conveyor belt after he repaired them. The claimant testified he handled around 500-600 tires/day, which ultimately

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resulted in both his separate right and left shoulder injuries. (T. 10-18).

The claimant has undergone a great deal of medical treatment and multiple surgeries on both his right and left shoulders, for which Cooper Tire has to date paid. Cooper Tire also has paid substantial amounts in both TTD and PPD, for both BAW impairment and wage loss disability, as mentioned above. (T. 10-14; and see the prior opinions, *supra*).

At the subject August 20, 2021, hearing, the claimant contended he is entitled to additional surgery on his left shoulder in the form of a left shoulder reconstruction and related procedures as recommended by his authorized treating orthopedic surgeon, Dr. Clayton Riley, as well as additional TTD benefits for the time he remains within his healing period following this surgery. The record consists of conflicting medical opinions concerning whether Dr. Riley's proposed left shoulder reconstruction surgery constitutes related, reasonably necessary medical treatment on these facts. (Claimant's Exhibit 1 at 1-17; Respondents' Exhibit 1 at 1-27; T. 35-63). In his independent medical evaluation (IME) report dated 10/09/2017, Dr. David Collins of Arkansas Specialty Orthopedics, opines, among other things, the claimant is a surgical candidate for a, "*Reverse total [left] shoulder arthroplasty with or without tendon transfers to restore functional external rotation if absent.*" (CX1 at 3, 1-3) (Emphasis in original; bracketed material added).

On the other hand, in his medical records review, examination/evaluation opinion report dated 1/12/2021, another orthopedic surgeon, Dr. Lawrence O'Malley, expresses his concern the claimant "is not going to improve with surgical intervention as the entirety of his shoulder with extreme weakness that cannot be explained by a very small tear in his rotator cuff." Dr. O'Malley goes on to state, among other things, his opinion the claimant's expressed complaints of pain and

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weakness in his left shoulder are “out of proportion” with his MRI findings, and surgical intervention will not provide the claimant with “relief” of his complaints. (RX1 at 19; 18-23).

The claimant testified he continues to suffer from pain and other problems with his left shoulder, all of which have remained ongoing since the time of his compensable injury and the various surgeries he has undergone related to it. In recent years, the claimant has undergone steroid injections in an attempt to alleviate his left shoulder pain and related problems; however, the claimant is a diabetic and is concerned about the long-term effects these repeated steroid conditions are likely to have on his diabetes and overall health, in general. The claimant is aware that any benefits and relief the proposed surgical procedure/left shoulder reconstruction may provide him will be temporary, and not permanent, in nature. Still, he wishes to undergo the surgery. (T. 10-33).

The claimant applied for, was awarded, and has been receiving Social Security disability (SSD) benefits in the amount of \$2,000.00 per month since 2010 or 2011. (T. 12-13). The claimant also receives disability retirement benefits from Cooper Tire pursuant to a collective bargaining agreement between his union and Cooper Tire in the amount of \$1,336.00 or \$1,346.00 per month. (T. 13-15; 33-34).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2021 Lexis Repl.). The

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claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2020 Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardee's*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but it may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers' Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999).

Entitlement to Additional Medical Care

Ark. Code Ann. § 11-9-508(a)(1) (2021 Lexis Repl.) requires an employer to promptly provide an injured worker with, among other modalities, such medical treatment "as may be

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reasonably necessary in connection with the injury received by the employee.” The burden of proof is on the claimant to prove the additional medical treatment he requests is related to, and reasonably necessary for treatment of, his compensable injury. *Lankford v. Crossland Constr. Co.*, 2011 Ark. App. 416, 384 S.W.3d 561 (Ark. App. 2011). What constitutes reasonably necessary medical treatment is a question of fact for the Commission, and turns on the sufficiency of the evidence. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (Ark. App. 1984); *Gansky v. Hi-Tech Eng’g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

While injured employees must prove by a preponderance of the evidence that medical services are related to and reasonably necessary for treatment of the compensable injury, Arkansas law is well-settled that such services may include those necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. *Ark. Code Ann.* § 11-9-705(a)(3) (2021 Lexis Repl.); *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (Ark. App. 1995).

It is beyond reasonable dispute the current condition of the claimant’s left shoulder is related to his compensable injury of January 2007, and all the surgeries he has since undergone for this admitted and accepted compensable injury. Consequently, the only real issue to be resolved herein is whether Dr. Riley’s proposed total left shoulder reconstruction constitutes reasonably necessary medical treatment on these facts. I find that, based on the totality of the medical and other relevant evidence of record related to the claimant’s 2007 January left shoulder injury contained in the voluminous record in this claim, Dr. Riley’s proposed left shoulder injury does in fact constitute

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reasonably necessary medical treatment for, among other obvious ones, the following reasons.

First, the claimant worked for Cooper Tire for some 25 years repairing tires. From the job description in the record, the evidence reveals the claimant's job required him to repair, then lift and throw onto a conveyor belt, anywhere from 500-600 tires per day. It is beyond reasonable dispute this job created a great deal of wear-and-tear on both the claimant's right and left shoulders. It also resulted in two (2) separate injuries, one (1) to the claimant's right shoulder, and then a second to the claimant's left shoulder. Both the claimant's admittedly compensable right and left shoulder injuries have, through the years, required the claimant to undergo a great deal of medical treatment, including multiple surgeries to both shoulders.

Second, the claimant's shoulder injuries have resulted in substantial permanent anatomical impairment to his whole body, and to a total of 30% in wage loss disability. The shoulder injuries necessitated his leaving Cooper Tire's employ, and filing for and receiving \$2,000 per month in SSD benefits, and his drawing a disability pension (which is a different benefit from a retirement pension) in the amount of \$1,370.13 per month, or \$316.18 per week, based on his union's collective bargaining agreement with Cooper Tire.

Third, it simply is beyond reasonable dispute that between the claimant's long-time job duties at Cooper Tire, his two (2) separate compensable injuries to his right and left shoulders, as well as all the medical treatment and multiple surgeries the claimant has undergone as a result of his compensable right and left shoulder injuries, he has developed, as the claimant's attorney eloquently and simply stated, "bad shoulders." (T. 6). While one may make various arguments based on the various imaging tests the claimant has undergone through the years, the simple fact

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of the matter is the claimant's left shoulder is in bad shape and will most likely continue to get worse through the years as the claimant ages and arthritic and other changes become more and more pronounced. Still, not only the voluminous medical and other relevant evidence of record in this claim, but simple common sense compel me to find it is quite understandable and reasonable for the claimant to insist on "the right to try" the proposed left shoulder reconstruction surgery his authorized treating physician, Dr. Riley, has recommended in order to alleviate the claimant's long-term, significant, and – I believe – credible complaints of pain. While it is easy for Dr. O'Malley to state the claimant's pain complaints of instability appear to him, at least, to be inconsistent with the imaging findings, Dr. O'Malley has not walked in the claimant's shoes, nor does Dr. O'Malley have to live on a daily basis with the claimant's left shoulder condition.

Fourth, based on the specific facts of this case, I find the opinions of the claimant's treating orthopedic surgeon, Dr. Riley, as well as that of the IME physician, Dr. Collins, to be more persuasive than that of Dr. O'Malley. Both Dr. Riley and Dr. Collins have opined the proposed surgical procedure to constitute reasonably necessary medical treatment for the claimant's left shoulder condition. That said, in making the final decision as to whether he will actually undergo Dr. Riley's proposed total left shoulder reconstruction surgery, I trust the claimant will thoughtfully consider Dr. O'Malley's concerns that the procedure may very well not effectively alleviate his complaints; as well as Dr. Collins's statements to the effect the procedure may only provide minimal and temporary, and not long-term, relief of his left shoulder complaints. Finally, of course as is always the case with any surgical procedure, there are other serious attendant risks to surgery, including but not limited to the possibility surgery could make one's condition worse,

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and not better. These, however, are decisions only the claimant and his doctor and family can make.

Therefore, for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations contained in the Prehearing Order filed July 23, 2021, which the parties affirmed on the record at the hearing, hereby are accepted as facts.
2. The claimant has met his burden of proof in demonstrating by a preponderance of the credible medical and other evidence of record that Dr. Riley's proposed left shoulder reconstruction surgery is related to, and constitutes reasonably necessary medical treatment for, his admittedly compensable left shoulder injury of January 9, 2007.
3. The claimant shall become entitled to additional TTD benefits from the date he undergoes the proposed left shoulder reconstruction surgery and reenters a healing period through the date he reaches maximum medical improvement (MMI) following the subject surgery. *See Ark. State Hwy. & Trans. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981); *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (Ark. App. 1982); and *Long v. L & J Mechanical*, AWCC No. F008439 (Full Commission Opinion filed September 30, 2003).
4. In addition to the \$2,000 per month the claimant receives in SSD benefits, based on a collective bargaining agreement between his union and Cooper Tire he receives a disability pension of \$1,370.13 per month, or \$316.18 per week. Pursuant to *Ark. Code Ann.* Section 11-9-114, Respondent No. 1 is entitled to a dollar-for-dollar credit/off-set of \$316.18 per week against the claimant's weekly TTD benefits (which is the 2007 maximum rate) from the time the claimant reenters a healing period on the date of his left shoulder surgery through the date he reaches MMI following the surgery.
5. The claimant's attorney is entitled to a controverted attorney's fee based on the *total/gross amount of TTD benefits* to which the claimant is entitled *before and notwithstanding the dollar-for-dollar credit/off-set* required by *Ark. Code Ann.* Section 11-9-114.

If they have not already done so, Respondent No. 1 shall pay the court reporter's invoice

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within ten (10) days of its receipt of this opinion and order.

AWARD

The respondents are hereby directed to pay benefits in accordance with the “Findings of Fact and Conclusions of Law” set forth above. Any and all accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to *Ark. Code Ann.* Section 11-9-809, and *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. App. 1995); *Burlington Indus., et al v. Pickett*, 64 Ark. App. 67, 983 S.W.2d 126 (Ark. App. 1998); and *Hartford Fire Ins. Co. v. Sauer*, 358 Ark. 89, 186 S.W.3d 229 (2004).

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp