

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. D916735**

TED J. ARNETT, EMPLOYEE

CLAIMANT

VS.

LARRY W. DAVIS CONSTRUCTION, EMPLOYER

RESPONDENT

THE TRAVELERS, CARRIER

RESPONDENT

OPINION FILED JULY 18, 2003

Hearing held May 21, 2003, in Little Rock, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Mr. Gary Davis, Attorney at Law, 1415 North McKinley, Suite 415, Little Rock Arkansas 72205.

Respondents are represented by Mr. Phillip Cuffman, Attorney at Law, #319, 17200 Chanal Parkway, Suite 300, Little Rock, Arkansas 72223.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in Little Rock, Arkansas, on May 21, 2003. A prehearing telephone conference was held on this claim on April 8, 2003, with a Prehearing Conference Order filed on April 9, 2003. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, the parties agreed upon the following stipulations:

1. The employee-employer-carrier relationship existed between the parties on August 11, 1989, at which time claimant sustained a compensable neck injury at a compensation rate of \$209.08/\$156.81;

2. Medical expenses, temporary total disability benefits, and a 5% rating have been paid.

At the hearing, respondents offered as a stipulation the last date of payment on this claim was for an October 26, 2001, pharmacy bill which was paid on December 5, 2001.

During the prehearing telephone conference the parties agreed to limit the issues to:

1. Whether claimant sustained a compensable back injury;
2. Whether the medical expenses incurred by the claimant are reasonably necessary and related to claimant's compensable injury;
3. Whether claimant is entitled to an additional 5% permanent partial disability for her neck injury;
4. Controversion and attorney's fees.

The parties also listed rehabilitation and loss of earning capacity as issues for litigation. However at the time of the hearing, claimant's attorney requested that these two issues be withdrawn and held in abeyance for a later hearing.

With regard to the remaining issues, claimant contends that he injured his back on August 11, 1989, at the same time as the compensable neck injury. Claimant contends that he is entitled to continuing medical expenses for an aggravation of a pre-existing condition to his back. Claimant further contends that he was assessed a 10% rating for his compensable neck injury, but the respondents only paid for a previous 5% rating. Claimant seeks additional permanent partial disability benefits for the remaining 5% rating on the neck and attorney's fees. Respondents contend that all appropriate benefits have been paid, as the claimant's

lower back problems are not causally related to the compensable neck injury. Respondents contend that claimant's pre-existing back problem, spondylolisthesis, is not related to his compensable injury

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

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on April 8, 2003, and contained in the Prehearing Order filed April 9, 2003, are hereby accepted as fact.

2. Respondents last paid benefits for claimant's neck injury on December 5, 2001, for services rendered on October 26, 2001.

3. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his lower back in August of 1989.

4. The medical treatment rendered for claimant's continuing neck problems is reasonable and necessary medical treatment related to claimant's compensable neck injury.

5. Claimant has failed to prove by a preponderance of the evidence that he sustained a 10% permanent anatomical impairment as a result of his compensable neck injury.

6. Respondents have controverted claimant's entitlement to additional medical treatment as of at least October 26, 2001.

CONCLUSION

Claimant sustained an admittedly compensable injury to his neck on August 11, 1989, when he was installing a laminated beam and the beam was dropped striking the claimant in the back of the neck. Claimant began seeking medical treatment within a few days of this incident. Claimant introduced several medical records from his various treating physicians, however several of claimant's treating physicians have since retired and thus, their medical records were not available.

According to claimant's testimony, he was first examined by an unnamed company doctor, then he sought treatment from his family physician, Dr. Stotz. Dr. Stotz referred claimant to Dr. Crow, an orthopedic specialist. Claimant testified that his primary complaint while treating with Dr. Crow was "extreme back problems." However, Dr. Crow's medical records were not available to confirm this testimony. Claimant testified that Dr. Crow found claimant's neck problems. In 1991, claimant came under the care of Dr. Dillard Denson. Claimant continued to see Dr. Denson for neck problems from 1991 through 1996, when Dr. Denson retired. Upon Dr. Denson's retirement, claimant returned to Dr. Stotz for medical care. Dr. Stotz's soon retired and claimant then came under the care of Dr. Steve Tilley. In 1998, Dr. Tilley referred the claimant to Dr. Scott Schlesinger, a neurosurgeon. Pursuant to claimant's testimony, Dr. Schlesinger examined and

treated his low back. Dr. Schlesinger opined that the claimant's low back problems were not surgical in nature, thus he referred the claimant to Dr. Lon Burba, for testing. Through another referral by Dr. Tilley, claimant was later seen by Dr. Ted Saer.

Throughout this course of referrals, claimant also sought medical treatment outside the chain of referrals from Dr. Phillip Johnson, an orthopedic specialist. Likewise, when Dr. Tilley advised the claimant that he had nothing to offer the claimant, claimant sought a different primary care physician and began treatment with Dr. Keith Dixon.

With regard to his neck, claimant testified that he is sometimes unable to turn his head or hold his head up. Claimant testified that he has a constant discomfort and dull pain in his neck and that he has difficulty sleeping. Claimant continues to experience muscle spasms in his neck on a regular basis.

Claimant described his low back problems as "pretty severe pain" although it is not a constant pain. Claimant described the pain as a throb that makes it difficult to bend or lift. Claimant no longer attributes his leg pain to his back problems now that his leg pains are improving with vitamin therapy.

The claimant continued to work for respondent-employer until 1994 or 1995, when he started his own construction business. Claimant testified that although he continued to work, he continued to experience flare-ups with his neck and low back from time to time. On cross-examination, claimant testified that his lower back problems tended to correspond directly with his physical activities. However,

claimant acknowledged that from 1992 through 1998 he did not have serious problems with his lower back, despite the fact that he continued to work performing a variety of physical activities.

The first medical report in the record with regard to treatment of claimant's compensable injury is a March 5, 1991, report from Dr. Dillard Denson. In this report, Dr. Denson recited a history of an accident at work about a year and a half previous that resulted in an injury to claimant's neck with pain radiating down the right shoulder. Dr. Denson further noted:

In the past year, the patient says that he has been suffering from increasingly severe neck and right shoulder pain and also increasingly severe headaches. These headaches usually radiate from the back of the neck up the right side of the head. He says that in the last few months, the headaches have been almost a daily occurrence. He says that he takes Aspirin or Tylenol on a daily basis for the headaches. In the last six months he has noticed some weakness developing in the right hand, especially after he has worked all day. He says that he has also noted some numbness in both hands that occurs when ever he gets cold. He has noticed no problems with the legs or feet but has noticed some increasing problems with pain in the lower back....

Dr. Denson examined the claimant's upper and lower extremities, performed a sensory examination of the upper extremities, tested claimant's upper and lower extremity reflexes, and observed the claimant heel and toe walk. Dr. Denson concluded based upon his neurological findings that the claimant "may have some nerve root compression in the lower cervical region." Dr. Denson did not find a

neurological problem with claimant's lower back or lower extremities. Throughout Dr. Denson's medical records from 1991 through 1996, while the claimant continued to complain of neck pain, there is no evidence of the claimant complaining of lower back pain or problems. In fact in his report dated April 22, 1996, Dr. Denson specifically noted; "He has no difficulty with his legs."

On a Commission sanctioned physician's form dated December 27, 1994, Dr. Denson noted that the claimant suffered a permanent impairment rating of 10% to the body as a whole, based upon objective and measurable findings. Dr. Denson did not identify the objective and measurable findings upon which he relied in making this assessment.

Following his April 22, 1996, examination by Dr. Denson, claimant did not seek additional medical treatment for his neck until November of 1998, when he was referred to Dr. Scott Schlesinger by Dr. Stephen Tilley. In his correspondence to Dr. Tilley, Dr. Schlesinger wrote:

Mr. Arnett is a 33-year-old left-handed male who says a beam fell and hit him on the neck years ago. Since then he has had neck pain, headaches and more recently numbness in his legs distal to the knee. He says this started in the summer but has been improved the last month. He has been on Skelaxin and Lorcet Plus. He comes in now for neurosurgical consultation. The rest of his past history is noncontributory to the current illness.

Dr. Schlesinger did not find anything of neurosurgical significance, but referred the claimant for a cervical MRI and an EMG/nerve conduction tests of the

lower extremities. After performing the EMG/nerve conduction tests, Dr. Lon Burba concluded:

He appears to have a bilateral peroneal neuropathy which is both axonal and demyelinating in that the distal onset latencies are prolonged and the amplitudes are reduced. We are initiating a complete polyneuropathy work-up. Hopefully he does not have early Charcot-Marie Tooth disease. I cannot relate this directly to the accident he described ten years ago. We are going to get a completely polyneuropathy work-up and proceed from there.

An MRI of claimant's lumbar spine performed on November 25, 1998, revealed a bilateral L5 spondylolysis with a grade I spondylolisthesis of L5 on S1, as well as disc degeneration at L5/S1.

In a follow-up visit with Dr. Schlesinger on December 7, 1998, Dr. Schlesinger noted that the claimant "is not having any significant back pain or neck pain at this time."

On August 13, 1999, claimant was examined by Dr. Philip Johnson. Claimant provided Dr. Johnson with a history of suffering a work related injury in 1989 "when a beam struck him across the back and neck and shoulders." Dr. Johnson recorded current complaints of "low back pain and some radicular left leg pain with numbness on the left side." Dr. Johnson further noted:

He has had a work related accident he feels produced his back pain. The truth of the matter is he may have had a preexisting spondylolisthesis that was aggravated by the accident or the fall of the beam could have produced a stress fracture in the lumbar area which has progressed now to a Grade I forward slip.

Claimant came under the care of Dr. Ted Saer on December 8, 2000. Dr. Saer recorded a history of "back problems since a work-related injury that occurred in August of 1989. A wood beam hit him in the back of the head; and he has had problems with his neck but predominately with his lower back ever since." Claimant further provided Dr. Saer with a history of developing "more" pain while standing over the past year or so. After examining the claimant and reviewing the records from Drs. Johnson, Schlesinger, Burba, and Denson, Dr. Saer opined that the claimant's problems are related to his spondyloisthesis. In a follow-up report dated February 2, 2001, Dr. Saer noted:

He has also had a problem with his workers(sic) comp. Apparently that was not addressed in my dictation. He relates his back pain to his injury back in 1989. Unfortunately, Dr. Joe Crow, who treated him initially, does not have any records available. They have been destroyed. He did mention this to Dr. Denson whom he say(sic) in 1991. He actually did okay for five or six years but began to have more trouble in 1998. Dr. Phil Johnson's note of 8/13/99 addresses that, and I agree with Dr. Johnson.

Claimant came under the care of Dr. Keith Dixon in 2001. Dr. Dixon primarily treated claimant for his lower back complaints; however notations with regard to spasms in the neck muscles and shoulder pain are seen in medical reports from October and November of 2001. In a letter dated March 8, 2001, addressed "To whom it may concern" Dr. Dixon wrote:

In my medical opinion, based upon medical records and the diagnoses of Dr. Phillip Johnson and Dr. Edward Saers, Mr. Arnett's grade I spondylolisthesis of the fifth

lumbar vertebra on the first sacral, with disc space narrowing, came directly from his 1989 work injury when he was struck on the back of his neck by a falling beam. Physical therapy was prescribed by Dr. Saer in an attempt to improve Mr. Arnett's disability.

Mr. Arnett's condition ameliorates from time to time, but is aggravated by his occupation as a carpenter. It is difficult to judge to what degree, but this has certainly resulted in some disability to perform the work he is trained to do.

It is reasonable to conclude that the work injury also contributes to a pericentral disc herniation at the junction of his 6th and 7th cervical vertebrae since it was at this point that the original injury occurred.

Respondents had claimant's medical records reviewed by an independent physician, Dr. James Hood. Dr. Hood's correspondence which was introduced as part of claimant's exhibit packet number 3, inadvertently excluded pages three and four. Accordingly, the entire report prepared by Dr. Hood has been made an exhibit by the undersigned subsequent to the hearing. This report lists Dr. Hood as Board Certified with the American Board Orthopedic Surgeons, and a member of the American Academy of Orthopedic Surgeons. In his report Dr. Hood stated:

* * * *

In summary, this is a gentlemen now 35+ years of age who had a work related injury on 8/89. The mechanism of that injury was said to have been a beam falling hitting on the neck. It was known at that time that he had a bilateral L5 spondylolysis with a grade I spondylolisthesis. The cervical MRI merely showed preexisting degenerative disc bulges. He also had an EMG/nerve conduction study that showed peripheral neuropathy. His treatment has begun again in 1998 and he has received medications, epidural steroid

injections, physical therapy, and a lumbar brace. The most recent note indicates that he is still being treated for both the neck and back pain.

On March 8, 2001 Dr. Keith Dixon stated:

“...In my opinion, Mr. Arnett’s grade I spondylolisthesis of fifth lumbar with disc space narrowing, came directly from his 1989 work injury when he was struck on the back of the neck by a falling beam.”

QUESTION:

ON REVIEW OF MEDICAL DOCUMENTATION SHOULD THIS CLAIMANT REQUIRE CONTINUED MEDICATION FOR THE INJURIES SUSTAINED THAT APPEARS TO ONLY BE SOFT TISSUE?

Absolutely not.

In review of this information this gentlemen had preexisting congenital spondylolisthesis and degenerative disc disease/all a disease of life.

The mechanism of injury represented only a contusion and possibly a mild sprain/strain event. There is no evidence whatsoever that he incurred any discal pathology as a result of the mechanism of injury.

I do not know whether Dr. Dixon is speaking out of ignorance or trying to be a false advocate for his patient when he makes a statement that the spondylolisthesis “came directly from his 1989 work injury.”

That statement is patently false. In medical certainty, this gentlemen has a congenital spondylolisthesis with bilateral pars defect. In 100% medical certainty had an MRI or radiographs been taken 24 hours prior to the date of injury he would have had spondylolisthesis. There are only rare instances of acute pars defect. These are rarely, rarely bilateral. Most, if not statically(sic) all, spondylolisthesis are congenital in nature and have been present for many, many years.

Certainly, the injury of 8/89 could have caused some soreness in his back and neck, but he in truth incurred no true bony or discal injury as a result of the effects of that injury.

While he may or may not need medications for his symptomatic spondylolisthesis, the need for that medication is absolutely unequivocally not a result of the effects of the one time incident of 8/89. In medical certainty, the effects of that one time episode in 8/89 would have resolved with or without treatment in a month or so.

QUESTION:

HOW DOES THE CLAIMANT'S CURRENT MEDICAL CONDITION RELATED TO THE INJURY OF ELEVEN YEARS?

It does not relate at all.

Since 1989, now 12 years ago, this gentlemen has done thousands upon thousands of activities with his back not only including work activities, but avocational activities, work around the house and yard, sleeping, driving, etc. It makes no sense whatsoever for anyone to claim any relationship of his current symptom complex to the episode of 8/89. His current symptom complex in medical certainty is related to his degenerative disc disease and congenital spondylolisthesis.

QUESTION:

IS THE DIAGNOSIS OF SPONDYLOLISTHESIS OF THE LUMBAR A DEGENERATIVE PROCESS?

Spondylolisthesis in this case is congenital and can cause progressive degenerative disc disease.

There are types of degenerative spondylolisthesis, but these occur in elderly individuals. In the case of

Mr. Arnett, this gentlemen has congenital spondylolisthesis, as well as degenerative disc disease.

* * * *

The burden of proof rests upon the claimant to prove the compensability of his claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Claimant's injury occurred prior to the effective date of Act 796 of 1993. Accordingly, compensability of this claim is governed by the law in effect in August of 1989. To be compensable, the alleged injury must not only arise in the course and scope of employment, but it must also arise out of the employment. Defenbaugh Indus. v. Angus, 39 Ark. App. 24, 832 S.W.2d 869 (1992); Wolfe v. City of El Dorado, 33 Ark. App. 25, 799 S.W.2d 812 (1990). The phrase "arising out of the employment" refers to the origin or cause of the accident. Id. The phrase "in the

course of" the employment refers to the time, place and circumstances under which the injury occurs. J&G Cabinets v. Hennington, 269 Ark. 789 (Ark. App. 1980).

In workers' compensation law the employer "takes the employee as he finds him" and employment circumstances which aggravate pre-existing conditions are compensable. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990). See also McGregor & Pickett v. Arrington, 206 Ark. 921, 175 S.W.2d 210 (1943); Green v. Lion Oil Co., 215 Ark. 305, 220 S.W.2d 409 (1949). 1 A. Larson, The Law of Workmens' Compensation, 12.20.

The issue which must first be determined is whether claimant sustained an injury to his back in August of 1989, when he was struck in the back of the neck by a falling beam. Claimant testified that he initially sought medical treatment for pain in his lower back, however there are no medical records to corroborate this testimony. Several physicians who have provided medical treatment to the claimant have since retired and their medical records are not available. However, the sheer mechanics of the accident as described by the claimant tends to diminish the claimant's testimony that he had to be told by Dr. Crow that he had an injury to his neck while he was seeking medical treatment from Dr. Crow for problems with his lower back. Dr. Dillard Denson's March 5, 1991, medical record is chronologically the first medical record in evidence. This report reveals that the claimant was seeking treatment for his neck, not his back. This medical record further reveals that the claimant did not have any problems with his legs or feet although he had

“noticed some increasing problems with pain in the lower back.” Dr. Denson recorded a history at that time as follows:

Mr. Arnett, you will remember, is a gentlemen that had an accident at work about a year and a half ago. He was on one end of a wooden beam, the person on the other end of the beam dropped it and it fell across Mr. Arnett’s shoulders. He said that at first he did not have any pain at all and did not think that he had been hurt. However, several days after the accident, he began having neck pain and pain radiating down the right shoulder. He had a MRI scan according to his history at the Freeway Medical Tower. Apparently this was of the neck and no evidence of a herniated disc was found. Also he noted that about three months after the injury, he had EMG/NCV studies done of the arms and shoulders and again, according to his history, there was no abnormality found. (Emphasis added)

This history diminishes claimant’s testimony of initially suffering lower back pain, not neck pain. Although the claimant mentioned noticing lower back pain in this office visit on March 5, 1991, this is the only mention of back pain throughout Dr. Denson’s medical records. Moreover, this passing comment belies claimant’s hearing testimony of an initial onset of back pain.

It was not until claimant was referred to Dr. Scott Schlesinger in November of 1998 that the claimant’s medical records reveal complaints of numbness in his legs. It is of interest to note that even in 1998, the claimant did not provide a history of pain in his lower back resulting from the 1989 injury, but rather a history of “neck pain, headaches, and more recently numbness in his legs distal to the knee.” Dr. Schlesinger referred the claimant to Dr. Lon Burba, a neurologist, who

performed an EMG/nerve conduction study of claimant's lower extremities. While Dr. Burba diagnosed claimant with a peroneal neuropathy, he specifically stated that he could not relate his findings to the claimant's work related injury in 1989. It is of further interest to note that each physician providing treatment to the claimant during the first ten years of treatment all recorded a history of an injury to claimant's neck with an onset of neck pain. It was not until the medical records in 1999, that the claimant provided his doctor's with a history of back pain resulted from the 1989 incident.

Claimant later came under the care of Dr. Philip Johnson and Dr. Ted Saer. Both these physicians have opined that the claimant's current back problems are directly related to his compensable injury in 1989. A review of Dr. Johnson's medical reports reveal a history of being struck across the back, neck, and shoulders by a beam in 1989. Likewise, the history provided by the claimant to Dr. Saer, includes "...a history of back problems since a work-related injury that occurred in August of 1989." I find that the causation opinion of Dr. Johnson, which in turn is relied upon by Dr. Saer, is based upon the claimant's reports of being directly struck in the back or of a continuing back pain resulting shortly after the 1989 accident. Neither the medical records nor the claimant's hearing testimony regarding the mechanics of the injury support this history.

The Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the

purposes of workers' compensation law. Tyson Foods, Inc. v. Watkins, 31 Ark. App. 230, 792 S.W.2d 348 (1990). As our Supreme Court has stated:

The Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather, we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony and the testimony of the claimant himself. Further...while medical opinions are admissible and frequently helpful in workers' compensation cases, they are not conclusive.

A.G. Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996). A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, FC Opinion filed Jan. 22, 1996 (E417617). The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

Assuming *arguendo*, that claimant's unsubstantiated testimony is true, a finding I specifically do not make, and he sought medical treatment for lower back pain from Dr. Crow in the months immediately following his compensable injury, this finding would not change my finding regarding causation. Claimant was without lower back pain or problems from at least 1991 until 1998. Accordingly, claimant's spondylolisthesis returned to its pre-injury status by 1991, when he was no longer complaining of lower back pain.

In my opinion the evidence of record does not support a finding that the claimant's development of numbness in his legs in 1998 and subsequent lower back pain is causally related to the 1989 injury. Both the opinions of Dr. Johnson and Dr. Saer are not based upon a complete history of claimant's symptoms. Both physicians were provided a history by the claimant of predominant lower back pain ever since the 1989 injury. This statement is not supported in the medical records. No matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249).

In reaching this finding, I note that Dr. Dixon has unequivocally opined that the claimant's grade I spondylolisthesis came directly from the 1989 injury. Dr. Dixon reached this finding while relying upon the medical records of Dr. Johnson and Dr. Saer. As previously noted, the opinions of these doctors are based upon an inaccurate and unsupported medical history. Accordingly, I do not find that Dr. Dixon's opinion on causation is entitled to any weight. Moreover, Dr. Dixon is a family physician and his opinion is clearly dismissed by Dr. Hood, an orthopedic specialist.

The second issue for determination is whether the claimant is entitled to additional permanent partial disability benefits for the difference between the 10% anatomical impairment rating assigned by Dr. Denson and the 5% anatomical impairment rating previously assigned by Dr. Crow. Dr. Denson's report assessing

the claimant a 10% anatomical impairment rating does not contain any supporting documentation. However, the medical records reveal that the claimant continued to seek medical treatment from Dr. Denson for several years due to his continuing complaints of neck pain. In his report dated April 11, 1991, Dr. Denson noted that the claimant “returned today with a normal MRI scan of the spine.” Nevertheless, the claimant continued to complain of chronic neck problems which Dr. Denson treated off and on for the next seven years. An MRI performed on claimant’s cervical spine in 1998, four years after Dr. Denson assessed claimant with a 10% permanent impairment rating, revealed a disc protrusion at C6/C7. However, an MRI performed on April 4, 2002 reveal only moderate disc degeneration with a very minimal annular bulge of doubtful significance. The radiologist interpreting the 2002 MRI specifically noted that “there is no significant disc herniation.”

A.C.A. § 11-9-704 (c)(1)(1987) requires that any determination of the existence or extent of a physical impairment shall be supported by objective and measurable physical or mental findings. Dr. Denson’s assessment of a 10% physical impairment rating does not meet this requirement. Dr. Denson’s rating is contained on the Workers’ Compensation’s Physician’s Form which specifically request the physician to list the objective and measurable findings supporting the rating. Dr. Denson did not list any such findings. Moreover, Dr. Denson’s rating does not clarify the condition rated. In Petty v. J&B Builders, Full Commission Opinion Filed July 8, 1996 (E303579), the Full Commission specifically stated, “A diagnosis of a probable condition without any supporting statements of objective

and measurable physical or mental findings is not sufficient to award a permanent impairment.” When he rated the claimant, Dr. Denson did not possess an MRI or other diagnostic test which revealed bulging or herniated discs in claimant’s cervical spine. At best Dr. Denson’s medical records only confirm the objective and measurable finding of muscle spasms.

In Taco Bell v. Finley, 38 Ark. App. 11, 826 S.W.2d 313(1992), the Arkansas Court of Appeals stated:

It is reasonably clear that in making its determination of physical impairment, the Commission also considered the claimant's testimony about her symptoms, including pain, and the effect of activity on those symptoms. Such consideration in the determination of permanent disability is not prohibited by Ark. Code Ann. 11-9-704 (c), so long as the record contains "objective and measurable" findings to support the Commission's ultimate determination.

The Commission did not adopt the AMA Guidelines to the Evaluation of Permanent Impairment, 4th Edition until after the enactment of Act 796 of 1993. However, the Third Edition to the Guidelines which was in effect at the time of claimant’s injury is a valuable resource in determining a claimant’s permanent physical impairment. Table 49 for Impairments Due to Specific Disorders of the Spine, of The AMA Guidelines to the Evaluation of Permanent Impairment, 3rd Edition, provides a 6% whole person impairment for an “Unoperated, with medically documented injury and a minimum of six months of medically documented pain, recurrent muscle spasm, or rigidity associated with moderate to severe degenerative changes on structural tests, including unoperated herniated nucleus pulposus, with or without radiculopathy.” Pursuant to this table, in order to generate

a higher rating, the person must have a surgically treated disc lesion. As the record is void of any specific range of motion findings, Table 49 is the only method available for medically rating the claimant pursuant to the Guides.

Accordingly, after I consider Dr. Denson's 10% rating which is not supported by a statement of objective and measurable findings, a diagnosis, or any other type of explanation, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional permanent partial disability benefits in association with this rating. In my opinion neither the medical records nor the claimant's recurrent symptoms account for an increase in the rating originally assigned by Dr. Crow.

Finally, it must be determined whether the additional medical treatment the claimant has received is reasonable, necessary and related to claimant's compensable cervical injury. Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish his claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board,

47 Ark. App. 181, 888 S.W.2d 314 (1994). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, the Commission must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

The medical treatment rendered for claimant's back complaints are not reasonably necessary in connection with claimant's compensable cervical injury. However, I find that the medical treatment rendered in relation with claimant's cervical injury is reasonably necessary medical treatment. In this regard, I note that Dr. Hood opined that the claimant's current medical treatment and continuing treatment are not related to the claimant's original compensable injury. However, a thorough review of Dr. Hood's report reveals that Dr. Hood's focus was on the claimant's spondylolisthesis, and lower back problems, not claimant's cervical complaints. Moreover, this blanket statement, is contrary to existing law with regard to a recurrence. A recurrence is defined as "a natural and probable consequence of a prior injury." Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996). I find that the claimant's continued difficulty with his neck is a recurrence of his compensable injury. Claimant did not suffer from cervical problems until he was struck in the neck by a falling beam. Ever since this incident the claimant has continued to require medical treatment for his neck. Therefore, I find that the claimant's neck spasms and need for continuing medical treatment of his cervical complaints are a recurrence of his compensable injury.

To the extent that the medical records delineate between treatment for claimant's low back and claimant's neck, respondents are only liable for treatment of claimant's neck complaints. In this regard, Dr. Denson's medical records reflect treatment for claimant's cervical complaints and thus Dr. Denson's treatment is respondents' responsibility. Dr. Schlesinger examined both claimant's cervical and lumbar spine, however, the primary complaint to Dr. Schlesinger was claimant's cervical pain. Therefore, I find that respondents' are liable for the treatment rendered by Dr. Schlesinger. Dr. Johnson's medical report indicates that the claimant was having very little difficulty with his neck when he sought treatment from Dr. Johnson for his lower back complaints. Consequently, I find that the respondents' are not liable for the treatment rendered by Dr. Johnson. With regard to the treatment rendered by claimant's new family physician, Dr. Steve Tilley, the medical records reveal that the claimant presented with chronic back pain. No mention of cervical complaints is found in Dr. Tilley's medical records which were introduced into evidence. Accordingly, respondents are not liable for the treatment rendered by Dr. Tilley for claimant's lower back complaints. Dr. Saer's medical records focus treatment to claimant's low back, not his neck until the November 2, 2001, office visit; therefore, I find that the respondents are not liable for the treatment of Dr. Saer, other than the November 2, 2001, office visit. I further find that the physical therapy initially prescribed by Dr. Saer's was for the treatment of claimant's low back complaints and is therefore not the respondent's liability. Likewise, the treatment rendered by Dr. Lon Burba was specifically related to the

numbness of claimant's lower extremity and is not respondents' liability. Dr. Keith Dixon rendered medical treatment for both claimant's lower back and cervical complaints. Respondents are only liable for the treatment of claimant's cervical complaints.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his lower back in August of 1989. The medical treatment rendered for claimant's continuing neck problems is reasonable and necessary medical treatment related to claimant's compensable neck injury. Claimant has failed to prove by a preponderance of the evidence that he sustained a 10% permanent anatomical impairment as a result of his compensable neck injury. Respondents have controverted claimant's entitlement to additional medical treatment as of at least October 26, 2001. Claimant's attorney is entitled to the maximum statutory fee on the benefits awarded, one-half (1/2) to be paid by the claimant and one-half (1/2) to be paid by respondents. Respondents are ordered to withhold claimant's portion of the attorney's fees from the claimant's award and to pay the attorney's fees directly to claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall draw interest at the maximum legal rate until paid.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge