

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112718

RICHARD CHISM, EMPLOYEE	CLAIMANT
ASPLUNDH TREE EXPERT COMPANY, CARRIER	RESPONDENT
LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER	RESPONDENT

OPINION FILED OCTOBER 14, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on July 17, 2003, at Helena, Phillips County, Arkansas.

Claimant represented by the HONORABLE MIKE ETOCH, Attorney at Law, Helena, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to permanent partial disability benefits and attorney's fees.

At issue is whether or not the claimant sustained permanent anatomical impairment as defined by Ark. Code Ann. §11-9-102 , §11-9-704 and Rule 34.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and additional benefits are denied.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on November 1, 2001 at which time the claimant sustained compensable injuries at a compensation rate of \$267.00/\$200.00. Medical expenses and temporary total disability benefits (until May 7, 2002) have

been paid.

The claimant contends he is entitled to payment of a 10% rating to the body as a whole as assessed by Dr. Barr in his reports of November 7, 2002, April 10, 2003 and June 10, 2003.

The respondents contend all appropriate benefits have been paid. The rating is based on pain, not objective medical findings.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and his wife Tina, based on a stipulation that her testimony would be corroborative. Mr. Frye's effective cross-examination of the claimant revealed that he had not been candid with his doctors about his medical history or employment.

The claimant age 34 (D.O.B. October 20, 1968) has a tenth grade education and is left hand dominant. He sat stiffly throughout the hearing turning his body rather than his head. His employment history includes farming. The claimant had worked for the respondent-employer four or five months prior to his injury. His medical history includes arthritis, headaches, depression anxiety, and a neck injury in a 1995 motor vehicle accident which remains symptomatic (Tr. p. 27-28).

The claimant was injured when he overturned a tractor while bushhogging. The tractor had a protective roll cage but information regarding the use of a seat belt varies. The claimant told Dr. Moore that he was wearing a seat belt at the time of the accident but Dr. Pearce and Dr. Barr were under the impression that he was either not wearing the belt or one was not available.

MEDICAL EVIDENCE

The claimant came under the care of general practitioner, Dr. Waddy who diagnosed a fractured right scapula, prescribed a shoulder immobilizer and referred him to Dr. Dalal. Dr. Dalal, an orthopedic surgeon, ordered diagnostic testing and recommended exercises instead of the immobilizer. An MRI and CT scan performed November 31, 2001 confirmed a fracture of the right scapula.

In a follow-up report dated November 27, 2001, the claimant reported improvement and Dr. Dalal released the claimant for light duty, noting “he should recover well.” The claimant returned on December 10, 2001 complaining of severe pain using his arm to lift himself into the trucks at work. Dr. Dalal noted, “he is here today with a lady who states that he cries all night long and complains of pain all the time.” Dr. Dalal excused the claimant from work but recommended physical therapy for three weeks.

In a follow-up report dated January 4, 2002 Dr. Dalal commented that “his complaint of pain is a little out of proportion to his clinical exam.” Repeat x-rays confirmed “the fracture is healing extremely well.” Dr. Dalal continued physical therapy for three more weeks but recommended that the claimant return to light duty with lifting restrictions.

A note from Dr. Dalal’s nurse dated January 8, 2002 indicates the claimant was upset about the unavailability of light duty and getting workers’ compensation benefits. The nurse spoke with the claimant’s supervisor who offered him a job doing paperwork either at home or the office. But when the nurse conveyed the job offer to the claimant he became upset and wanted a change of physician. Nurse Chapman informed the claimant that he would need permission to change doctors

and the claimant responded that his lawyer would contact them.

The claimant returned to Dr. Dalal on February 5, 2002 complaining that riding in a pick-up truck caused his arm to hurt. He also reported a new complaint of numbness in his arm three months after the accident. Repeat x-rays confirmed healing of the fracture. Dr. Dalal recommended more diagnostic testing to rule out a neck injury causing radicular arm pain. The MRI showed multilevel bulging with a disc protrusion at the C2-C3 level. Dr. Dalal recommended consultation with a spine specialist.

Dr. Jim Moore, neurosurgeon, examined the claimant's neck on February 26, 2002. He reviewed the claimant's history of injury, symptoms, medication and normal EMG/NCV study. Dr. Moore noted some tenderness in the suboccipital region and at the C2 level.

Dr. Moore also reviewed the MRI scan and commented "a C2/3 diskal lesion of significance is extremely unusual and I am not sure that this is going to fall into such a category." Dr. Moore recommended continued conservative treatment (traction, TENS unit, medication). The claimant reported improvement of his symptoms in a follow-up report dated March 13, 2002. Dr. Moore recommended additional testing in a report dated April 3, 2002 but did permit him to return to light duty activities as tolerated.

A myelogram performed on April 22, 2002 confirmed abnormalities at multiple levels of the cervical spine, especially at C2-3 however the lesions were described as "predominately bony rather than soft tissue such as a disk." Dr. Moore diagnosed "cervical radiculitis superimposed on cervical spondylosis" and recommended epidural steroid injections. In a report dated June 4, 2002 Dr. Moore opined, "he does not have a cervical disk herniation but rather some bony changes that were suggestive of compressive element with cervical disk at a high level." Dr. Moore diagnosed cervical

radiculitis and spondylolysis.

Dr. Moore referred the claimant to Dr. Charles Pearce, orthopedic surgeon, for continued complaints of shoulder pain. The claimant completed a history on May 28, 2002 showing that he was working part-time. In a report dated June 28, 2002 Dr. Pearce recounted the claimant's history and commented that the claimant was working part-time driving a delivery truck.

Dr. Pearce x-rayed the claimant's shoulder and commented that he felt the injury had healed and should not keep him from working. He opined, "I suspect that there may be some symptom magnification involved with the patient." A repeat CT scan confirmed the fracture had healed. Dr. Pearce recommended exercise to improve internal rotation of the shoulder. He released the claimant with 0% impairment and no work restrictions in a report dated July 26, 2002.

The claimant saw Dr. William Barr, orthopedist in Mississippi, on November 7, 2002 for complaints of headache, neck, upper back and right shoulder pain. Dr. Barr thought the claimant's major complaint was headache worsened by the cervical myelogram (prescribed by Dr. Moore). The claimant did not inform Dr Barr about the headaches or neck injury prior to his accident at work. Dr. Barr did not have the benefit of all of the claimant's medical records at the time of the examination and he was under the mistaken impression that the claimant had a herniated cervical disc. The claimant also complained of shoulder pain when he rolled on his right side in bed or performed strenuous work. The claimant informed Dr. Barr that he was working on a farm performing manual labor.

Dr. Barr's clinical examination noted tenderness in the cervical spine and spasm in the rhomboid area. The scapula at the fracture site was not tender. He had full range of motion of the right shoulder with "powerful" grip strength. Repeat x-rays showed a healed fracture line of the

scapula. He assessed 5% for chronic cephalgia and 5% for chronic rhomboid pain, noting that the shoulder injury, “healed without any significant residual – he obviously has a good range of motion of the shoulders.”

Dr. Barr authored a second report on April 10, 2003 amending the rating to 5% to the cervical spine and 5% to the thoracic spine. A third report dated June 10, 2003 changes the rating to 5% for rhomboid spasm and 5% for cervical disc disease with a herniation at C2-3 and cephalgia.

TEMPORARY TOTAL DISABILITY

The claimant apparently received temporary total disability benefits from January to May 2002 while he was working and earning wages at Bosnick Farms (Tr. p. 12-13/15/24-26/32-34). Accordingly, a copy of this opinion has been referred to the Fraud Unit for investigation pursuant to Ark. Code Ann. §11-9-106.

FINDINGS AND CONCLUSIONS

As this case arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717.

Anatomical impairment is a permanent abnormality after the end of the healing period, limiting the claimant’s ability to use part of the body. Crow v. Weyerhaeuser Company, 46 Ark. App. 295, 880 S.W.2d 320 (1994), Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

In pertinent part, the Act provides:

§11-9-102

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

“Major cause” means more than fifty (50%) of the cause. A finding of major cause shall be established according to the preponderance of the evidence.

Objective findings are those findings which cannot come under the voluntary control of the patient.

Medical opinions addressing . . . permanent impairment must be stated within a reasonable degree of medical certainty.

§11-9-704

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

Rule 34

..the Ark WCC hereby adopts *Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) ... (as) an impairment rating guide to be used in the assessment of anatomical impairment.

The evidence of record shows the claimant sustained a fractured right scapula in a compensable accident. According to three orthopedist who treated the claimant, Drs. Dalal, Pearce and Barr, the injury healed (as verified by x-ray) with no permanent impairment. Dr. Dalal felt the claimant’s symptoms were out of proportion to the injury sustained. Dr. Pearce noted symptom magnification and assessed 0% impairment. Dr. Barr noted full range of motion, powerful grip strength and healing without any “significant residual.” Accordingly, I find the claimant’s shoulder injury healed without permanent impairment.

Three months after the compensable accident, the claimant complained of pain and numbness in his right arm. Neurosurgeon Dr. Moore diagnosed cervical spondylolysis and radiculitis. The bony abnormalities described by Dr. Moore suggest a gradual process of long duration, not a traumatic injury caused by a recent specific incident. Dr. Moore assessed no rating. Accordingly,

I find the claimant's preexisting spondylolysis is the major cause of his neck pain.

Dr. Barr is the only physician to find evidence of back spasm, however, this finding comes one year after the claimant's injury and after his return to work. It is not clear how this finding is causally related to the compensable injury or why a temporary spasm would be considered a permanent abnormality.

Dr. Barr is the only physician to assess a rating. He never mentions which edition of the AMA Guidelines he consulted to determine the ratings. Dr. Barr's opinion was based on an inaccurate history provided by the claimant and incomplete medical records. His assessment is not binding on the Commission, Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

The first rating assessed by Dr. Barr is invalid as cephalgia is not objectively measurable and rhomboid pain cannot be considered in assessing impairment. Dr. Barr's second rating is invalid as the rating to the cervical spine was based on the mistaken notion that the claimant had a herniated disc and the thoracic spine has never been evaluated much less diagnosed with any specific injury. Dr. Barr's third rating is invalid as rhomboid spasm is not mentioned in the AMA Guidelines. Once again there was no cervical herniation and the accident was not the major cause of the cervical disc disease which was a preexisting condition.

After considering the claimant's lack of candor with his physicians concerning his medical history, his ability to return to manual labor, the gap in time between the compensable injury and the development of arm pain and rhomboid spasm, his preexisting spondylolysis, arthritis, neck pain and headaches, I find the claimant has failed to meet his burden of proving the compensable injury is the major cause of any permanent impairment based on objective medical findings and the AMA Guidelines.

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employer-employee-carrier relationship existed on November 1, 2001 at which time the claimant sustained compensable injuries at a compensation rate of \$267.00/\$200.00. Medical expenses and temporary total disability benefits (until May 7, 2002) have been paid.
2. Respondents have paid all appropriate benefits.
3. The claimant has failed to prove by a preponderance of the credible evidence of record that his compensable shoulder injury is the major cause of any permanent impairment based on objective medical findings and the AMA Guidelines.

This claim for permanent partial disability benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge