

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202987

JAMES DAVIS,
EMPLOYEE

CLAIMANT

WHITE RIVER MEDICAL CENTER,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 6, 2003

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Batesville, Independence County, Arkansas.

The claimant was represented by MR. PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by MR. BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 13, 2003 in Batesville, Arkansas. A prehearing order was entered in this case on April 24, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within case.

2. The employer-employee-carrier relationship existed between the parties on all relevant dates.
3. The claimant sustained a compensable specific incident injury to his left knee on March 5, 2002.
4. The respondent agrees that if compensability is determined, all medical treatment related to the claimant's neck and shoulder was reasonably necessary.
5. The respondent has accepted the 3% permanent impairment rating to the knee.
6. The claimant earned sufficient wages to entitle him to compensation at the rate of \$261.00 for temporary total disability benefits and \$196.00 for permanent partial disability benefits.
7. All benefits relating to the claimant's alleged neck and shoulder injuries have been controverted in their entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable specific incident injury to his neck and left shoulder on March 5, 2002, and whether there are

any objective findings of such alleged injuries.
(Nature and extent of original injury).

2. Whether the claimant is entitled to reasonably necessary medical treatment.
3. Whether the claimant is entitled to a permanent impairment rating for his neck and shoulder.
4. Whether the claimant is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1).
5. Whether the claimant is entitled to a controverted attorney's fee, and whether the claimant is entitled to controverted fees on all amounts previously paid by the respondent.

DISCUSSION

1. Did the claimant sustain a compensable specific injury to his neck and left shoulder on March 5, 2002, and were there any objective findings of such alleged injury?

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. § 11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which

required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, I find that the claimant has established by a preponderance of the credible evidence that he has experienced a compensable injury to the neck and shoulder area, as he asserts, in the ladder incident that occurred on March 5, 2002. In reaching this conclusion, I note that the very first medical report from March 5, 2002 from the White River Medical Center indicates the presence of tenderness in the trapezius, and I note that the illustration on page 1144 of Dorland's Illustrated Medical Dictionary (29th Edition) indicates that the trapezius is a muscle connecting the neck to the shoulder. I further note that the record contains no indication that the claimant had

ever experienced any neck or shoulder complaints prior to the ladder incident on March 5, 2002, but has experienced persistent complaints in the neck or between the neck and the arm since the time of the ladder incident. In addition, I note that the claimant's physicians, based on what I find to be an accurate history, have related the claimant's symptom onset to the ladder incident that occurred on March 5, 2002. Consequently, I find that the claimant has established by a preponderance of the evidence that the injury at issue to his neck and shoulder arose out of and in the course of his employment, that the injury has caused internal physical harm to his body which required medical services, and that the injury was caused by the slip on a ladder (which qualifies as a specific incident) that occurred on March 5, 2002.

I also find that injury to the claimant's neck and shoulder area is established by medical evidence supported by objective findings, including straightening of the normal curvature of the spine on x-ray consistent with muscle spasm [Claimant's Exhibit No. 1 page 19], trigger points [Claimant's Exhibit No. 1 page 32, 38], and documented muscle spasm [Claimant's Exhibit No. 1 page 24]. Accord High Capacity Products v. Moore, 61 Ark. App. 1, 962 S.W.2d

831(1998); Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Consequently, for all of the foregoing reasons, I find the claimant has established by a preponderance of the credible evidence a compensable injury to his neck and shoulder areas.

2. Is the claimant entitled to reasonably necessary medical treatment?

The parties have stipulated that if compensability is determined, all medical treatment related to the claimant's neck and shoulder was reasonably necessary. Therefore, I find that the claimant is entitled to reasonably necessary medical treatment for his neck and shoulder injury. As far as I can tell, there has never been any dispute as to whether or not the treatment that the claimant has received for his knee injury was reasonably necessary for that injury.

3. Is the claimant entitled to a permanent anatomical impairment rating for his neck and shoulder?

Ark. Code Ann. § 11-9-704(c) (B) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Further, permanent disability "benefits shall be awarded only upon a

determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. § 11-9-102(4)(F)(ii)(a)(Repl. 2002). The Commission had adopted the American Medical Association's Guides to the Evaluation of Permanent Impairment, (4th ed. 1993) for use in assessing the extent of permanent anatomical impairment.

In the present case, the record contains several types of "objective" findings of physical abnormality in the claimant's neck and/or shoulder area. As discussed previously, these include in part observations of muscle spasm, trigger points, and MRI findings which have been interpreted at various times as spinal stenosis, osteophytes, ligamentum flavum hypertrophy, and discogenic changes which have been interpreted by Dr. Ismail as indicative of disc herniation.

However, the medical record fails to establish that either the muscle spasms or trigger points were permanent in nature. While the spinal stenosis, osteophytes and ligamentum flavum hypertrophy were permanent in nature, I interpret from Dr. Schlesinger's evaluation that these conditions pre-existed the work-related neck injury and therefore were not caused by the work-related neck injury. While I note that Dr. Ismail's interpretation of disc

herniation could certainly be caused by the work-related neck injury in question, I also note that Dr. Ismail has not indicated whether or not he interprets that the work injury caused any discogenic change and/or herniation, and I note that Dr. Schlesinger, who assigned the claimant a 6% impairment rating under the AMA Guides to the Evaluation of Permanent Impairment, has opined that the claimant's accident brought about an onset of symptoms related to degenerative arthritis in his neck. Absent any credible medical opinion contrary to Dr. Schlesinger's medical opinion in the record, I find that the preponderance of the credible evidence fails to establish that whatever degree of discogenic change or "herniation" that Dr. Ismail or any other physicians have observed in this case, was caused by the March 5, 2002 ladder accident.

To the contrary, as discussed, Dr. Schlesinger's medical opinion on point would seem to indicate that the claimant's work related accident caused pre-existing degenerative arthritic changes to become symptomatic. While the medical record is replete with objective findings indicative of these degenerative arthritic changes, the legal question in this case appears to be whether or not the claimant can establish the major cause requirement of Ark.

Code Ann. § 11-9-102(4)(F)(ii)(a) under circumstances where the work related compensable injury aggravated, but did not cause, degenerative arthritic changes. Although the Arkansas courts have apparently never addressed this precise issue directly, I understand the current status of the law as interpreted by the majority of the Full Commission, to be that a claimant cannot establish his burden of proof on major cause where the preponderance of the evidence only establishes that a work-related injury aggravated a pre-existing degenerative condition. See Nathaniel Jarrett v. SOL Alman Co., Inc., Full Workers' Compensation Commission, Opinion filed May 30, 2003 (E904563, Olan W. Reeves concurring (Citing Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278(1998))).

Because I find that the preponderance of the evidence establishes that the claimant's work related injury only aggravated pre-existing degenerative conditions, so as to make those pre-existing conditions symptomatic, I find that the claimant has failed to establish that his compensable neck injury is the major cause of any disability or impairment at issue. In reaching this decision, I note that Dr. Safman has also assigned the claimant a 2% impairment rating to the upper extremity. However, as I interpret Dr.

Safman's note, this rating is clearly not for the neck or shoulder, and as the respondents have noted, the claimant has not alleged an upper extremity injury. Therefore, I also find no basis in the law or evidence for awarding the claimant benefits for the 2% rating to the upper extremity assigned by Dr. Safman on July 29, 2002.

4. Is the claimant entitled to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1)?

In order to prove entitlement to benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1), the employee must establish (1) that he sustained a compensable injury; (2) that suitable employment within his physical and mental limitations was available with the employer; (3) that the employer refused to return the employee to work; and (4) that the employer's refusal to return the employee to work was without reasonable cause. Torrey v. City of Fort Smith, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

In the present case, there is no dispute that the claimant sustained a compensable knee injury on March 5, 2002, and as discussed above, I find that the claimant has also established that he sustained a compensable neck and shoulder injury on that date. Likewise, the claimant's pre-March 5, 2002 job with the respondents was within the

claimant's physical and mental limitations and was still available at White River Medical Center on March 7, 2002, when the respondents terminated the claimant and refused to return him to work. Therefore, there is no dispute that the claimant has established the first three requirements to establish an entitlement to benefits under Ark. Code. Ann. § 11-9-505(a)(1).

In the present case, however, I find that White River Medical Center's refusal to return the claimant to work after March 7, 2002 was with reasonable cause. Therefore, I find that the claimant has failed to establish by a preponderance of the evidence that he is entitled to benefits under the Ark. Code. Ann. §11-9-505(a)(1).

In reaching this conclusion, I note that the claimant recollected at the time of his hearing testimony that he was only shown one page of respondents' Exhibit No. 3 at the time of his personnel evaluation on January 8, 2002. I also note with interest that the fourth page of respondents' Exhibit No. 3 appears to contain an employee signature line which was left blank, consistent with the claimant's testimony that he was only shown the first page of that document in the evaluation and the other pages were added later. In fact, the claimant recollected at the hearing

that during his January 2002 evaluation, he was told to improve on the one item listed on the first page of respondents' Exhibit No. 3 and that he would do fine. The claimant testified that he was never given the Goals and Improvement Plans and that these items were only brought to his attention after the accident on March 5, 2002. Under these circumstances, the claimant asserts that he was actually terminated because of his March 5, 2002 injury, and the respondents' refusal to return him to work after March 7, 2002 was without reasonable cause.

The claimant's hearing recollection notwithstanding, I interpret his more contemporaneous comments in the Employment Security Department application in the record as respondents' Exhibit No. 10, as being that he was told six months after beginning his employment with the respondents (i.e. contemporaneous with the January 2002 Performance Evaluation) that he was not performing a good and satisfactory job. His comments in this document indicate to me that he did in fact receive notice that there were problems with his performance/capabilities in this job at the time of the January 2002 Performance Evaluation. In light of the comments on the employment application, the concerns written on the January 2002 Performance Evaluation,

and the relevant testimony of the claimant's supervisors about performance problems, I am persuaded that a preponderance of the credible evidence establishes that the respondent employer had legitimate safety concerns regarding the claimant's capabilities at least by January 8, 2002. I am persuaded that a preponderance of the credible evidence also establishes that respondent employer originally intended to terminate the claimant on March 5, 2002, but coincidentally, that plan changed when the claimant became injured on that date, and the termination was postponed for two days. Based on the testimony of the respondents' employees, I am persuaded that the claimant lacked the necessary skills and abilities to perform the job for which he was hired, and that the claimant was terminated in light of the lack of skills indicated in respondents' Exhibit No. 3. In light of the nature of the work environment, the nature of the work involved, and the safety concerns discussed at the hearing, I find that the respondents had reasonable cause to separate the claimant from his employment and refuse to return him to work after March 7, 2002.

5. Is the claimant's attorney entitled to a controverted attorney's fee and if so, is the claimant's attorney entitled to controverted attorney's fees on all amounts previously paid by the respondent?

Since the claimant's injury occurred after July 1, 2001, I note as a threshold matter that any controverted attorney's fees would by necessity be 25% of compensation for indemnity benefits, and that attorney's fees are no longer awarded on medical benefits as a routine matter. See Ark. Code. Ann. § 11-9-715(a) (1) (B).

With the respect to the temporary total disability benefits which have been paid for the claimant's admittedly compensable knee injury, I note that the claimant's attorney was hired on March 21, 2002, and according to respondents' Exhibit No. 8, the first check for temporary total disability was made on April 2, 2002 for the period covering March 6, 2002 to April 2, 2002. As far as I can tell from the record, the respondents have never expressed any intent, nor shown any intent to be inferred through delay in payments, indicating that the respondents were ever controverting the claimant's admittedly compensable knee injury. Therefore, I find that the claimant's attorney has failed to establish that he is entitled to an attorney's fee on the period of temporary total disability compensation

whose payments are reflected in respondents' Exhibit No. 8. I note that in light of my finding that the claimant has experienced a compensable neck and shoulder injury, the claimant may or may not be entitled to any additional periods of temporary total disability benefits. If so, then the claimant's attorney will be entitled to an attorney's fee on any temporary disability benefits owed for the neck and shoulder injury, since claimant's neck and shoulder injury has been controverted in its entirety. However, I have not been requested to determine any potential periods of additional temporary total disability benefits that might be associated with the claimant's compensable neck and shoulder injury.

With regards to the 3% impairment rating assigned to the claimant's knee, I note that this rating was assigned in August 2002. The respondents' attorney's questioning at the claimant's December 2002 deposition would seem to indicate that the respondents' attorney was not made aware of the existence of the rating until the deposition, and I note that the rating was ultimately paid by lump sum in January of 2003. The mere failure to pay compensation benefits does not amount to controversion, in and of itself. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d

477(1983). Likewise, controversion may not be found where the respondent accepts its compensability but delays payment in a reasonable attempt to investigate the extent of the disability. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182(1976). Assuming a position which requires an injured employee to retain an attorney to take the actions necessary to insure the employees rights are protected may constitute controversion. Turner v. Trade Winds Inn, 267 Ark. 861, 592 S.W.2d 454(1980). In the present case, the respondents have failed to offer a justification for some five months of delay in making payment on a permanent impairment rating. I therefore infer by their unexplained delay that the respondents controverted the 3% impairment rating assigned in August of 2002 and paid in January of 2003 by lump sum. The claimant's attorney is therefore entitled to a fee on the 3% rating to the knee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employer-employee-carrier relationship existed between the parties on all relevant dates.
3. The claimant sustained a compensable specific incident injury to his left knee on March 5, 2002.

4. The respondents agree that if compensability is determined, all medical treatment related to the claimant's neck and shoulder was reasonably necessary.

5. The respondent has accepted the 3% permanent impairment rating to the knee.

6. The claimant earned sufficient wages to entitle him to compensation at the rate of \$261.00 for temporary total disability benefits and \$196.00 for permanent partial disability benefits.

7. All benefits relating to the claimant's neck and shoulder injury have been controverted in their entirety.

8. The claimant sustained a compensable specific incident injury to his neck and shoulder on March 5, 2002 which is supported by objective findings.

9. The claimant is entitled to reasonably necessary medical treatment for his neck and shoulder injury.

10. The claimant has failed to establish that he sustained a compensable anatomical impairment for his neck and shoulder injury.

11. The claimant has failed to establish that he is entitled to additional benefits pursuant to Ark. Code Ann. § 11-9-505(a)(1).

12. The claimant has established by a preponderance of the evidence that his attorney is entitled to an attorney's fee on the 3% anatomical impairment rating to the knee previously paid by the respondents, and on any additional temporary total disability benefits to which the claimant may be entitled as a result of his compensable neck and shoulder injury.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715; and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463(2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge