

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E104546

CECIL DIXON, EMPLOYEE

CLAIMANT

P.A. MANAGEMENT, EMPLOYER

RESPONDENT

TRAVELERS INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED OCTOBER 27, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 31, 2003, at Texarkana, Miller County, Arkansas.

Claimant represented by the HONORABLE DALE GRADY, Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Maumelle, Arkansas.

OPINION FILED OCTOBER 20, 2003

A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On May 20, 2003, a prehearing conference was conducted in this claim from which a prehearing order of May 23, 2003, filed. The prehearing order reflects stipulation entered by the parties, the issues to be address during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission's Exhibit #1.

The testimony of Cecil Dixon, claimant, and Benny Emmert, coupled with medical reports and other documents comprise the record in this claim. Further, the hearing record generated as a result of the October 31, 2001, hearing in the claim, to include the November 6, 2001, deposition of Dr. Berry Green, which is contained the Commission's file, is incorporated by reference in this

record. Additionally the August 26, 1994, ruling of Administrative Law Judge Lewis D. Smith, as a results of a March 16, 1994, hearing in this claim is incorporated by reference in the present claim. Prior to the July 31, 1993, hearing in this claim the parties have scheduled the deposition of Dr. Jeffery DeHaan for July 17, 2003. The deposition was canceled and was rescheduled subsequently to the hearing for August 12, 2003. That deposition was later canceled, and the parties concluded that the same would not be necessary. During the course of the hearing there was a discussion had relative to the payment of lump sum permanent partial disability benefits to the claimant pursuant to the filing of a petition for lump sum payment. The January 11, 2002, letter of the legal advisor directed to the claimant and respondents' attorney is herein designated a part of the record as Commission's Exhibit #2.

DISCUSSION

Cecil Dixon, the claimant, with a date of birth of September 20, 1959, left school in the eleventh grade and later obtained his GED. On March 15, 1991, claimant suffered a compensable injury to his neck and right shoulder within the course and scope of his employment with respondent.

The compensability of the March 15, 1991, neck and right shoulder injuries sustained by the claimant in his employment with respondent has never been disputed. Nevertheless, two prior hearing have been conducted relative to the claimant's March 15, 1991, accident. The records and ruling generated as a result of the afore hearings have been incorporated in the present record.

On March 16, 1994, a hearing was conducted on claimant's claim for wage loss benefits in excess of the anatomical impairment injuries growing out of the March 15, 1991, accident. In a August 26, 1994, ruling it was found that claimant had sustained an anatomical impairment of 20%

to the body as a whole and an additional 20% wage loss disability as a result of the March 15, 1991, accident. The anatomical impairment was based upon claimant's injuries which resulted in a September 19, 1991, surgery to the right shoulder under the care of Dr. John Gregory and a March 23, 1993, surgery to the right shoulder under the care of Dr. Jeffery DeHaan, as well as a March 24, 1992, anterior cervical discectomy and interbody fusion under the care of Dr. Donald Smith. There was not an appeal of the August 26, 1994, ruling. Subsequent to his March 15, 1991, injury and prior to the March 16, 1994, hearing claimant underwent a two year program at Red River Technical Collage, in Hope, Arkansas, for heating and air conditioning work.

Claimant continued to treat with Dr. Donald Smith, a Louisiana neurosurgeon, relative to his cervical injuries growing out of the March 15, 1991, accident, and Dr. Jeffery DeHaan, a Texarkana orthopedic physician, relative to his right shoulder injury growing out of the March 15, 1991, accident. Claimant later developed lumbar complaints which he attributed to the March 15, 1991, accident and for which he underwent two surgical procedures, one under the care of Dr. Smith and one the care of Dr. DeHaan. Claimant underwent a second cervical surgery procedure under the care of Dr. Smith on August 29, 2000. Appropriate benefits were paid by respondent relative to the August 2000, cervical surgery, however claims relative to the lumbar complaints of the claimant were disputed by respondents.

On October 31, 2001, the second hearing was conducted in this claim before the Arkansas Workers' Compensation Commission on the issue of compensability relative to the claimant's lumbar complaints. The January 28, 2002, ruling of the administrative law judge relative to the October 31, 2001, hearing finding lumbar complaints compensable and awarding corresponding

workers' compensation benefits, to include medical and indemnity, was appealed by respondents to the Full Arkansas Workers' Compensation Commission. In an Opinion filed October 31, 2002, the Full Commission reversed the ruling of the administrative law judge relative to the compensability of the claimant's lumber spine complaints. There was not an appeal taken from the Full Commission ruling.

While the ruling was pending on the October 31, 2001, hearing, claimant petitioned for a lump sum payment of benefits based upon the rating generated by Dr. Green on June 26, 2001, with respect to the claimant's shoulder and cervical injuries in the amount of 33% to the body as a whole. The January 11, 2002, letter of the legal advisor of the Arkansas Workers' Compensation Commission provided authorization for the issuance of a lump sum payment to the claimant by respondents based upon the aforementioned rating. (Commission's Exhibit #2)

Claimant now contends that in addition to the acknowledged compensable injuries to his neck and right shoulder, he also suffered an injury to his right leg and hip on March 15, 1991, which required medical treatment and for which respondents are liable. In this regard, claimant offered his testimony and that of Mr. Benny Emmert, a co-worker, current employee of respondent, and witness to the March 15, 1991, accident. Mr. Emmert testimony reflects, with respect to the mechanics of the accident on March 15, 1991:

Okay. We were on a Cooper rig and we were having clutch trouble. The clutch had been slipping and catching and in the process it had tore the drum shift up and so we had Cooper mechanics over and they pulled that drum shaft and we had put it back in and we were attempting to try it again and the deadman - we took a string on the pipe that we were pulling on

and the deadman is - your drill line comes off of you drum, goes over your crown and then through you traveling block, like we were on six lines so it goes through, you know, makes the trip three times. We were probably working maybe 160,000 pounds, or trying to work 160,000 and that clutch kept slipping and everything. So, Cecil was standing on the side of the rig right at the clutch, looking at it, you know. We had put comet and everything else, you know, a lot had been tried to correct that problem and the deadman comes off the rig. Okay when the deadman comes off the rig, which should be the last thing that comes off, it's probably a 200 pound piece of iron approximately and on like, like I say, is going to the drum and the other end of the line is going to this deadman and it's wrapped several times around the deadman and, you know, it's a cylinder. It is dead bolted over here, clamped on one side. Well, when it give up and come off, the derrick is 110 foot tall so the extra line - after the dead line is wrapped around the deadman, then it goes to a spool up on the front of the rig. So when it come off, you know, that line goes straight from 110 foot to the front of the rig. In other words, it comes over the crown and comes down right at the derrick - comes over the crown and comes down right here. Okay. When the deadman gives up right here, well then that line goes from the crown to the front of the rig so when it was doing that, Cecil was standing in a position where he was standing sort of on that line or that line was right at him and that line caught him and it flipped him in the air. There's no telling how high it flipped him. The deadman was bolted to the line, it was clamped to that line when it come off, and it come off and went in the air hear enough that it tore those clamps loose and it hit the - it hit a float, you know, sitting on location, but there was all kinds of shovels and nipples and stuff that was in a little old collection box there and that line flipped all of those and some of those went over in the pit. And there was a swab lubricator, probably weighed 300 pounds, that was laying right beside that line and

when we found Cecil, Cecil was laying on his back
and that swab lubricator was across him. (T 12-14)

Mr. Emmert testified that the claimant did get hit by the drill line, as evidence by black tar residue on the claimant's britches and claimant's leg above the knee and across his buttocks.

The testimony of the claimant reflects that prior the March 15, 1991, he had not experience any physical limitations or restrictions in his activities. Further, claimant denies having experiencing and complaints relative to his shoulder, neck or right hip and leg prior to the March 15, 1991, accident. The testimony of the claimant reflects a description of the March 15, 1991, accident, corroborative of that of Mr. Emmert. Further, claimant maintains that he was hit by the line on his right leg, right below the buttocks. Claimant attributes his problem with his right leg, hip and a hematoma to the March 15, 1991, accident. Claimant noted that his most pressing or visible injuries growing out of the March 15, 1991, accident were to his right shoulder and arm. Later, claimant after continuing to experience symptoms or pain in his shoulder and upper extremities, and undergoing diagnostic studies was referred to a neurosurgeon for his cervical disk injury, also growing out of the March 15, 1991, accident.

Claimant acknowledged that he has been seen by a number of physicians relative to his injuries, growing out of the March 15, 1991, accident. Claimant maintains that he did relay complaints relative to his right leg and hip to his treating physicians. The testimony of the claimant reflects that at the time of his early complaints, to include lumbar complaints, he was treating with Dr. Brad Harbin his family physician, who assessed the complaint as arthritic in nature, specifically, rheumatoid arthritis. The medical in the record does reflect a November 6, 2000, office note of Dr.

Jeffery DeHaan sitting forth claimant's complaints of hip and knee pain as well as ankle discomfort. Indeed, as a result of the claimant's complaint of hip pain during the November 6, 2000, visit, Dr. DeHaan obtain x-rays of claimant's hip to see if there were any significant arthritic changes to the hip. (CX. #, p5). While the claimant testified it was his recollection that he had relayed complaints relative to his right hip during one of his previous hearing before the Arkansas Workers' Compensation Commission, a review of the records generated as a result of the hearings is devoid of testimony relative to same. At the time of the initial hearing before the Arkansas Workers' Compensation Commission the issue was the extent of the claimant's permanent disability to include permanent total disability. At the time of the second hearing before the Arkansas Workers' Compensation Commission the issue centered on the compensability of the claimant's lumbar complaints. Since neither of the prior hearing dealt with compensability of the claimant's right hip or knee complaint or a claim for medical benefits associated with same, there does not appear to be a basis for the claimant giving testimony relative to a right hip complaint during either of the previous hearings.

Claimant's testimony reflects that he continues to experience severe debilitating pain relative to his cervical and right shoulder areas. Claimant noted that after Dr. Brad Harbin closed his practice he was referred to Dr. Patrick Antoon by Dr. Jeffery DeHaan, to address his medical maintenance needs. Claimant testified that he has been prescribed OxyContin and other pain relief medication by his treating physicians, however he has experienced difficulties with obtaining the prescription medication. Specifically, claimant testified that respondent have directed that secure prescription medication through PMSI, a Florida operation. Claimant noted that on numerous occasions he has

forwarded the prescriptions from his treating physicians to the provider in Florida and that either they failed to timely provide the medication or declined to fill the prescription. As a consequence of the afore, when experiencing severe pain claimant has on occasion gone to the local emergency room for either medication or prescription by the attending emergency room physician for the necessary pain medication. On said occasions claimant has paid for the cost of the prescription.

Claimant noted that the OxyContin which was initially prescribed by Dr. Harbin to address his pain complaint and has continued to be prescribed by Dr. DeHaan and Dr. Antoon, has become less effective. Accordingly, claimant noted that while he initially adhered to the prescription direction with respect to the medication, he has found that he has to increase his dosage and frequency in order to address his debilitating pain complaints. Claimant is of the opinion that he is addicted to the prescription narcotic pain medication OxyContin and desires a pain management program which will address both the pain and addiction.

Claimant was referred by Dr. DeHaan to Dr. Aaron Calodney, a Texas pain management physician, for intractable neck and bilateral shoulder pain. Claimant was initially seen by Dr. Calodney on July 19, 2002. Five recommendations were made by Dr. Calodney as a result of the July 19, 2002, visit. Claimant continued to treat with his family physician and with Dr. DeHaan after July 19, 2002. Claimant was again seen by Dr. Calodney on February 4, 2003, upon referral of Dr. DeHaan for consideration of a Synchromed pump. In considering the morphine pump placement in the treatment of claimant's chronic pain growing out of the injury to his cervical and shoulder areas. Dr. Calodney arranged for the claimant to undergo a behavior medicine evaluation to determine if he was an appropriate candidate for the intrathecal pump trail. (CX. 4). Dr. Calodney

is located in Tyler, Texas. Respondents in an April 2, 2003, correspondence acknowledged receipt of the request for intrathecal pain pump trial of March 11, 2003, however denied the request. (CX. 2, p10-11)

Claimant noted that after pain management recommendation was denied, he continued to experience difficulties securing his pain medication based upon his prescription provided to PMSI by his treating physician. In furtherance of the afore, claimant sought treatment under the care of Dr. Mary C. Weatherby. Claimant was seen on two occasions by Dr. Weather by and paid for the cost of the services for the visits.

The testimony of the claimant reflects that because of the increase in pain restrictions on his physical activities he is unable to hold-up and performing work in his business. Claimant testified that within the last few months, as of the date of the hearing, he has been unable to perform work in his business, and as a consequence of the afore he earning far less than the previously earned. Claimant went to school for heating and air conditioning and has attempted self-employment in air conditioning repair. Claimant's testimony reflects that if he was physically able he would have all of the business he wanted and more than he could do. Claimant explained that he does not work every day because he is not physically capable of doing so, and the determination of whether or not he work is depended upon how he feels when he gets up in the morning. Claimant noted that some days or better than others. Claimant presented testimony regarding his present work capabilities in the heating and air conditioning trade:

I may go out and piddle for 30 minutes, but as far as getting out and working, no.

* * *

If I've got somebody calling and saying, hey, I think I may need a shot of freon, then I'll do that. (T. 40)

Claimant's testimony reflects a distinction between his current work abilities and what he was previously able to do following his March 15, 1991, injury and after obtaining training in the heating and air conditioning trade:

Q. When you were able to do that kind of work the best that you could, what did it involve? What all would you do?

A. Cleaning, you could say cleaning the unit or oiling the motor or changing the condenser motor out. (T.40)

The testimony of the claimant reflects that his primary problems which causes the greatest pain symptoms and inhibits his ability to earn wages are in his neck and shoulders:

I'm going to say that it could be bothering me some because it runs down both my arms, so it is possible that it could be something bothering me in there but I can't tell it because it acts like it is coming from my neck. (T. 42)

After thorough consideration of all of the evidence in this record, I make the following:

FINDINGS

- _____1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On March 15, 1991, the relationship of employee-employer-carrier existed among the parties.
3. On March 15, 1991, the claimant earned wages sufficient to entitle him to weekly

compensation benefits of \$231.37/\$173.53 for total disability/permanent partial disability benefits.

4. On March 15, 1991, the claimant sustained injuries to his neck and shoulder arising out of and in the course of his employment.

5. Claimant has been paid appropriate temporary total disability benefits growing out of the March 15, 1999, compensable injuries.

6. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he suffered injuries to his right hip/leg or a hematoma on March 15, 1991.

7. Medical treatment rendered to the claimant under the care of his authorized treating physician, Dr. Jeffery DeHaan, to include authorized referrals therefrom is reasonable necessary medical treatment relative to the March 15, 1991, compensable injuries of the claimant. Respondents are liable for any incurred unpaid medical expenses had by the claimant relative to his medical treatment under the care of Dr. DeHaan, to include medical mileage and prescription medication.

8. The claimant was referred to Dr. Patrick Antoon, a family practitioner, by Dr. Jeffrey DeHaan, relative to the claimant's March 15, 1991, compensable injuries. Medical treatment rendered to the claimant by Dr. Antoon was reasonably necessary and relative to claimant's March 15, 1991, compensable injury. Respondents are liable for any incurred unpaid medical treatment had by the claimant under the care of Dr. Antoon, to include medical mileage and prescription medication.

9. Claimant's addiction to the narcotic pain medication, OxyContin, is a compensable consequence of his March 15, 1991, compensable injuries, and respondents are liable for treatment relative to same, to include the cost incurred by the claimant under the care of Dr. Mary C. Weather

by, a neuropsychologist.

10. On July 7, 2003, claimant was seen at the emergency room/minor care clinic, for treatment relative the compensable March 15, 1991, injuries which was reasonably necessary and for which respondents are liable, to include medical mileage and the cost of prescription medication associated with the visit.

11. The claimant has sustained his burden of proof by a preponderance of the evidence that a pain management program is reasonably necessary and related to his compensable injuries of March 15, 1991. The evidence further preponderates that intrathecal pain pump trial, as recommended by Dr. Aaron Calodney, is reasonably necessary medical treatment relative to claimant's March 15, 1991, compensable injuries. Respondents have controverted the claimant's entitlement to the afore procedure.

12. The claimant was referred to Dr. Aaron Calodney by Dr. Jeffery T. DeHaan, relative to claimant's March 15, 1991, compensable injuries. Medical treatment rendered to the claimant by Dr. Calodney was reasonably necessary relative to claimant's compensable injuries. Respondents have controverted any incurred unpaid medical expenses had by the claimant in his medical treatment with Dr. Calodney, to include medical mileage and prescription medications.

13. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of March 15, 1991.

14. The claimant's healing period ended June 29, 1993 and June 26, 2001.

15. The claimant has a permanent physical impairment in the about of 53% to the body as a whole.

16. When the claimant's age, education, permanent restrictions and limitations are considered, the evidence preponderated that claimant has suffered a change of physical condition such that he has been rendered permanently and totally disabled as a result of his compensable injuries of March 15, 1991.

17. The change in claimant's physical condition subsequent to his August 29, 2000, second cervical surgical procedure, limits the amount of work that claimant can do such that he falls within the odd-lot category with respect to permanent total disability.

18. The respondents have controverted the payment of all incurred unpaid medical benefits from authorized treating physicians, to include medical milage and prescription medication, and the payment of permanent disability benefits in excess of 73% permanent partial disability benefits.

CONCLUSIONS

On March 15, 1991, claimant suffered compensable injuries arising out of his employment with respondent. The compensability of the claimant's cervical and right shoulder injury is not disputed. Claimant asserts that he also suffered an injury to his right hip and leg in the March 15, 1991, accident and that respondents are liable for corresponding workers' compensation benefits relative to same. Further, claimant maintains that as a results of the injuries suffered in the March 15, 1991, accident he is entitled medical treatment to include pain management as recommended by his treating and examining physicians. Claimant asserts entitlement to treatment for addiction to narcotic pain medication, a compensable consequence of the March 15, 1991, compensable injuries. Finally, claimant asserts that the has been a change in his physical condition and that the change had

rendered him permanently and totally disable from engaging in gainful employment.

Respondents deny the compensability of the claimant right hip and leg complaints relative to the March 15, 1991, accident. Further, respondents maintain that they have provided all of the appropriate reasonable necessary medical treatment relative to claimant's compensable injuries. Respondents deny that the claimant is permanently and totally disable.

COMPENSABILITY

The present claim for workers' compensation benefits, growing out of the claimant's March 15, 1991, accident is governed by the law in affect prior to Act 796 of 1993. Claimant asserts that he suffered an injury to his right hip and leg, to a hematoma, as a result of the March 15, 1991, compensable accident. Claimant has the burden of proving the compensability of his right hip/leg complaint by a preponderance of the evidence. Ringier America v. Comles, 41 Ark. App. 47,849 S. W. 2d 1(1993).

In the present claim it is undisputed that claimant suffered a fall on March 15, 1991, in a work-related accident. There has been two prior hearings in the claim resulting in records consisting of testimony and medical reports. During an October 31, 2001, hearing on the issue of compensability of claimant's lumbar complaints, claimant provided a vivid description of the mechanics of the March 15., 1991, accident. Similarly, claimant and a co-worker who witness the March 15, 1991, accident provided detailed description of the March 15, 1991, accident during the most recent hearing in this claim. There is not a dispute regarding mechanics of the accident.

The evidence in the record reflects that at the time claimant sought and obtained treatment immediately following the March 15, 1991, accident his principal area of complaint was that of his

right shoulder. Claimant underwent two different surgical procedures on his right shoulder under the care of two different physicians. Further, claimant has undergone two surgical procedures relative to his cervical injuries suffered in the March 15, 1991, accident.

There is no medical in the record to reflect that claimant registered complaints relative to his right hip or leg prior to 2000. A November 6, 2000, clinic note of Dr. DeHaan, reflects that claimant was having a lot of hip and knee pain as well as ankle discomfort. Dr. DeHaan obtained an x-ray of the claimant's hip during the November 6, 2002 visit. The November 6, 2002, report of Dr. DeHaan does not reflect the presence of an hematoma on the claimant's right hip. Further, Dr. DeHaan attributes the claimant's right hip complaints to rheumatoid arthritic changes.

The claimant was referred by Dr. DeHaan to Dr. Aaron Calodney, for treatment relative to the claimant's cervical and shoulder complaints. During a February 4, 2003, follow-up visit Dr. Calodney noted with respect the nexus between the claimant's right hip complaint and the March 15, 1991, accident:

. . . He is a 43-year-old, right-handed heating and AC contractor who was injured on 3-15-91 when he was knocked of the side of a rig by a drill line cable. He noted immediate onset of pain in the neck and shoulder. It should be noted that the blow was directly upon his right hip, thigh, and buttock area. That is where he was struck, and he still has a huge area of soft tissue swelling in this area which, in my opinion, represents a post-traumatic lipoma that is clear evidence of the strength of the blow to the hip. (CX. 2, p5)

The compensability of the claimant's right hip complaint rest upon the testimony of the claimant, with respect to the onset of his symptoms and the opinion expressed by Dr. Calodney. As previously

noted, there is not a dispute regarding the mechanics of the March 15, 1991 accident. Nevertheless, there is no evidence to reflect that claimant registered complaints relative to his right hip prior to November 6, 2000. It is undisputed that claimant had serious injuries which required medical treatment subsequent to the March 15, 1991, accident, his neck and right shoulder.

Further, the evidence discloses that during an October 31, 2001, hearing before the Commission on the claimant's claim relative to the compensability of his lumbar spine complaints, claimant did not assert a claim regarding to his right hip. Claimant underwent diagnostic studies, to include an MRI in March 2000, with respect to his low back complaint, however, the medical is silent with respect to any complaints relative to claimant's right hip or evidence of a lymphoma in the area. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he suffered an injury to his right hip on March 15, 1991.

MEDICAL BENEFITS

As a result of the March 15, 1991, compensable accident claimant suffered injuries to his cervical spine and to his right shoulder. Claimant has undergone two surgical procedures relative to his cervical spine injury and two cervical procedures relative to the right shoulder injury.

Claimant underwent surgery relative to his right shoulder under the care of Dr. John Gregory on September 19, 1991. On March 24, 1992, claimant underwent an anterior cervical diskectomy and interbody fusion at C3-C4 and C5-C6, under the care of Dr. Donald R. Smith. On March 23, 1993, claimant underwent right shoulder anterior reconstruction under the care of Dr. Jeffery DeHaan. During the March 16, 1994, hearing before the Arkansas Workers' Compensation Commission on the issue of the extent of the claimant's wage loss suffered as a result of the March 15, 1991,

compensable injury, claimant was not taking prescription medication for his compensable injury but was taking Advil. Claimant also noted that efforts to place him on muscle relaxants to address his symptoms were not successful because the medication made him sleepy and had him in a constant daze.

On August 29, 2000, claimant underwent a second cervical surgical procedure under the care of Dr. Donald Smith, relative to the March 15, 1991, accident. Claimant has also undergone two surgical procedures relative to his lumbar spine complaints which were ruled non-compensable.

Claimant treated with Dr. Brad Harbin in addition to Dr. Donald Smith and Dr. Jeffrey DeHaan for complaints relative to the compensable injury. A September 26, 2000, patient medical history reflects that the claimant was taking several prescription medications relative to his shoulder, neck, and back. (CX.3, p4). Claimant's testimony reflects that he is no longer having difficulties or claimant's relative to his low back. The testimony of the claimant reflects that Dr. Harbin was the first physician to prescribe OxyContin to address his pain complaints. A review of the medical in the record reflects that Dr. Harbin's initial diagnosis relative to the claimant's joint complaints as rheumatoid arthritic. Dr. DeHaan, in citing the rheumatoid arthritic, was relying upon the information relayed to him by the claimant based upon Dr. Harbin's diagnosis.

After Dr. Harbin relocated his practice, and while claimant was under the care of Dr. DeHaan he continued to receive prescription OxyContin relative to complaints growing out of his compensable injury to his neck and shoulder. Claimant resides in Stamps, Arkansas. Dr. DeHaan is located in Texarkana, Arkansas. Claimant was later referred by Dr. DeHaan to Dr. Patrick Antoon, a Magnolia general practitioner, to monitor claimant's regular prescription needs. As a consequence

of the afore, Dr. Antoon also on occasions prescribed OxyContin for the claimant. The testimony of the claimant reflects that the OxyContin was initially effected in addressing his pain complaints relative to the injury in his cervical spine and right shoulder.

Claimant is addicted to OxyContin and that he desire to get off of the medication. In that regard, claimant noted that while OxyContin was effective in addressing his complaints of pain at the outset, he has found that he had to increase his dosage in order to achieve the same or any level of pain relief. Added to the claimant's problem is the fact that OxyContin and other prescription medication prescribed by his treating physician, is supplied by PMSI out of Florida pursuant to the direction of the claim adjuster for respondent. Claimant noted that on occasions he has furnished the prescription to the pharmaceutical concern and that the medication had either been late in arriving or denied by the claim adjuster resulting in him not having access to pain medication. Claimant attributes a July 7, 2003, visit to the emergency department minor care clinic to his situation where he was in severe pain and PMSI along with Travelers had failed or refused to provide prescriptions medication. (CX. 5)

A review of the medical in the record reflects that in early 2001 claimant was seen on several occasions by Dr. DeHaan for complaints relative to his right shoulder and cervical spine. An entry of May 9, 2001, clinic note of Dr. DeHaan reflects:

Cecil is here F/U EMG/NCV of his RUE. He has a chronic C5 radiculopathy which is an old injury I'm sure from previous reason why he's had his previous surgery. At this point there's really nothing further that I can offer him treatment-wise. There' nothing surgical that he needs done. As far as the medications are concerned , Dr. Harbin has got him under close

control there and there's nothing I can add there either. I think we'll just have to keep an eye on him and see what happens down the road. If there's anything that is questionable to him at all or any other things he needs dealt with, he'll bet back in to see me. (CX. 3,p7)

A February 11, 2002, clinic note of Dr. DeHaan relative to the claimant reflects:

Cecil is here today F/U C-spine upper extremity problems. He continue to have significant cervical and upper extremity difficulty. Most of it is centered around his neck, however, and he's got a lot of crepitation and grinding with rotation and flexion extension of his neck .He has a lot of pain in the neck with extension to the neck and has limited extension to not much beyond neutral. (CX 3,p17)

An April 3, 2002, clinic note of Dr. DeHaan relative to the claimant outlines the results of EMG/NCV studies that the claimant had undergone. The report addresses claimant's complaint relative to his low back and lower extremities. Dr. DeHaan concluded, with respect to the claimant's lower extremities complaint that the symptoms were probably most rheumatoid mediated and secondary to arthritic type problems. The April 3, 2002, clinic note of Dr. DeHaan relative to the claimant concludes:

I've recommended that we get him into a pain management program, and we're going to try and get him in to Dr. Calodney in Tyler to see if they can't help him or benefit him. I'll check him back here again in 3 months to see whence how he's doing, but at this point there's not much further that I have to offer. We will try him on some Bextra to see if that might not help him. (CX 3, p17)

On July 19, 2002, claimant was evaluated by Dr. Aaron Calodney at the Neurocare

Network, in Tyler, Texas, pursuant to the referral of Dr. DeHaan. The July 19, 2002, report of Dr.

Calodney, relative to the claimant, reflects, in pertinent part:

Unfortunately, he continues to have problems with his neck and low back as a result of this injury. He has had surgery on his neck on two occasions, as well as right shoulder surgery related to this accident, as well. He is fused from C5 through C7. The original surgery in 1991, and he apparently had another neck surgery as recently as August of 2000.

* * *

His complaint that is the focus of his visit today is clearly his neck pain. Apparently, there is some controversy about whether the back is covered. I want to make it clear to the adjuster that the back was not addressed as a specific problem during today's visit.

* * *

MEDICATION:

OxyContin 80 mg. two in the morning and one at noon(occasionally, he will take up to five per day); Neurontin 300 mg, one twice a day and two at bedtime; Prednisone on a tapering dose; Enbrel injections biweekly.

* * *

MEDICAL DECISION MAKING:

II. IMPRESSION:

- A. status post ACF at C5 through C7 that appears solid
- B. Cervical disc bulge at C4-5 with a disc protrusion eccentric to the right.
- C. Mechanical cervical spine pain with radiation to both shoulders, right greater than left.

D. Cannot rule out a C5 radiculopathy on the right.

III RECOMMENDATIONS:

A. At this point, the family doctor is providing the OxyContin, and I am comfortable with having his doctor continue this as Cecil lives quite a distance from us, and it would be difficult for me to really supervise the OxyContin as well as I would like to. That is not say that in the future we may need to look at something else in regards to pain medication, such as Synchroned, etc. At the present time, I am going to leave the opioids to his family doctor.

B. The Neurontin 300 mg b.i.d. and 600 mg at bedtime is a reasonable dose of 1200 mg. It certainly could be bumped upward, but I am not going to make any changes there at this time.

C. I am going to go ahead and give him Zanaflex 4 mg at bedtime. This will help with sleep and also help with muscle relaxation. It also is an alpha adrenergic blocking agent and, as such, may allow us to let him slightly taper down his OxyContin.

D. I will provide him with a prescription for a muscle stim unit. He and his wife describe "like a baseball" sized muscle spasm in his cervical paraspinals. Although this is likely a bit exaggerated, he is having a significant amount of trapezius and cervical paraspinal tenderness and spasm, and the muscle stim units are usually very helpful with this.

E. I am going to Scheduled him for cervical selective epidural

block at C5 on the right. By all indications, he does have a C5 radiculopathy on the right side and some foramina stenosis at this level on the right creating his neck and shoulder pain. I have also talked to him about the possibility of looking at the motion segments just above and below his fusion in regards to the posterior elements/facet joints as a possible cause of his ongoing axial pain. If this is not the case, then unfortunately, I would likely be due to the C4-5 disc above his fusion, which does demonstrate a significant protrusion, particularly to the right.

The Dixon's are nice folks, and they desperately want to get off of the OxyContin. He wants to be able to work and support his family, and his motivation is sincere. Ultimately, if none of the above is effective, he may need to consider the Synchronomed pump. He and his wife have brought this up to me as a possibility today. This is on the "back burner" at the present time. I am hoping that we can get by without looking towards this. (RX, 2. p1-4)

The record reflects at February 4, 2003, follow-up visit by the claimant to Dr. Calodney:

Today, in addition to his neck and shoulder pain, he is complaining of worsening right hip pain and states that the hip "goes out" on him if he moves the wrong way. He has not had this hip imaged recently, and it absolutely needs to be imaged. We will start by simply obtaining plain x-rays of the right hip.

Cecil continues to have intractable pain. He was referred to me by Dr. Jeff DeHaan to consider a Synchronomed pump. He has been getting OxyContin by his family doctor in Arkansas. I explained to the

patient that cannot prescribe OxyContin across the sort of distance and into another state because I have no way of monitoring the pharmacies in that area, etc. He understands this but does have a problem because his family doctor has left practice, and he is going to run out of medication.

I will give him a prescription of Zanaflex which is an alpha blocking muscle relaxant that will help him avoid withdrawal symptoms. I will also give him a prescription for hydrocodone tablets that he can take up to twice per day if he needs for pain. This will also help him avoid possible withdrawal. It is really going to be his responsibility to talk to his family doctor or whoever is taking his patients and his responsibility in regards to continuation of the OxyContin or tapering, etc.

The Synchroned pump remains a therapeutic option; however, at this point, we are not going to scheduled a trail.

I am going to set up a time for him to see Donna Robertson, RN LMSW-ACP, to at least clear the hurdle which is required and it the behavioral medicine evaluation. (CX2, p5-6)

On February 21, 2003, claimant underwent a behavior medicine initial evaluation under the direction of the Ms. Donna Robertson, pursuant to the referral of Dr. Calodney. After undergoing a battery of tests pursuant to the directions of Ms. Robertson two recommendations were made:

1. Review the patient's current medication regiment and consider adding psychotrople medication to relieve his depressive symptoms.
2. Proceed with intrathecal pump trial, with reservations. (CX 4,p5)

In a April 2, 2003, letter to Dr. Calodney, respondent acknowledge receipt of the request for

intrathecal pain pump trial, however note that the request was being denied. Specifically, the April 2, 2003, letter of respondent reflects:

RECOMMENDATION: Deny intrathecal pump
RATIONAL: Available information suggests that response to the requested treatment might be adversely affected by narcotic usage and his psychological profile. Long-term response appears to be problematic. The requested treatment is not reasonable or medically necessary R.A. Shirley, MD/OR/TX/ZFD. (CX 2, p10)

Claimant was seen by Dr. DeHaan on April 2, 2003:

Cecil is here for follow-up of cervical and shoulder problems. He is also having some lower back problems but these are not work related. His problem is that the doctor that was giving him his pain management control medicine no longer practices and therefore I am his primary physician now. He has gotten turned down for a pain pump, i.e. Morphine pump in Tyler TX, because the insurance company denied it for whatever reason. He needs to have his medication refilled.

CURRENT MEDICATIONS: Embro, OxyContin, Prilosec, Celebre and a few other medications which I am going to refill for him today.

I will see him back in 3 months and I guess that I will be filling his medications now. I am not sure what else to do for him as far as any further definitive treatment is concerned. I think that hopefully he will not need anything surgical for quite sometime. I still think the Morphine pump would have been beneficial to him but be that as it may I will refill his medications today. I will see him back again in 3 months. (CX 3, p24)

Claimant acknowledged that he took the OxyContin pain medication contrary to the dose direction

because of the increase pain. As a consequence of the afore, claimant has come to the point where he has on occasion run out of medication before the time allotted by the prescription. The afore is corroborative of the recommendation of Dr. Calodney and that of Dr. DeHaan with respect to at least a trial of the intrathecal pain pump. Respondents have denied the afore.

Respondent have failed to provide reasonable necessary medical treatment relative to the claimant's compensable injury. In the instant claim claimant's compensable injury consist of injuries to his cervical spine and his right shoulder as a result of the March 15, 1991, compensable injury. Before proceeding with the trail period of the pain pump claimant underwent a behavioral medicine evaluation pursuant to the direction of Dr. Calodney. It is not disputed, based upon the result of the diagnostic studies, that the claimant continues to experience difficulties and severe complaints relative to pain in his cervical spine and upper extremities, attributable to the compensable injury. Claimant has credibly testified that he is unable to achieve the effectiveness of pain relief with prescribed dosages of OxyContin, and, as a consequence, has increased his use in an effort to address his increase in pain. The evidence reflects that in addition to the evaluation by Donna Robinson pursuant to the recommendation of Dr. Calodney with respect to the pain pump, claimant has been seen by Dr. Calodney on at least five occasions, based upon milage claims. (CX 1, p11). Further, claimant has been treated by Dr. DeHaan, relative to his complaints growing out of the March 15, 1991, injury since 1992.

It is therefore my opinion, after a through consideration of all of the evidence in the record, that the recommended intrathecal pain pump trail is reasonable and medically necessary relative to the claimant's March 15, 1991, compensable injury. Respondents have controverted the afore

procedure. Further, respondents have controverted any incurred unpaid medical benefits relative to the claimant's treatment under the care of Dr. Calodney, to include medical related travel and prescriptions.

The evidence discloses that after claimant was unable to proceed with the recommended procedure under the care of Dr. Calodney, he sought treatment under the care of Dr. May C. Weatherby, Ph D., a neuroscologist, relative to his OxyContin addiction and as a mean of pain management. Claimant has been seen by Dr. Weatherby on two occasions and has paid for the cost of the visits himself. The evidence in clear that Dr. DeHaan, one the claimant's principal treating physician, recommended a pain management program. Respondents controverted the pain management program as identified and recommended by Dr. Calodney. Claimant use of OxyContin to address his pain complaint contrary to the recommended dosage is evidence of addiction and dependency relative to the medication. Claimant has expressed a sincere desire to taper off and be removed from the narcotic medication, OxyContin, taken relative to his compensable injury. Claimant's addiction to OxyContin is a compensable consequence of his March 15, 1991, compensable injury. Respondents are liable for medical treatment relative to the claimant's OxyContin addiction, to include the expenses incurred by the claimant under the care of Dr. Weatherby. Respondents have controverted the afore benefits.

A CHANGE OF PHYSICAL CONDITION

Claimant was awarded a lost of earning capability in the amount of 20% in addition to a 20% anatomical impairment, as a result of the March 16, 1994, hearing before the Arkansas Workers' Compensation Commission. During the afore hearing claimant asserted entitlement to

wage loss benefits of at least 50% if not permanent total as a result of the compensable injury. The compensable injuries on which anatomical impairment and wage loss were based as a result of the March 16, 1994, hearing included the claimant's cervical spine, for which he had undergone one surgery and his right shoulder, for which he had undergone two surgeries.

At the time of the time of the 1994, hearing before the Commission claimant had completed a heating and air condition course at Red River Votech, in Hope, and was gainfully employed, though at a substantial lower wage rate than at the time of his employment with respondent. Claimant has subsequently undergone a second surgical procedure relative to his neck since the March 16, 1994, hearing before the Commission. Further, as a result of claimant's severe debilitating pain relative to his compensable injuries, the extent of his gainful employment is minimum, at best. Claimant noted that he is unable to consistently discharge employment activities as result of the degenerating condition in his cervical spine and right shoulder. Claimant acknowledged that sufficient work is available in the heating and air condition business in his location if he could physically perform the work. Claimant has limited his employment activities to non-strenuous maintenance type activity of recharging Freon in units.

The evidence discloses that as a result of the claimant's August 29, 2000, second surgical procedure on June 10, 2001, he was evaluated by Dr. Berry Green, a Texarkana orthopedic physician, and found to have a permanent physical impairment of 33% to the body as a whole. The afore impairment rating did not include the claimant's lumbar complaints. On or about January 11, 2002, respondents were given authorization to pay a lump sum payment to the claimant relative to the impairment rating, and the same was had. The evidence further reflects the claimant has

undergone a change of physical condition since the prior ruling of August 26, 1994. Further, as a result of the change of condition, to include the subsequent cervical surgical procedure claimant received an increase in anatomical impairment and the same was paid in a lump sum.

Ark. Code Ann. §11-9-713, Modification of awards, provides, in pertinent part:

(a)(1) Except where a joint petition settlement has been approved, the Workers' Compensation Commission may review any compensation order, award, or decision.

(2) This may be done at any time within six (6) months of termination of the compensation Period fixed in the original compensation order or award, upon the Commission's own motion or upon the application of any party in interest, or ground of a change in physical condition or upon proof of erroneous wage rate.

In the instant claim, claimant has undergone surgery since the original award was entered. Claimant has sustained an increase in anatomical impairment as a result of the additional surgery. Further, the evidence disclose that as a result of the residuals of the claimant's compensable injury, claimant is unable to engage in gainful employment on a consistent, and regular basis.

It is therefore my opinion, after a thorough consideration of all of the evidence in this record, that when the claimant's age, education, permanent restrictions and limitations, are considered, the claimant has been rendered permanently and totally disable from engaging in gainful employment as a result of the March 15, 1991, compensable injury. Respondents have controverted the payment of permanent total disability benefits in excess of 73% permanent partial disability benefits heretofore paid.

The evidence further reflects that the present claim is not one governed by the provisions of Act 796 of 1993, but by the case law in place prior to the enactment of the afore provision, to include the odd lot doctrine. In the instant claim, the evidence reflects that claimant falls within the odd lot doctrine as a result of a change in his physical condition since the March 1994, hearing and subsequent ruling before the Commission. The evidence clearly reflect that claimant was unable to return to his former employment following the March 15, 1991, compensable injury. Claimant's previous work history consisted of working the oil fields. Subsequent to his compensable injury, claimant underwent additional education or vocational training at Red River Votech in Hope, and succeeded in securing a diploma or certificate for heating and air condition. Claimant remained employed in the afore field until his August 29, 2000 second cervical procedure. The evidence is clear that prior to August 2000, claimant had suffered a reduction in earning capacity brought on as a result of residuals of his March 15, 1991, compensable injury subsequent to March 1994. Since August 2002, claimant's ability to work a minimal amount is not disputed. Claimant acknowledged that on occasions he would go out and paddle around for up to thirty minutes during the day.

The amount of work performed by the claimant is dependant upon claimant's physical condition and the intensive of his residuals symptoms on a given date. The evidence reflects that there is more than sufficient work available in the claimant's chosen field at his present location, however claimant is physically incapable of performing the work. Under the odd lot doctrine once the claimant establish a prima facie case of permanency, the onus is on the respondent to show that there is work available for the claimant on a regular and consistent basis which the claimant can perform. There is no showing in the record. Further, the courts have noted that once is claim is made

for permanent total disability, under the previous case law, respondents were placed on notice that odd lot was in issue. Moser v. Arkansas Lime Company, 40 Ark. App. 108 (1992).

It is therefore my opinion, after a through consideration of all of the evidence in his record, that the claimant has sustained his burden of proof that he is permanently and totally disabled pursuant to the odd lot doctrine.

AWARD

Respondents are hereby ordered and directed to pay to the claimant permanent total disability benefits at a weekly compensation benefit rate of \$231.37, until it satisfy its obligation pursuant to Arkansas statute, as a result of claimant's compensable injury of March 15, 1991. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sum heretofore paid toward the discharge of the aforementioned obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of March 15, 1991..

Maximum attorney fees are herein awarded to the claimant's attorney the Honorable Dale Grady, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with Holiday Inn-West v. Coleman, 31 Ark. App. 224, 792 S.W. 2d 345 (1990).

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge