

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F300128**

**LARRY W. OATES**

**CLAIMANT**

**APPLICA, INC.**

**RESPONDENT EMPLOYER**

**CNA**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED NOVEMBER 12, 2003**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE PETER O. THOMAS, JR., Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on October 14, 2003. A prehearing conference was held on August 12, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on November 16, 2002.
2. The compensation rates are \$335/251.

The claimant contends that he sustained a specific incident injury on November 16, 2002 and contends he is entitled to medical benefits and temporary partial disability benefits from early April 2003 through June 2003. The claimant also contends he is entitled to a 5% permanent impairment rating and attorney's fees.

The respondents contend the claim was accepted as compensable and medical benefits were paid through the end of 2002, with the company doctor. The respondents have controverted medical with Dr. Derek Lewis and Dr. Gordon Newbern. The respondents also did not pay any temporary total disability or temporary partial disability benefits during the approximately two months the claimant was unable to work. The respondents have also controverted the permanent impairment rating.

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

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. There was a compensable injury on November 16, 2002.
2. The compensation rates are \$335/251.
3. The claimant has proven by a preponderance of the evidence that the additional medical treatment he has pursued with Drs. Lewis and Newbern is reasonable and necessary and was pursuant to his compensable November 16, 2002, injury.
4. The claimant has proven by a preponderance of the evidence that he has sustained a 5% permanent anatomical impairment to his body as a whole.
5. The claimant has proven by a preponderance of the evidence that he is

entitled to temporary partial disability benefits from April 2003 through June 2003, when he was laid off work by the respondent employer.

### **DISCUSSION**

The claimant, 45 years old, was working at a part-time job, as well as holding a full time job for the respondent employer on November 16, 2002, when he was involved in a forklift injury. According to the claimant, he was driving a forklift when another employee on a forklift hit him on the side, shearing three or four bolts off his lift and knocking him out of his seat. The claimant testified that he grabbed hold of the forklift cage but received a whiplash injury to his neck. The incident was reported and the claimant saw the company doctor on Monday, following the Saturday incident. The claimant was x-rayed, given a prescription and returned to work on light duty but unable to drive a company vehicle. The claimant testified that he clocked in each day and simply sat around.

According to the claimant, he has muscle spasms in his neck and he gets a catch when he turns his neck. The claimant testified that his job required him to look at placards up high and he is constantly looking up and turning all day, plus watching out for other forklifts since about 35 forklifts are running all the time. The claimant described his neck having a burning sensation. He underwent some physical therapy but that did not help him. The claimant confirmed that he last saw Dr. Cynthia Almond with Concentra on December 31, 2002, and she stated again that he was unable to drive a company vehicle and recommended he see his primary care physician. The claimant testified he made an appointment with his primary care physician, Dr. Derek Lewis, per the instructions of Dr. Almond. Dr. Lewis referred the claimant to Dr.

Newbern, a specialist. The claimant's first appointment with Dr. Newbern was April 7, 2003, and after an evaluation, Dr. Newbern gave him a restriction of not working over four hours per day.

The claimant testified that he had continued to go to work each day and do nothing but receive full pay until he received the restriction from Dr. Newbern of working no more than four hours per day. At that time, the employer laid him off and advised him they could not accommodate him. The claimant confirmed that when he saw Dr. Newbern in June 2003, Dr. Newbern allowed him to work eight hours a day and his employer allowed him to return to work. The claimant returned to work driving the forklift.

The claimant confirmed that for most of his life, he has held a second job for additional income. At the time of his November 16, 2002, injury, the claimant confirmed he was working about four hours a week for Hollis as a supervisor, inspecting buildings and making a report of what was clean or not. There was no physical labor involved in his supervisory job. According to the claimant, he continued working his second job until Dr. Newbern put him back to work for eight hours. After he returned to his employer, he was unable to work past eight hours so he no longer worked for Hollis Janitorial. When he was on only a four-hour restriction and his employer would not allow him to come in to work, the claimant testified he continued his work at Hollis Janitorial, working two to three hours per day and was paid \$125 per week.

The claimant testified that he is currently working eight hours per day and does not lift over 15 pounds. While he works eight hours, the claimant testified that after four hours of working, he is in pain from all the looking, pushing and turning. He stated that

he has to turn around backwards and there is a constant bump, bump, bump on the forklift. The claimant testified that he had never missed any work in the 20 years he has worked since being out of the military except for the forklift incident.

Under cross examination, the claimant was questioned about ever having any neck problems before the forklift incident. The claimant had previously under oath stated that not as he remembered had he been treated for neck pain. The claimant was asked about a cervical MRI he had in August 2000, but he testified he could not remember his neck hurting before.

The claimant described his pain at the hearing as starting at the base of the skull and going down and a headache. The claimant testified that he takes Aleve for his pain and headaches and can still work with that medication. He is unable to afford the muscle relaxers and pain medication prescribed by Dr. Newbern.

The claimant first contends that he is entitled to additional medical treatment after December 31, 2002, when the respondents controverted the claim.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 1996). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation

Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

In the present case, the claimant has proven by a preponderance of the evidence that the additional medical treatment he has pursued is both reasonable and necessary and related to the compensable injury. It is undisputed that respondents accepted the claim as compensable and paid medical benefits through December 31, 2002, while the claimant was seeing the company doctor, Dr. Cynthia Almond, a general practitioner. The claimant presented testimony as to his understanding from Dr. Almond was that she was referring him to treat with his primary care physician, as documented in Dr. Almond's Activity Status Report as Claimant's Exhibit No. 1, page 7. The respondents rely on Dr. Almond's December 31, 2002, Transcription Report included as Respondents' Exhibit No. 1, page 24, where Dr. Almond's report is expanded to reflect that she was referring the claimant to his primary care physician for care associated with a non-work-related condition. It was unclear at the hearing if the claimant had immediate access to this report from Dr. Almond. In any event, the claimant sought treatment with his primary care physician and respondents denied further liability.

The claimant initially went to Dr. Derek Lewis and was referred to Dr. Gordon Newbern, an orthopedic surgeon. Dr. Newbern's April 7, 2003, report provides the history of the forklift incident and the claimant's symptoms along with acknowledging the claimant had neck problems several years ago and some mild degenerative arthritis of the cervical spine. Dr. Newbern had the claimant's December 20, 2002, MRI and the

x-rays and these were considered along with the doctor's examination of the claimant.

Dr. Newbern opined, in part:

**X-RAYS**

He presents with plain films from Concentra, taken November 18, 2002, which showed at that time loss of normal cervical lordosis, consistent with muscle spasm, which is good testament to the degree of trauma sustained by his neck at the time of injury, also suggesting that there was acute insult to the neck.

**ASSESSMENT:**

His presentation appears to be an acute, high energy, sudden acceleration/deceleration type injury to the muscle and tendon units of the cervical spine which occurred when high energy was imparted to the forklift he was driving. Four bolts sheared in two on the forklift that struck his vehicle, causing the whole forklift apparatus to fall off that vehicle.

**PLAN:**

I explained to him that I do not believe degenerative disc disease is the primary cause of his symptoms but rather the sudden acute musculotendinous strain injury, not dissimilar from a whiplash type injury in a motor vehicle type accident. I explained to him that this will slowly get better over the first year or two after the injury. The use of muscle relaxants, physical therapy, and oral anti-inflammatories is the most reasonable way to manage this... (Cl. Exh. No. 1, pp. 15-16.)

Dr. Newbern referred the claimant back under Dr. Lewis' care. Dr. Newbern did see the claimant again on July 9, 2003 and again gave his assessment of the claimant's condition: "Chronic musculotendinous/musculoligamentous strain of the cervical spine from a sudden acceleration/deceleration injury while driving a forklift now eight months post injury with only mild improvement." (Cl. Exh. No. 1, p. 18. Dr. Newbern went on to assign some work limitations as well as assigning a 5% permanent impairment for the claimant's injury.

The medical evidence indicates that the claimant had a pre-existing condition of some degenerative problems with the cervical spine. This is documented in the

medical evidence. There was very credible and undisputed testimony from the claimant that he had never missed any work at all during about 20 years of work because of any health problems until the November 2002, forklift incident. The claimant presented credible testimony that he had also maintained a second job for a number of years to further supplement his income. While the claimant had some pre-existing neck problems, I find the medical evidence very much supports the claimant's contentions that his neck problems are now worse and he now has limitations.

A preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See, *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962); *Conway Convalescent Center v. Murphree*, 266 Ark. App. 985, 588 S.W.2d 462 (1979); *St. Vincent Medical Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). As is commonly stated, the employer takes the employee as he finds him. *Murphree, supra*. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates or combines with the condition. However, although a disabling symptom of a preexisting condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by accelerating or combining with the preexisting condition. See, *Ark. Power & Light Co. v. Scroggins*, 230 Ark. 936, 328 S.W.2d 97 (1959).

I find the claimant has pursued medical treatment that is reasonable and necessary for his compensable injury. I give greater weight to the opinions rendered by Dr. Gordon Newbern, an orthopedic surgeon, over the opinion of the general practitioner. Dr. Newbern opined that the primary cause of the claimant's problems was the sudden acute musculotendinous strain injury similar to a motor vehicle whiplash injury. Dr. Newbern has suggested conservative treatment is required for the claimant to improve over time. He has recommended muscle relaxants, physical therapy and oral anti-inflammatories all taken under supervision. The claimant has proven by a preponderance of the evidence that his additional medical treatment is reasonable and necessary.

The claimant next contends that he is entitled to approximately two months of temporary partial disability benefits when he was placed on restrictions of working only four hours per day and his employer took him off the payroll. The claimant testified that he still was able to work his second job and had some minimal income. Ark. Code Ann. §11-9-520 provides that in case of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, the employee is entitled to 66-2/3% of the difference between the employee's average weekly wage prior to the accident and his wage earning capacity after the injury.

In the present case, I find the claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits from the date the respondent employer took him off work until he returned back to work for approximately two months.

The claimant next contends he is entitled to the 5% permanent impairment rating

assigned by Dr. Newbern. In order to be compensated for permanent partial disability benefits, the claimant must prove that the compensable injury is the major cause of the permanent impairment, Ark. Code Ann. §11-9-102(4)(F) and (14) (Repl. 2002); the impairment rating must be established by medical evidence supported by objective findings, Ark. Code Ann. §11-9-102(16) (Repl. 2002, WCC Rule 34; the medical evidence must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16) (Repl. 2002); and the *AMA Guidelines* must be used as a guide in determining impairment ratings, Ark. Code Ann. §11-9-522(g) (Repl. 2002), WCC Rule 34.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. *Crow v. Weyerhaeuser Co.*, 45 Ark. App. 295, 880 S.W.2d (1994). However, it is the duty of the Commission to determine whether any permanent anatomical impairment resulted from the injury and if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

In *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002), the Court of Appeals affirmed the Commission's holding that the claimant's work-related injury to his right shoulder aggravated an asymptomatic pre-existing condition and was the major cause of 3% of the claimant's permanent impairment rating. The claimant's

physician in *Westbrook* opined that the claimant's problems with his right shoulder began with the work-related injury and aggravated a pre-existing problem.

In Dr. Newbern's July 9, 2003, report, he assigned a 5% permanent anatomical impairment due to the claimant's neck injury and he opined that he extrapolated from the *AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Ed.* While Dr. Newbern did not get into how he arrived at his calculations, he did use the *Guides* as required by law and did evaluate and treat the claimant for his injuries. A review of the *AMA Guides* reveals that Dr. Newbern was conservative in his assignment of the rating and the claimant's problems are consistent with Dr. Newbern's rating. Therefore, the preponderance of the evidence supports the claimant's entitlement to the 5% permanent impairment rating.

### **ORDER**

The claimant has proven by a preponderance of the evidence that the additional medical treatment he has pursued with Drs. Lewis and Newbern is reasonable and necessary and was pursuant to his compensable November 16, 2002, injury. The claimant has proven by a preponderance of the evidence that he has sustained a 5% permanent anatomical impairment to his body as a whole. The claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits from April 2003 through June 2003, when he was laid off work by the respondent employer.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be

paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**