

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211602

TRAVIS BURNETTE, EMPLOYEE	CLAIMANT
MEHAFFY CONSTRUCTION CO., INC., EMPLOYER	RESPONDENT NO. 1
BITUMINOUS INSURANCE COMPANIES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED DECEMBER 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 17, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of permanent partial disability benefits for anatomical impairment, wage loss, and vocational rehabilitation as well as continuing medical treatment and attorney's fees.

At issue is whether or not the claimant is entitled to permanent partial disability benefits pursuant to Ark. Code Ann. §11-9-522, whether or not continuing medical treatment is reasonable and necessary pursuant to Ark. Code Ann. §11-9-508; and whether or not there is Second Injury Fund liability. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, A.C.A. §11-9-704, I find the claimant is entitled to continuing medical treatment at Respondent No. 1's expense. There is no wage loss and no Second Injury Fund liability.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship with Respondent No. 1 on October 3, 2002 at which time the claimant sustained compensable injuries at a compensation rate

of \$328.00/\$246.00. Medical expenses, temporary total disability benefits (until July 10, 2003) and anatomical impairment (7% to the lower extremity as assessed by Dr. Safman in his report of June 19, 2003 and 5% to the body as a whole as assessed by Dr. Ackerman in his report of March 5, 2003) have been paid. The claimant receives Social Security Disability benefits.

The claimant contends he is permanently and totally disabled based on his age 63 (D.O.B. October 6, 1940), education (G.E.D.), work experience (manual laborer) and injuries. Alternatively, the claimant is willing to participate in rehabilitation and seeks a wage loss award in excess of his 5% rating to the body as a whole. The claimant also seeks continuing medical treatment with a general practitioner based on Dr. Ackerman's recommendation, in his report of March 5, 2003.

Respondent No. 1, Bituminous, contends all appropriate benefits have been paid. The respondents controvert any further medical treatment as unreasonable, unnecessary and unrelated to the compensable injury. Respondents also contend that the major cause of any disability over the 5% rating is not the compensable injury. Alternatively, in the event of an award, the respondents seek a credit for an overpayment of temporary total disability benefits from June 16, 2003 to July 10, 2003. Respondents also contend any disability in excess of the 5% rating is the responsibility of the Second Injury Fund.

Respondent No. 2, the Second Injury Fund, contends the claimant is not entitled to the 5% rating to the body as a whole and therefore the claimant is not entitled to any wage loss disability. Furthermore, the Fund contends that Respondent No. 1, Bituminous, cannot prove Second Injury Fund liability in this case. Respondent No. 2 agrees with Respondent No. 1 that the healing period ended June 16, 2003.

The following were submitted without objection and comprise the evidence of record: The parties' prehearing questionnaires with attached medical exhibits (the transcript is bound in three volumes) and the deposition of Dr. Bruce Safman taken January 26, 2004, incorporated by reference. The deposition of the claimant is included as part of Respondent No. 2's exhibits.

The following witnesses testified at the hearing: the claimant, who was using crutches, and friends Harold Wilson and Edna Goodbar. Mr. Wilson testified about the claimant's job duties with the respondent-employer and both Mr. Wilson and Ms. Goodbar socialize with the claimant at a dance club.

The claimant, age 64 (D.O.B. October 6, 1940) completed the eleventh grade in school and obtained a G.E.D. while in prison (1986-1990) on drug charges. He is able to read and write but has some trouble with spelling.

His work experience includes jobs as a carpenter and laborer on a construction crew, glazer of glass doors, co-owner of a liquor store, landscaper, garage door installer, beverage salesman, car salesman, siding and insulation salesman, tire builder, warehouse man, dispatcher, welder, fabricator of air conditioning duct work and manager of a skating rink. These jobs required heavy lifting or climbing ladders or crawling around attics which he can no longer handle. The claimant supports himself with the help of friends, his brother, and \$1,326.02 per month in Social Security benefits.

The claimant's health history includes a left leg injury in a motorcycle accident, high blood pressure, a hernia, a lipoma in the upper back, a neck injury in a motor vehicle accident, and a back injury in the 1970's while working for Firestone resulting in two surgeries and a 15% impairment. He was off work three years and drew Social Security after the Firestone injury, but was able to return to work at full duty and continued to be employed there for ten years.

The claimant was employed by the respondent-employer for three months on a construction crew building bridges and earning \$12.00 per hour. On October 3, 2002, he developed left leg pain which gradually worsened, after stepping on rebar. The claimant completed an AR-N (Notice of Injury) on October 9, 2002 reporting an injury to both legs after walking on rebar. There is no mention of a back injury in the report.

MEDICAL EVIDENCE

The claimant went to a family health clinic on October 3, 2002 complaining of left leg pain. He was referred to Dr. Joe Crow, diagnosed with compartment syndrome, and immediately underwent surgery (fasciotomy) on the same day.

Dr. Rowe's Report of 10-3-02:

This is a 61-year-old white male who recalls a history of hurting his left leg a few days ago while at work. He does not describe an acute injury. He just noticed over the course of the day while climbing and working that his leg began to hurt some... It did not bother him too much until today, when he stepped down and had an acute episode of tearing sensation and pain with subsequent swelling of the lower extremity.

Dr. Crow's Report of 10-3-02:

Mr. Burnett was seen for injury sustained earlier today when he was stepping down from one re-bar to another and suffered a twisting injury to the left leg. He had a bleed in the proximal calf and suffered an acute compartment syndrome.

In follow-up with Dr. Crow on October 30, 2002, the claimant complained of "right sided sciatica, which occurred at the same time as his fall..." "He has weakness in his L4 distribution on the right side, as well as hypesthesia there and numbness and pain around the thigh and knee area."

A lumbar MRI scan conducted October 31, 2002 revealed post-operative changes at L5-S1 from surgery in 1971 and bilateral foraminal encroachment at L4-5 worse on the right. Dr. Rosenzweig commented in a report dated November 6, 2002, that these findings appeared "to be more of a chronic condition, rather than an acute injury." Dr. Rosenzweig diagnosed "right knee pain, either from the injury, delayed onset or compensatory due to gait disturbance from his left leg. He is having some low back pain with underlying degenerative disease, significant foraminal stenosis, particularly at 4-5."

The claimant was evaluated by Dr. Yocum on November 22, 2002. He complained of intermittent numbness and pain in his right leg. The claimant indicated he had arthritis in both knees for years but it had not bothered him until after the accident at work. Dr. Yocum opined, "it is my

impression that his right leg pain is multi factorial in nature and related to preexisting osteoarthritis in the knee as well as spinal stenosis.” Dr. Yocum recommended the claimant return to Dr. Crow for medication and physical therapy.

The claimant then saw Dr. Brown, physiatrist, for medication before returning to Dr. Crow on December 16, 2002. Dr. Crow noted that the claimant’s left leg symptoms had abated and characterized his back and right leg symptoms as an aggravation of a preexisting condition. Dr. Crow refused the claimant’s request for pain medication and advised him to use Advil or Tylenol.

His other problem has been his low back and right-sided sciatica, which was an aggravation of an old problem he had many years ago. He had sciatica and surgery in the past and this fall at work seems to have aggravated his situation with right-sided sciatica. Now he has an absent knee jerk and positive straight leg raising on the right. His MR shows some irritation of his disc on that side at L4-5. (Emphasis added)

The claimant was seen by Dr. Ackerman on December 19, 2002 for epidural steroid injections and medication to treat “radiculopathy right lower extremity.” Dr. Ackerman noted normal strength, gait, balance and reflexes in the claimant’s lower extremities. The claimant returned to Dr. Ackerman on January 6, 2003 with increased pain after dancing on New Year’s Eve.

The claimant was seen by Dr. Saer on January 9, 2003 who recommended that he return to Dr. Ackerman for physical therapy. The physical therapist, Blake Wagner, also characterized the claimant’s back and right leg condition as an aggravation of a preexisting condition in a report dated January 13, 2003.

Patient presenting with low back pain resulting from a work-related injury. I feel that it may be secondary to gait deviations and hip substitution during ambulation along with increased demands on his right lower extremity secondary to the left lower extremity surgery. I feel that his arthritis pain may have also been aggravated in his right knee during this period.

The claimant returned to Dr. Ackerman on February 5, 2003 complaining that physical therapy had made his symptoms worse. Dr. Ackerman prescribed a medication change for “post laminectomy syndrome.” The claimant was discharged from physical therapy on March 4, 2003, and

returned to Dr. Ackerman for treatment of “failed back syndrome.”

Dr. Ackerman’s Report of 3-4-03:

The patient has a sprain/strain injury superimposed upon a previous back injury... Mr. Burnette has had muscle spasms and should be able to qualify for an impairment rating of 5% to the body as a whole based on the American Medical Association’s Guides To The Evaluation of Permanent Impairment, fourth Edition, page 110 using the table for lumbosacral pathology.

His medications could be followed by his primary care physician, as he will need nonsteroidal anti-inflammatory medications, as well as analgesic and anticonvulsants long-term.

Dr. Saer’s Report of 3-6-03:

I think he has just had a strain or sprain with history of preexisting laminectomy. I do not think he is going to need any surgical treatment for this.

A Functional Capacity Evaluation was conducted on March 14, 2003 which was considered valid but the claimant’s subjective rating of pain did not correlate with the tester’s observations or the claimant’s abilities. He was rated as eligible for work in the Medium Physical Demand Classification.

The claimant returned to Dr. Ackerman on March 24, 2003 for anxiety and restless leg syndrome which Dr. Ackerman refused to treat.

The claimant saw Dr. Safman on April 16, 2003 and was diagnosed with “denervation distally in the right lower extremity” based on an EMG/NCV study.

Dr. Safman’s Report of 4-16-03:

It appears that the slowing of the nerve conduction is in the region of the fibular head of the right peroneal nerve, which could possibly indicate that when he was on the operating table he had pressure on that area. I cannot rule out the fact that he may have had an anterior compartment syndrome on the right side that was overlooked initially because of the severity of his left-sided symptoms.

This patient has a right peroneal neuropathy. I believe the site of pathology is behind the right fibular head. I suspect this may be from pressure at the time he was on the operating table. I expect spontaneous improvement will probably occur with time. I will treat him symptomatically.

On June 16, 2003, Dr. Safman assessed maximum medical improvement:

He may get some additional spontaneous recovery in the peroneal nerve distribution. His disability rating will be based on a partial right peroneal neuropathy involving a 30% sensory loss and a 15% motor loss in a peroneal nerve distribution on the right side.

Dr. Safman's Report of 6-19-03:

According to Table 68, page 89 in the Guides to the Evaluation of Permanent Impairment, 4th Edition a 15% peroneal motor neuropathy would yield a 2.25% total body disability rating and a 6.3% lower extremity disability rating. His sensory deficit would yield a 1% total body or lower extremity disability rating. Combining these this patient is entitled to a 3% total body disability rating or a 7% lower extremity disability rating.

In his deposition, Dr. Safman testified he treated the claimant from March 31, 2003 to November 10, 2003, on referral from Dr. Ackerman. Dr. Safman's treatment was focused on pain management as the claimant complained of symptoms in both legs. Dr. Safman diagnosed anterior compartment syndrome and perineural nerve deficit but could not isolate the cause of the conditions. He released the claimant on June 19, 2003 with a 7% impairment rating to the lower extremity. He did not recommend any further treatment but referred the claimant to his general practitioner for prescription medications (Flextra DS and Darvocet). Dr. Safman opined that the claimant's back pain was unrelated to the perineural nerve problem.

FINDINGS AND CONCLUSIONS

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

The evidence of record shows the claimant had a pre-existing left knee condition and lower back condition which left him with arthritis and a limp in the left leg and degenerative changes in the low back. Neither of these conditions prevented him from working or enjoying a social life for the last thirty years. Neither of these conditions caused him to miss work or seek medical treatment over the last thirty years. The claimant attributes his disability solely to the last injury with Mehaffey.

The Supreme Court set forth the appropriate factors to consider when determining Second Injury Fund liability in Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 276 S.W.2d 539 (1988). In order for the Second Injury Fund to have liability, three prerequisites must be met: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to the injury, the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must combine with the recent compensable injury to produce the current disability status. *Id.*; see also Arkansas Highway & Transportation Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the more recent injury alone would have caused the claimant's current disability status, the Second Injury Fund has no liability. McWilliams, supra. After reviewing the lay testimony and expert medical evidence, I find no combination of injuries producing disability. Therefore, the Second Injury Fund has no liability.

After the left leg injury on October 3, 2002 with the respondent-employer, Dr. Crow's surgery corrected the injury and he was released with no impairment.

The claimant also reported a right leg injury although the etiology is unclear. Physicians have commented that it could be a new injury or a compensable consequence of pressure during surgery on the left leg, or the result of osteoarthritis. Dr. Safman, however, has opined that the right leg condition is unrelated to the claimant's back symptoms based on EMG/NCV studies. Therefore, lumbar radiculopathy can be ruled out. The healing period ended on June 16, 2003 when Dr. Safman assessed a 7% rating. The respondent-employer is entitled to a credit for temporary total disability benefits paid between June 16, 2003 and July 10, 2003. Dr. Safman recommended follow-up care with a general practitioner to monitor the claimant's prescription medication. Therefore, I find the claimant is entitled to continuing medical treatment for his leg with a general practitioner. I suggest the parties try to agree on a medical provider close to the claimant's home. If the parties are unable to reach an agreement, the Medical Cost Containment Division will appoint a physician.

Diagnostic testing of the claimant's lumbar spine revealed chronic degenerative and post-operative changes but no acute injury. Dr. Ackerman has assessed a rating based on muscle spasm

but a spasm is a temporary muscle contraction, not a permanent functional or anatomical loss, Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Dr. Crow has also referred to “irritation” on the MRI scan but it is unclear how that is objectively measured.

Impairment must be supported by objective and measurable physical findings Ark. Code Ann. §11-9-704 and the compensable injury must be the major cause of the impairment Ark. Code Ann. §11-9-102.

In summary, the claimant reported left and right leg injuries. He has been treated for both, and released to return to work with a 7% rating on the right. Sometime later, the claimant reported back pain. Diagnostic testing has shown no objective evidence of a new back injury or any condition that could be attributed to radiculopathy. Under the circumstances, I find the claimant’s condition more closely fits category 1 of Table 72 on page 110 of the Guidelines – “Complaints or Symptoms – 0% impairment.”

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on October 3, 2002 at which time the claimant sustained compensable injuries (back, left leg) at a compensation rate of \$328.00/\$246.00. Medical expenses, temporary total disability benefits (until July 10, 2003) and anatomical impairment (7% to the lower extremity as assessed by Dr. Safman in his report of June 19, 2003 and 5% to the body as a whole as assessed by Dr. Ackerman in his report of March 5, 2003) have been paid.
2. The claimant’s healing period ended June 16, 2003 based on Dr. Safman’s assessment and Respondent No. 1 is entitled to a credit for overpayment of temporary
3. The claimant will require follow-up medical care for his compensable leg injuries with a general practitioner at the expense of Respondent No. 1.
4. The claimant has failed to prove that he sustained permanent impairment to his back as a result of his leg injuries. Therefore, he is not entitled to an award of wage loss.

5. Even assuming, arguendo, that the claimant is entitled to a rating to the body as a whole, Respondent No. 1 has failed to prove a combination of injuries to cause disability and invoke Second Injury Fund liability.
6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge