

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E004333

JOHN T. DOPIERALLA

CLAIMANT

GENERAL MOTORS ACCEPTANCE CORP.

RESPONDENT EMPLOYER

**ROYAL INSURANCE COMPANY
SECOND INJURY FUND**

**RESPONDENT CARRIER NO. 1
RESPONDENT NO. 2**

ORDER AND OPINION FILED MAY 13, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JAMES W. STANLEY, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE WHITNEY MOORE AND HONORABLE MICHAEL J. EMERSON, Attorneys at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on April 14, 2004. A prehearing conference was held on February 17, 2004 and a prehearing order was filed on February 18, 2004. 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 February 2, 1990, injury.
2. The compensation rates are not in dispute.

The claimant contends that he is permanently and totally disabled as a result of his compensable injury. Alternatively, the claimant contends he is entitled to additional wage loss benefits. Claimant contends there has been a change of circumstances meriting additional permanent benefits. All other issues are reserved.

The respondents contend that there has not been a material change in the claimant's physical condition to warrant an award of permanent and total disability. The respondents contend that a 15% anatomical impairment has been paid and a 20% wage loss disability has already been paid.

From a review of the record as a whole, to include medical reports, documents, transcript and opinions from previous hearings incorporated by reference 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 February 2, 1990, injury.
2. The compensation rates are not in dispute.
3. The claimant has failed to prove by a preponderance of the evidence that the changes to his physical condition was the result of his compensable injury, which would entitle him to a modification of the award and an increase in benefits.

DISCUSSION

The claimant, 52 years old, sustained a compensable injury resulting from a motor vehicle accident on February 2, 1990, for which he has received benefits. The respondents have paid a 15% anatomical impairment and a 20% wage loss disability following a January 3, 1995, award in this matter. Another hearing was held on June 27, 1997, where the claimant was contending he was permanently and totally disabled;

however, the Full Commission affirmed and adopted on February 19, 1998, the administrative law judge opinion and order that denied the claimant's request to modify his award of wage loss disability and find him permanently and totally disabled. The claimant now contends that his circumstances have changed and he is permanently and totally disabled.

Responding to questions about how his medical situation has changed over the past few years, the claimant testified that he has more pain and stiffness with his lumbar spine and cervical spine. The respondents asked the claimant if in 1993 he had described his pain as a "stiffening pain" and he verified that. Also, the claimant verified that in 1997 he described his pain as a "stiffening, burning pain." The claimant, at the hearing, described his current pain as a burning, stiffening pain. The claimant verified that in 1993 he was unable to participate in hobbies such as golf, fishing and playing with his children and he expressed the same inability in 1997. The claimant verified he still has those same disabilities today. The claimant verified that he talked about depression and feelings of hopelessness in 1993, as well as having those same feelings in 1997 and again today. The claimant described his significant amounts of medications that render him unable to function normally and with the proper alert level.

The claimant testified about an incident in June 2003, where he was walking and he began having pain down his left leg and his condition seemed to worsen. The claimant has had a facet neurotomy to the low back in 1991 and has no other surgery or procedures since the neurotomy. In September 2003, Dr. Richard Jordan discussed a posterior lumbar interbody fusion from L3 to S1 and indicated the claimant's lumbar problems were worse. The claimant saw Dr. Richard Peek, a spine surgeon, and Dr.

Peek diagnosed the claimant with extreme problems with “arachnoiditis and stenosis.” Cl. Exh. No. 1, p. 5. Dr. Peek opined the claimant was permanently disabled from employment. Dr. Raymond Remmel, the psychiatrist, opined that the claimant is unable to work but also opined that the claimant’s depression is improved. Dr. Richard Jordan saw the claimant on October 9, 2002, and that was the first time to see the claimant in ten years. Dr. Jordan opined in his July 21, 2003, deposition that the claimant’s complaints have remained the same since the first time he saw him with neck and back pain. Dr. Jordan discussed the diagnostic studies, as follows:

The diagnostic films now show more cervical spondylosis than he had before. And on the lumbar study, he had a bulging disc at L2-3, a bulging disc at L3-4, and another at L4-5, and these were causing both canal and foraminal compromise, that is the stenosis. And he had multilevel facet arthropathy. That is to say, arthropathy means that the joints are enlarged and distorted. (Cl. Exh. No. 1, Dep. of Dr. Richard Jordan, p. 7, lines 6-12.)

Dr. Jordan was asked if the claimant’s current status was the result of the aggravation from the motor vehicle accident or the normal aging process. Dr. Jordan asked the claimant’s age and then answered, in part:

Fifty-two. He has always seemed older than his chronologic age. His spine looks older than chronologic age. When people have accidents that traumatize their spine, then they often look older than a chronologic appearance. Now there’s no way that any of us can discount ten years. I mean, that can’t be escaped. Yes, he’s ten years older and he’s ten years further down the line, but it’s ten years built on what we had ten years ago. (Cl. Exh. No. 1, Dep. of Dr. Richard Jordan, p. 14, lines 7-17.)

Dr. Jordan did opine that the claimant had some degenerative changes in his spine and then had an accident, which worsened or accelerated his degenerative

problems. Dr. Jordan was recommending a discogram to determine if surgery was a viable recommendation to help alleviate some of the claimant's problems.

The claimant must prove by a preponderance of the evidence that his condition has changed since 1997 and is now entitled to additional permanent benefits. Ark. Code Ann. §11-9-704(c)(5). The claimant was awarded permanent disability benefits of 35% to the body as a whole in an opinion filed January 3, 1995. The claimant again asked for additional benefits and was denied any additional benefits in a Full Commission Opinion filed February 19, 1998. The claimant now contends he is permanently and totally disabled, or, alternatively, entitled to additional wage loss benefits.

Ark. Code Ann. §11-9-522(d)(1987) provides:

In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination, if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

In the present case, the claimant has not worked since his 1990 motor vehicle accident and has continued to seek medical treatment for his cervical and lumbar spine and psychiatric treatment for depression. The claimant contends that in June 2003, his condition began to worsen following a long walk and he now has more pain. Dr. Richard Jordan opined in his deposition that the diagnostic studies did reveal more cervical spondylosis, more stenosis and multi-level facet arthropathy. When Dr. Jordan was questioned regarding the motor vehicle accident causing the claimant's current problems or the aging process, he stated that the effect of ten years cannot be

discounted. Dr. Jordan finally did state that the claimant had some degenerative changes in his spine and then had an accident, which worsened or accelerated his degenerative problems. The claimant had pre-existing disc problems and degenerative problems along with sustaining the compensable motor vehicle accident injuring his cervical and lumbar spine. I find the claimant has failed to prove by a preponderance of the evidence that his condition has changed substantially and that the cause of any changes resulted from the compensable February 1990 compensable injury.

ORDER

The claimant has failed to prove by a preponderance of the evidence that his physical condition has materially changed as a result of the compensable injury, which would entitle him to a modification of the award and an increase in benefits. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**