

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110757

JESSE MOSES

CLAIMANT

CITY OF VAN BUREN

RESPONDENT

MUNICIPAL LEAGUE WC TRUST  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,  
Sebastian County, Arkansas.

Claimant represented by DAVID HARP, Attorney, Fort Smith, Arkansas.

Respondents represented by CHRIS BRADLEY, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 13, 2004, in Fort Smith, Arkansas. The deposition of Dr. Steve Smith was taken on March 4, 2004. This deposition has been admitted as Claimant's Exhibit No. 2.

A pre-hearing order was previously entered in this case on January 21, 2004. A copy with certain amendments noted thereon was made Commission's Exhibit No. 1 to the hearing. However, the claimant's attorney (by his letter of April 27, 2004) calls the accuracy of both of these Orders into question.

Therefore, I feel that some preliminary discussion of the situation is merited. In his original pre-hearing questionnaire (filed December 23, 2003), the claimant expressly raised the issues of his entitlement to continued medical treatment, primarily medication, and his entitlement to permanent disability benefits for both permanent physical impairment and loss of wage earning capacity.

However, at the pre-hearing conference, the claimant's counsel advised that he had been unable to obtain an impairment rating by the claimant's treating physicians. He requested that the issues be limited to the claimant's entitlement to additional medical services, and his entitlement to additional temporary total disability benefits from June 5,

2002 through a date yet to be determined.

After the pre-hearing conference, but prior to the scheduled hearing, the claimant apparently obtained a permanent physical impairment rating from Dr. Steven Smith. This report is dated January 26, 2004 (Claimant's Exhibit No. 1, page 1). Although claimant's counsel repeatedly refers to an impairment rating by Dr. Michael Standefer, there has been no evidence introduced to indicate that the claimant has ever seen or been rated by Dr. Standefer. By letter dated March 29, 2004, claimant's counsel requested that the issue of the claimant's entitlement to permanent disability benefits for both permanent physical impairment and wage loss disability (including permanent total disability) be added.

In response to this letter, I requested claimant's counsel to advise me if the claimant still desired to litigate his entitlement to additional temporary total disability benefits and to state his contention in regard to when the period of temporary total disability ended and permanent disability began. On April 6, 2004, claimant's counsel responded that he and respondents' attorney have agreed to change the issues for the April 13, 2004 hearing to the claimant's entitlement to a 10% permanent impairment and wage loss disability and to retain the issue of the claimant's entitlement to continued medical treatment.

Prior to the commencement of the hearing, the respondents' counsel contended that the respondents had overpaid temporary total disability benefits and that the claimant's healing period and consequently his period of temporary total disability had ended on February 13, 2002. He requested that the respondents be afforded a credit for any overpayment of temporary total disability benefits.

At the commencement of the hearing, (T.3-4), I attempted to state the various amendments that had been made to the pre-hearing order, which it was my understanding had been agreed to by the parties. Since the parties had not addressed some of these issues in the contentions stated in their pre-hearing questionnaires, I requested that (subsequent to the hearing) both parties set out their contentions in regard to all of these

issues in writing.

In his letter of April 27, 2004, the claimant's counsel does state the claimant's contentions in regard to the date of the end of the healing period. However, he also states that he was unaware that this was going to be an issue and that he did not realize that the respondents would be "asking for an offset for TTD" on any such benefits actually paid after the end of the healing period.

I am at a loss to understand how claimant's counsel could be unaware of these issues. He expressed no surprise when these amendments were made at the commencement of the hearing. I would also note that these issues were addressed in the deposition of the claimant's physician (Dr. Smith), which was taken on March 4, 2004. Obviously, the date of the end of the healing period is generally a necessary corollary issue to any award of permanent disability benefits. Such benefits only began to accrue on the date the healing period ends.

However, to avoid any possibility of confusion (however remote) over the issues to be litigated and resolved at the present time, this Opinion will only address the issues of permanent physical impairment, permanent functional disability (i.e. loss of wage earning capacity), and continued medical services, after April 25, 2003. The issues of the specific date on which the claimant's healing period ended and the respondents' entitlement to credit for any overpayment of temporary total disability benefits will be reserved for future determination.

The following stipulations have been offered by the parties and are hereby accepted:

1. On August 27, 2001, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$410.00 for total disability and \$308.00 for permanent partial disability.
3. On August 27, 2001, the claimant sustained a compensable injury to his

back.

4. There is no dispute over the payment of medical benefits accruing through April 25, 2003.
5. Temporary total disability benefits were actually paid through June 4, 2002.

The issues to be litigated and resolved at the present time are limited to the claimant's entitlement to permanent disability benefits for both permanent physical impairment and permanent functional disability or loss of wage earning capacity and his entitlement to additional medical services, provided after April 25, 2003.

In regard to these issues, the claimant contends that he has sustained a permanent physical impairment of 10% to the body as a whole, and has further been rendered permanently totally disabled, as the result of the effects of his compensable injury. He further contends that he is entitled to continued reasonably necessary medical services for this compensable injury, after April 25, 2003.

The respondents deny that the claimant has experienced any permanent physical impairment or any loss of wage earning capacity, as a result of the effects of his compensable injury. The respondents further deny that any medical services, which have been rendered to the claimant after April 25, 2003, constitute reasonably necessary medical services within the meaning of the Act.

## DISCUSSION

### I. ADDITIONAL MEDICAL SERVICES

The first issue to be addressed concerns the claimant's entitlement to continued medical services, after April 25, 2003. The burden rests upon the claimant to prove that any services he has been rendered, after that date, represent "reasonably necessary medical services for his compensable injury".

Medical services are "reasonably necessary" when they are necessitated by or related to the compensable injury and have a reasonable expectation of accomplishing the

purpose or goal for which they are intended. Medical services may be “reasonably necessary” even though they are rendered after the end of the actual “healing period”. Medical management of permanent or chronic conditions, which meets the above stated criteria, has long been recognized as falling under the provisions of Ark. Code Ann. §11-9-508. In fact, the legislature has seen fit to expressly exempt such long term medical maintenance from the bar established by the statute of limitations, Ark. Code Ann. §11-9-702(b)(2).

The medical record reflects that, after April 25, 2003, the only medical services provided or recommended to the claimant consists of oral medications, periodic injections and occasional medical evaluations, for the purpose of monitoring the claimant’s long term medications or periodic injections. The medications being provided the claimant appeared to be primarily in the form of muscle relaxers and analgesics.

The medical evidence shows that these oral medications and injections have been deemed necessary by Dr. Smith to reduce or alleviate the chronic spasms in the claimant’s thoracic musculature, which are shown to be the result of the claimant’s compensable injury on August 27, 2001. In the expert opinion of Dr. Smith, these medications will be required intermittently for the foreseeable future (report of June 20, 2002). In his deposition, Dr. Smith specifically noted that on every occasion that he evaluated the claimant, including the visit on January 26, 2004, he has visually observed the presence of muscle spasms in the muscle of the claimant’s upper back or thoracic spine (D.6).

Dr. Smith is a highly competent orthopaedic surgeon with considerable expertise in the area of medicine associated with the treatment of injuries and conditions involving the back or spine. It cannot be assumed that such an expert would provide or recommend unnecessary or useless treatment. Thus, it would appear that the medical services, which have been provided and recommended to the claimant by Dr. Smith, would be medically appropriate for the difficulties associated with this type of injury. These medical services

are of a type and nature generally recognized by the medical community as being appropriate for the treatment of chronic soft tissue injuries, such as that experienced by the claimant on August 27, 2001.

After consideration of all the evidence presented, it is my opinion that the medical services, which were provided and recommended to the claimant by and at the direction of Dr. Smith were and are necessitated by and related to the claimant's compensable injury. It is my further opinion that these medical services had and have a reasonable expectation of accomplishing their desired purpose or goal of maintaining the claimant's chronic difficulties at a stable level and resolving periodic exacerbations of his complaints. Therefore, I find that these medical services represent "reasonably necessary medical services" for the claimant's compensable injury, within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the expense of these services (subject to the medical fee schedule established by this Commission) is the liability of the respondents herein.

## II. PERMANENT DISABILITY BENEFITS

The claimant must first prove that his compensable injury was the "major cause" (more than 50%) of a specific degree or percentage of permanent physical impairment, Wal Mart Stores, Inc. v. McConnell, 340 Ark. 475, 10 S. W. 3<sup>rd</sup> 727 (2000). This specific degree or percentage of permanent physical impairment must be supported by "objective findings" i.e. the independent observation of findings beyond the claimant's voluntary control, Ark. Code Ann. §11-9-704(c)(1)(B). This specific degree or percentage of permanent physical impairment must also be calculated in a manner that conforms to the current official rating guide adopted by this Commission, The American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition), Ark. Code Ann. §11-9-522(g). In making this assessment of anatomical impairment, no consideration can be given to pain or loss of range of motion, Ark. Code Ann. §11-9-102(16)(A)(ii).

Finally, it is the duty of this Commission to make a determination in regard to both the existence and the specific degree of permanent physical impairment, Polk County v. Jones, 74 Ark. App. 159, 47 S.W. 3<sup>rd</sup> 904(2001).

In the present case, Dr. Smith opined that the claimant's compensable thoracic injury has caused a permanent physical impairment of 10% to the body as a whole. (Claimant's No. 1, page 1). In his deposition, Dr. Smith explained how he arrived at this conclusion. He stated that the claimant's objective symptoms, particularly his persistent chronic muscle spasms, placed him somewhere between a DRE cervicothoracic Category II and Category III. These various categories are discussed on pages 104 through 110 of The American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). Dr. Smith concluded that, excluding pain and range of motion, the claimant did not entirely fall under either of the categories. Instead, it was his opinion that the claimant fell in between these two categories. As the Guides recommended a 5% permanent physical impairment to the body as a whole for Category II and a 15% permanent physical impairment to the body as a whole for a Category III, he simply took the average for these two categories or 10% to the body as a whole.

On page 104, of the Guides, a DRE cervicothoracic Category II is delineated as follows:

"Description and verification: The history and findings are compatible with the specific injury and include intermittent or continuous muscle guarding observed by a physician, non uniform loss range of motion, (dysemtria differentiator I, table 71 , page 109); or non verifiable radicular complaints. There is no objective evidence of radiculopathy or loss of structural integrity."

On page 104 of the Guides a DRE cervicothoracic Category III is described as follows:

"Description and verification: The patient has significant signs of radiculopathy, such as (1) loss of relevant reflexes or (2) unilateral atrophy with greater than a 2 cm. decrease in the circumference compared with the unaffected side, measured

at the same distance above or below the elbow. The neurologic impairment may be verified by electrodiagnostic or other criteria (differentiators 2,3, and 4, table 71, page 109).”

The evidence presented shows that the claimant would clearly meet the requirements for a DRE cervicothoracic Category II. He has a history and objective findings that are compatible with a specific injury. He has also exhibited continuous muscle guarding or spasms in the musculature of his thoracic spine. All of these are “objective findings” as that term is defined by Ark. Code Ann. §11-9-102(16)(A). The medical evidence indicates that there is no objective evidence of an actual radiculopathy or loss of structural integrity. In regard to the latter consideration, the evidence shows that x-rays and an MRI performed on the claimant showed no structural abnormalities or defects.

It is equally apparent from the evidence presented that the claimant would not meet the requirements for a DRE cervicothoracic Category III. He has exhibited no significant signs of a radiculopathy, such as loss of relevant reflexes or unilateral atrophy greater than a 2 cm. decrease in circumference, or any abnormalities on electrodiagnostic testing.

It must be noted that the Guides provide that when using the DRE categories to assess permanent impairment, the claimant must be placed in one particular category. The Guides also indicate that the appropriate category should be determined from the claimant’s objective findings, table 71 on page 109, DRE impairment category differentiators. There is no provision in the Guides for simply averaging the impairment given for two separate categories, as was done by Dr. Smith.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that his compensable injury has resulted in a permanent physical impairment of 5% to the body as a whole. This degree or percentage of permanent physical impairment is supported by “objective findings” in the form of chronic and persistent muscle spasms of the musculature in the claimant’s thoracic spine. No consideration has been given to pain or loss of range of motion in assessing this

degree or percentage of permanent physical impairment. This degree or percentage of permanent physical impairment would also conform to the current official rating Guides adopted by this Commission.

Thus, it next becomes necessary to determine whether the claimant has experienced any permanent functional disability or loss of wage earning capacity, in addition to the 5% permanent physical impairment and, if so, the specific degree or percentage of such permanent disability. In making this determination, consideration must be afforded not only to the degree or percentage of permanent physical impairment, but also to the claimant's age, education, work experience, and any and all matters reasonably expected to affect his future earning capacity, Ark. Code Ann. §11-9-522(b). In determining the appropriate percentage or degree of permanent functional disability for loss of wage earning capacity, unlike permanent physical impairment, there is no statutory prohibition against affording consideration to chronic pain. Clearly, the presence of chronic pain could reasonably affect the claimant's ability to perform regular employment.

In the present case the evidence shows the claimant to be of advancing age (53). He has only an 11<sup>th</sup> grade education with no particular transferable vocational or technical training, with only a single correspondence course and various on the job training in the operation of water meters. The evidence also shows the claimant's prior vocational experience to be extremely limited, having worked for over the last 23 years in the Water Department for the City of Van Buren.

In regard to his physical restrictions, the claimant testified that he can no longer stoop over, bend, or lift, more than minimal weights. He also testified that he cannot sit, stand, walk, or drive, for any extended period of time. He stated he is in constant pain, to the point where he had difficulty sleeping or concentrating.

I find the claimant's testimony in regard to his restrictions to be credible. His credibility was supported by his demeanor at the hearing and his long history of

employment with the respondent. Most importantly, the presence of continuous and persistent muscle spasms involving the claimant's thoracic spine, support his testimony concerning pain and restrictions in the use of this portion of his anatomy. The atrophy of the muscles in the claimant's upper extremities from lack of use, which was also observed by Dr. Smith, would further support the claimant's testimony concerning both his constant pain and his inability to use the upper portion of his body any prolonged or strenuous manner. Thus, the various physical limitations voiced by the claimant are consistent with both the subjective and objective findings observed by Dr. Smith on his numerous physical examinations.

It must also be noted that the record indicates that the claimant had experienced at least two separate injuries to other portions of his anatomy, prior to the compensable injury giving rise to this claim. These consist of an injury to his lower back and lumbar spine, which appears to be in the form of an unoperated herniated disc. The second of these is in the form of carpal tunnel syndrome, which required surgical intervention. Clearly, both of these pre-existing injuries may still be causing some adverse effect on the claimant's ability to obtain employment in the open job market. However, the law clearly provides that an employer takes the employee "as is" with all pre-existing physical defects and infirmities. It must also be noted that neither party has requested or obtained joinder of the Second Injury Fund, prior to a determination of the existence and extent of permanent functional disability for loss of wage earning capacity. Thus, the right to join the Second Injury Fund in this claim has been waived.

After consideration of all the evidence presented, I find that the greater weight of the credible evidence establishes that the restrictions and limitations resulting from the claimant's compensable injury on August 27, 2001, prevents him from returning to his pre-injury position with this respondent. The respondent has not offered the claimant any other position. Thus, it can only be assumed that the respondent has no position available within

the claimant's restrictions and for which he would otherwise be qualified. Clearly, the claimant's inability to continue his long term employment with this respondent would have a significant adverse impact on his wage earning capacity. The claimant must now, after over 23 years, try to obtain employment in the open job market, without even any assistance being offered by his long term employer.

I recognize that the record reveals that the claimant has not looked for work. However, I am not convinced that this is due to a lack of motivation. Instead, it is my opinion that the claimant has not looked for employment because he is truly ignorant of the availability of any employment positions for which he would be qualified and which would be within his restrictions and limitations. It is my opinion that he sincerely believes that there are simply no employment positions for which he would be qualified and would be physically capable of performing. His opinions in this regard have clearly been encouraged, if not initiated, by Dr. Smith's directives to remain off work. As previously noted, the respondent has provided the claimant with no job placement assistance to educate him in regard to any potential available employments in the open job market. Finally, I would note that the claimant's extremely long term employment with this respondent would clearly be inconsistent with a lack of motivation.

When the claimant's current physical restrictions on his potential employment activities (as proven by the greater weight of the evidence) are considered, in light of his advancing age, limited education, and extremely limited work experience, the claimant has clearly proven that he has sustained a substantial degree or percentage of permanent functional disability for loss of wage earning capacity. However, I find that the greater weight of the credible evidence fails to prove that this loss is total. The claimant appears to still retain the physical capabilities of performing light sales or clerical positions, light delivery positions, or light factory or bench work positions. Although there is no evidence that he has any previous experience in these types of positions, none is generally

required. Most of these positions would also not require a level of education or intellectual functioning in excess of that possessed by the claimant. Although these positions exist in sufficient number (in the area of the claimant's residence) to present him with a meaningful opportunity to obtain regular gainful employment, these positions are definitely limited in number and would pay significantly less than the wages the claimant was able to earn at the time of his compensable injury.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the claimant has experienced a permanent functional disability for loss of wage earning capacity, in the amount of 30% to the body as a whole. This percentage or degree of permanent partial disability is in excess of that attributable to the claimant's permanent physical impairment of 5% to the body as a whole. Thus, the claimant is entitled to a total award for permanent partial disability equivalent to a 35% permanent partial disability to the body as a whole.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 27, 2001, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On August 27, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$410.00 for total disability and \$308.00 for permanent partial disability.
4. On August 27, 2001, the claimant sustained a compensable injury to his upper back or thoracic spine.
5. There is no dispute over the payment of medical benefits accruing through April 25, 2003.
6. The medical services rendered to the claimant by and at the direction of Dr.

Steven O. Smith, after April 25, 2003, for his continuing thoracic difficulties represents reasonably necessary medical services for the compensable injury. The expense of such services, subject to the medical fee schedule established by this Commission, is the liability of the respondents herein, pursuant to Ark. Code Ann. §11-9-508.

7. Temporary total disability benefits were paid to the claimant through June 4, 2002.
8. As a result of his compensable injury of August 27, 2001, the claimant has sustained a permanent partial disability of 35% to the body as a whole. This represents a permanent physical impairment of 5% to the body as a whole and permanent functional disability for loss of wage earning capacity in the amount of 30% to the body as a whole.
9. The issues of the exact date upon which the claimant's healing period ended and the respondents' entitlement to a credit for an overpayment of temporary total disability benefits is reserved for future determination. Therefore, at the present time, the respondents shall commence the payment of permanent partial disability benefits, at the appropriate weekly compensation rate, on the date of this Order. Any previously accrued benefits can only be ascertained after a determination of the specific date upon which the claimant's healing period ended.
10. The respondents have controverted the claimant's entitlement to the payment of any medical expenses incurred after April 25, 2003, and his entitlement to any permanent disability benefits.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded.

## ORDER

The respondents are liable to the claimant for permanent partial disability benefits for a 35% permanent partial disability to the body as a whole and shall commence the payment of permanent partial disability benefits from the date of this Order.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded . One-half of this fee is the obligation of the respondents in addition to such benefits and the remaining one-half of this fee is to be withheld by the respondents from such benefits.

The issues of the specific date upon which the claimant's healing period ended (thus the date upon which permanent partial disability benefits commenced to accrue) and the respondents' entitlement to credit for any overpayment of temporary total disability benefits is reserved for future determination at the earliest convenient date and after having given ample opportunity to both parties to present any and all relevant evidence they desire on this issue.

For the reasons heretofore set forth in this Opinion, the claimant's request for permanent total disability benefits must be denied.

All benefits herein awarded and which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge

