

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E708648

FLOYD SAVAGE

CLAIMANT

**CITY OF LITTLE ROCK
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED NOVEMBER 3, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case comes on for a hearing in Little Rock, Arkansas on September 15, 2004. A prehearing conference was held on June 30, 2004 and a prehearing order was filed the same date. 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 July 9, 1997, injury.
2. The temporary total disability/permanent partial disability rates are \$348/261.
3. Respondents accepted a 7% permanent impairment rating.

The claimant contends that he sustained a herniated disc in his lumbar spine that resulted in a 7% permanent impairment to the body as a whole. The claimant further contends that he sustained injury to his SI joint, which resulted in surgery and

that the surgery has left him with a permanent impairment. The claimant requests that the Commission determine the appropriate impairment for the SI joint impairment. The claimant further contends that he is entitled to permanent disability greatly in excess of the permanent impairment ratings when the appropriate vocational factors are considered. The claimant finally contends he is entitled to attorney's fees.

The respondents contend that the claimant has been paid the 7% permanent anatomical rating that was assigned for the claimant's back and that no rating for the SI joint has been presented; therefore, there can be no controversion. The respondents further contend that the claimant has not sustained any wage loss disability as a result of his 1997 work-related injury.

Issues to be litigated:

1. Whether there is a permanent impairment rating for the SI joint.
2. Wage loss disability.
3. Attorney's fees.

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, and incorporated by reference the May 12, 2002, record and opinions, 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 July 9, 1997, injury.

2. The temporary total disability/permanent partial disability rates are \$348/261.
3. Respondents accepted a 7% permanent impairment rating.
4. The claimant has proven by a preponderance of the evidence that he has sustained an 8% anatomical impairment rating for his SI joint condition.
5. The preponderance of the evidence provides that respondents controverted the SI joint impairment.
6. The claimant has proven by a preponderance of the evidence that he has sustained a diminished wage earning capacity of 30% in excess of his anatomical ratings.

DISCUSSION

The claimant, 51 years old, worked as a police officer in July 1997. The claimant went to a disturbance call and was in the process of arresting a man for disorderly conduct when he resisted arrest and a scuffle ensued. As a result of that incident, the claimant sustained a low back injury and a right sacroiliac joint injury. The claimant was diagnosed with a herniated disc in his back and has had no surgery for that condition but did undergo surgery for a SI joint problem. The claimant has participated in two previous hearings where continued medical treatment was an issue.

Before the claimant's SI joint surgery, he had pain in his low back and right leg and hip and was unable to sit very long, stand, walk or lay down. He could not squat or do anything without pain in his low back and right hip. According to the claimant, his SI joint surgery helped alleviate some of his pain. The claimant testified that the SI joint has remained basically the same since March of 2002. The claimant testified that he

now has pain radiating from the center of his low back down to both legs with a lot of muscle spasms and his tailbone hurts.

The claimant stated that he agreed with Dr. Robert Holladay, an orthopedic surgeon, who opined that he could stand, sit, or walk for periods up to 45 minutes to an hour and was capable of performing these for approximately 4 or 5 hours per day. The claimant confirmed that he cannot go eight hours at a time without pain such that he has to lay down. According to the claimant, he attempts chores such as cutting the grass using a riding lawn mower if he feels up to it during the day.

As a police officer, the claimant testified that he would make alarm calls, investigate accidents, go to disturbances and fights and perform all the tasks a police officer is required to do on patrol. According to the claimant, he returned to work as a police officer following the work injury and worked for 13 months, beginning in patrol unrestricted. In November 1997, he was placed on a desk job where he sat a great deal of the time. According to the claimant, he complained about the sitting causing him a lot of pain. He was changed to a desk job downtown where he worked eight hours, was off eight hours and would return to work for eight hours. The claimant stopped working in August 1998, when Dr. Stuart Phillips took him off work.

The claimant contends that he continues to need medical treatment for his hip and back and is currently getting only limited medical treatment; however, medical is not an issue at this hearing.

Under cross examination, the claimant confirmed that at a February 12, 2002, hearing following his SI joint surgery he told the judge he was 1000 percent better than before the surgery and was able to return to work. The claimant testified that he had

been released to return to work in January 2002. The claimant verified that he was working a desk job at a motel in February 2002 and he had some mini-strokes and was hospitalized and placed on a drug called Plavix. The claimant verified that he has had some knee problems since February 2002 and has experienced some heart problems, and takes medication for hypothyroidism. The claimant verified that he has not looked for work since February 2002. The claimant confirmed that he attempted to return to work for the city after his SI joint surgery but was not permitted to return to work. The claimant verified that he is not currently having any problems relating to his mini-strokes.

The claimant first contends that he has a permanent impairment relating to his SI joint problem and requests the Commission assign such.

Ark. Code Ann. §11-9-704(c) provides that a permanent impairment rating must be supported by objective and measurable physical findings. Objective findings are defined as “those which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16); see, *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Objective findings are based upon observable criteria perceived by someone other than a claimant. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992). The absence of a medically assessed degree of permanent physical impairment does not automatically preclude the claimant from being entitled to benefits for permanent physical impairment. It is the duty of the Commission to translate evidence into findings of fact. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In *Polk County v. Jones*, 74 Ark. App. 159,

47 S.W.3d 904 (2001), the Court held that in cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, the Commission has the duty to determine whether the claimant has met his burden of proof by using the *AMA Guides* when determining the existence and extent of permanent impairment.

The claimant underwent sacroiliac joint fusion on June 29, 2001. Dr. Sadasivan, on December 13, 2001, opined that the claimant had recovered nicely and could return to work in a light-duty capacity on January 7, 2002 and could return to work full duty about March 7, 2002. Dr. Sadasivan's operative report reveals that the claimant's right sacroiliac joint was fused based on instability and degeneration. Referring to the *AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.*, Table 75, provides that a surgically treated disk lesion without residual signs or symptoms results in an 8% body as a whole rating. The Louisiana Clinic in New Orleans had rated the claimant with a 10% permanent impairment rating pertaining to his sacroiliac syndrome problem before the surgery. Dr. Stuart Phillips also assigned a 10% permanent rating to the sacroiliac problem on June 21, 1999 and again this was before the fusion surgery. The claimant has received some relief from pain following the surgery and has been released to return to work following the surgery after completing his healing period. I find the claimant has sustained some permanent impairment for his sacroiliac problem and find the appropriate rating, utilizing the *AMA Guides, 4th Ed.*, is 8%.

Respondents contend a rating has not been assigned for the SI joint; therefore, those benefits have not been controverted. Both the Louisiana Clinic and Dr. Stuart Phillips assigned a 10% rating to the SI joint problem in 1999. That rating was not

accepted and paid. Controversion is a question of fact to be determined from the circumstances of the particular case by the Commission. *New Hampshire Ins. Co. v. Logan*, 13 Ark. App. 116, 680 S.W.2d 720.

I find the SI joint impairment rating has been controverted since these ratings were presented to respondents and were not paid. The claimant continued to experience SI joint problems and ultimately underwent surgery and sustained some permanent impairment.

The claimant next contends that he is entitled to wage loss benefits to exceed the anatomical ratings he has been assigned. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co., Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

In the present case, the claimant is 51 years old with a compensable work injury on July 9, 1997, that resulted in a right sacroiliac joint fusion in 2001 and bulging discs at L2-3 and L4-5. The claimant has a high school education and has work experience as a police officer in Houston, Texas; Magnolia, Arkansas and in Little Rock, Arkansas. Following the work incident, the claimant returned to work at the police department and worked about 13 months until August 13, 1998. The claimant did attempt to work for a short time performing a desk job at a family owned motel but left that job because of mini-strokes and treatment for that condition.

Dr. Robert Holladay, orthopedic surgeon, opined in correspondence dated January 21, 2003, about the claimant's condition and provided some guidance for returning to work.

Mr. Savage is physically capable of sitting, use of his upper extremities for grasp, fine manipulation, pushing and pulling, and reaching overhead. He is capable of sitting, standing, or walking for periods up to 45 minutes to an hour before he takes a position break. He is capable of sitting, standing, or walking for a total during the day of approximately 4-5 hours.

At this time, Mr. Savage should refrain from frequent repetitive bending, any heavy lifting of weights that weigh more than 25 pounds on a regular basis. (Cl. Exh. No. 2, p. 3.)

The claimant in his testimony agreed with the parameters set by Dr. Holladay. The claimant did testify that he could not go eight hours without laying down because of pain and testified he takes a number of prescription medications. The claimant's annual income before his work injury was approximately \$37,000.

After considering all the factors to determine wage loss, to include, age, education, work experience, medical evidence and other factors, I find the claimant has

sustained a decrease in his future earning capacity amounting to 30%. Evidence presented indicated that the claimant's physical abilities are limited and that he continues to remain in a substantial amount of pain and can work at less than full time. The claimant is no longer able to perform the duties of a patrol officer for the present employer and the bulk of his work experience has involved police officer work.

ORDER

The claimant has proven by a preponderance of the evidence that he has sustained an 8% anatomical impairment rating for his SI joint condition. The preponderance of evidence provides that respondents controverted the SI joint impairment. The claimant has proven by a preponderance of the evidence that he has sustained a diminished wage earning capacity of 30% in excess of his anatomical ratings.

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, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**