

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311769 & F200447

DAVID K. WILLIAMS,
EMPLOYEE

CLAIMANT

PINECREST LUMBER CO.,
EMPLOYER

RESPONDENT

EMPLOYERS INS CO OF WAUSAU,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 14, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 27, 2004 in Little Rock, Arkansas. A prehearing order was entered in this case on October 30, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. Employee/employer/insurance carrier relationship

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existed on or about 6-16-00 at which time claimant sustained a compensable injury.

2. The claimant reserves the right to supplement the proposed stipulations once pretrial discovery has been completed.

3. The claimant's compensation rate for TTD benefits is \$278.00 per week. The claimant's compensation rate for PPD is \$208.00 per week.

4. The employee/employer/insurance carrier relationship also existed between the parties on 6-30-03.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Payment of PPD benefits pursuant to a 12% rating Mr. Williams received from Dr. Oberlander.

2. Payment of medical expenses concerning an alleged aggravation or recurrence on 6-30-03 of Mr. Williams' first injury.

3. Controversion and attorneys fees.

4. The parties reserve the right to supplement the proposed issues once pretrial discovery has been completed.

DISCUSSION

1. Aggravation Verses Recurrence

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

After reviewing the entire record, I find that the preponderance of the evidence establishes that the claimant's neck problems since mid-2003 are a recurrence of his June 13, 2000 compensable neck injury, and not an aggravation or new injury caused by the slip in sawdust in June of 2003, by helping to load his cousin shortly proceeding the June 2003 slip, or by cervical degeneration.

In reaching this conclusion, I first note that I find the claimant's testimony highly credible. The claimant's credible testimony establishes by a preponderance of the evidence that, after being hit by a stack of falling 4X4 timbers on June 13, 2000, the claimant has returned to work with a neck condition which never resolved. He has had muscle spasms and required medication including muscle relaxers since that original injury. When he returned to work he required a significant amount of time to become capable of doing anything close to what he was capable of doing before the injury. Since June 13, 2000 he has been highly restricted in his ability to perform overhead work.

Furthermore, since 2000, the claimant has gone to the doctor an average of once every three months. He had no problems with his neck before June 2000, and he underwent a permanent impairment evaluation on November 12, 2002, some two and one-half years after the original injury, and approximately six months before the loading incident and the slip incident in mid-2003.

The claimant's credible testimony therefore establishes by a preponderance of the evidence that his 2000 work-related neck injury never resolved. On this record, I therefore find that a preponderance of the evidence

establishes that his ongoing neck problems after mid-2003 are causally related to his ongoing neck problems that he was experiencing before mid-2003 dating back to the work-related injury that occurred on June 13, 2000, and are a natural and probable result of that injury.

Because I find that the claimant has established by a preponderance of the credible evidence that his ongoing neck problems since mid-2003 are a recurrence of the neck injury that he sustained on June 13, 2000, I find that the respondents are liable for reasonably necessary medical treatment for the claimant's ongoing neck problems. However, the respondents are directed to reduce dollar for dollar the amount of benefits that the claimant has previously received from group health insurance for the medical services at issue, and the respondents are directed to hold in reserve for a period of five years the amount of such potential subrogation claims as a result of said group health insurance payments. See Ark. Code Ann. § 11-9-411.

2. Permanent Anatomical Impairment

The claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 2003), provides

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that "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" is defined as more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann.

§ 11-9-102(14). Further, any determination of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1)(B). In addition, pursuant to Ark. Code Ann. § 11-9-522(g), the Commission has adopted the Guides to the Evaluation of Permanent Impairment, Fourth Edition, for assessing anatomical impairment, "exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine." See Commission Rule 34.

The Commission is required to weigh the medical evidence and to translate this medical evidence into an appropriate finding regarding permanent impairment using the AMA Guides. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). Thus, the Commission may assess its own

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impairment rating using the Guides rather than relying solely on its determination of the validity of ratings assigned by physicians. Id.

Among the other criteria governing assignment of an anatomical impairment rating, it must be determined when the condition, particularly a soft tissue injury, becomes "permanent." The Guides define a "permanent impairment" as an "impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment." See Guides, 4th Ed., page 315. Accord Guides, 4th Ed., page 9: "An impairment should not be considered 'permanent' until the clinical findings, determined during a period of months, indicate that the medical condition at issue is static and well stabilized."

In the present case, the claimant's attorney at the beginning of the hearing argued that any disk bulges identified by MRI are objective, and that the claimant is entitled to a 12% impairment rating on the following basis:

We would argue also that we've got a protrusion following this injury of 2000 at the L5-S1 level. And besides Table V here, if we go to the AMA Guides, Page 110, Table 7-2 and Table 7-3, we're going to see that basically for this soft tissue lesion, we're going to end up with what we're

arguing for is a five percent for the protrusion at the cervical area, five percent for the protrusion at the lumbar area, and a combined value of ten percent on all those on objective findings and also still use objective findings in the functional capacity to bring it back up to a 12 percent. And basically that's our position on that, Your Honor.

For their part, the respondents rely on the conclusions of Dr. Safman, who has opined that the claimant will sustain zero percent anatomical impairment from his work-related injury. As a threshold matter, I note, as has the claimant's attorney, that the functional capacity evaluation and anatomical impairment rating performed during a November 12, 2002 evaluation appears to have relied significantly on active range of motion testing in the cervical spine, and by law, range of motion tests performed on the spine are not considered objective findings. See Ark. Code Ann. § 11-9-102(16) (A) (ii) (Repl. 2002).

Furthermore, although the claimant's attorney asserts that the claimant has sustained permanent anatomical impairment as a result of cervical and lumbar disk protrusions, I note that Dr. Cathey reviewed the claimant's MRI on September 19, 2000. While Dr. Cathey's report notes the presence of disk protrusions at C6-7 and L5-S1, I note

that Dr. Cathey ultimately diagnosed the claimant with "musculoskeletal injury to the neck and low back" which I do not interpret as a diagnosis of a disk injury. Furthermore, upon a close evaluation of Mr. Dahlke's November 12, 2002 anatomical impairment rating, at no point did Mr. Dahlke specifically indicate that he was assigning the claimant any anatomical impairment for lumbar disk bulges, and at no point did he indicate that the anatomical impairment that he assigned pursuant to Table 75 of the AMA Guides at page 113 was for intervertebral disk injury as opposed to soft tissue lesion (as Dr. Cathey appears to have diagnosed). Based on Dr. Cathey's diagnosis of a musculoskeletal injury, and the presence of objective cervical muscle spasms some three years after the 2000 injury, the preponderance of the evidence does establish that the claimant has experienced a permanent soft tissue lesion objectively established by the presence of cervical muscle spasm so as to entitle the claimant to benefits for a permanent anatomical impairment for a stable un-operated soft tissue lesion in the cervical spine with medically documented injury, pain, and rigidity,

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pursuant to Table 75 II. B. on page 113 of the AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.

However, whereas Mr. Dahlke indicated that Table 75 assigns a four percent rating for an impairment affecting two levels of the spine, my understanding of Table 75 II. B. and F. is that Table 75 assigns a four percent impairment for the first level of involvement of soft tissue injury in the cervical spine, and an additional one percent impairment for each additional level for multiple level injuries. Consequently for soft tissue lesion extending to two levels of the cervical spine, the preponderance of the evidence establishes that the claimant is entitled to a five percent anatomical impairment to the body as a whole under Table 75, and not the four percent assigned by Mr. Dahlke under Table 75. Likewise, I note, as did the claimant's attorney at the hearing, that Table 72 on page 110 would also assign the same 5% impairment to the whole body for minor neck impairment that I have calculated under Table 75 on page 113.

Furthermore, the claimant's testimony regarding his symptom onset and persistence, along with his diagnostic

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test results and physician diagnoses and observations, persuade me that a preponderance of the evidence establishes that the claimant's 2000 soft tissue injury at work is the major cause (and even the sole cause) of the 5% anatomical impairment that I have calculated using two methods under the Guides. The persistent 2000 injury is also the major cause for his need for medical treatment for the neck, and that injury is the major cause of any disability currently attributable to his neck. I therefore find that the claimant has established by a preponderance of the evidence any and all requirements necessary to establish the compensability of his 5% anatomical impairment caused by his 2000 soft tissue injury at work.

To the extent that the claimant also seeks benefits for a lumbar spine impairment, I am simply not persuaded from the evidence presented that the claimant has sustained any permanent lumbar spine impairment related to his 2000 injury, since the claimant has failed to establish that he experienced any lumbar disk protrusion or herniation in that injury and has no other potential objective findings establishing any lumbar impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employee/employer/insurance carrier relationship existed on or about 6-16-00 at which time claimant sustained a compensable injury.

2. The claimant reserves the right to supplement the proposed stipulations once pretrial discovery has been completed.

3. The claimant's compensation rate for TTD benefits is \$278.00 per week. The claimant's compensation rate for PPD is \$208.00 per week.

4. The employee/employer/insurance carrier relationship also existed between the parties on 6-30-03.

5. The claimant's cervical neck problems after mid-2003 are a recurrence of his work-related June 13, 2000 neck injury.

6. The preponderance of the evidence establishes that the claimant has sustained a five percent permanent anatomical impairment as a result of his June 13, 2000 work-related cervical injury.

7. The respondents are entitled to a dollar for

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dollar offset on any medical benefits previously paid by group health insurance, and the respondents are directed to hold in reserve for a period of five years the amount of potential subrogation claims arising out of those group health insurance payments.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge