

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E809076**

**JERRY M. WILSON, EMPLOYEE**

**CLAIMANT**

**JENNIFER CONSTRUCTION COMPANY,  
INC., EMPLOYER**

**RESPONDENT**

**CINCINNATI INSURANCE COMPANY,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED APRIL 16, 2004**

Matter before Chief Administrative Law Judge David Greenbaum submitted on March 22, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted August 4, 2003, to determine the claimant's entitlement to additional workers' compensation benefits.

This claim has a lengthy and complicated procedural history. It has been the subject of multiple prehearing conferences, as well as two (2) formal hearings which will be summarized herein.

It is undisputed that the claimant sustained a compensable injury on July 17, 1998, when while working for Jennifer Construction Company, several roof trusses fell on him, striking his right hip and back. The claimant sustained a lumbar back injury, as well as a post-traumatic deep vein thrombosis in the right

lower extremity. At the time of the injury, claimant's average weekly wage was \$484.00, entitling him to compensation rates of \$324.00 per week for temporary total disability and \$243.00 per week for permanent partial disability. Respondents paid various medical and related expenses, as well as temporary total disability through November 6, 1998, at which time respondents controverted claimant's entitlement to further benefits.

A hearing was conducted on September 13, 1999, to determine claimant's entitlement to further benefits. At that time, the claimant was represented by Ms. Patricia Young-Bryant. An Opinion was filed on October 13, 1999, awarding claimant additional medical treatment while finding that the claimant was not entitled to additional temporary total disability. No appeal was taken by either party from the October 13, 1999, decision. Apparently, respondents paid the medicals awarded therein. Respondents had previously controverted claimant's entitlement to all indemnity benefits beyond those previously paid, including entitlement to permanent disability benefits, if any.

A prehearing conference was conducted on May 28, 2003, and a Prehearing Order was filed on said date. By agreement of the parties, the issues to be presented for determination included:

- 1) Respondents' responsibility for outstanding medical expenses; and,
  - 2) claimant's entitlement to permanent impairment benefits.
- By agreement of the parties, the claim was scheduled for a formal

hearing on August 4, 2003. At the hearing, the parties announced that the issues, as well as their respective contentions were properly set out in the Prehearing Order which was introduced without objection as "Commission's Exhibit 1."

Claimant contended, in summary, that all of his outstanding medical expenses were reasonably necessary, as well as related to the admitted injury and should be paid by the respondents. In addition, the claimant contended that he had sustained an eleven percent (11%) permanent impairment. The claimant requested a controverted attorney's fee on any additional benefits awarded. Conversely, respondents contended that it paid all reasonably necessary, and authorized medical expenses; that following the first hearing, the claimant changed physicians to Dr. Simpson at UAMS which respondents accepted and paid, and that any further medical treatment was unauthorized and outside the chain of valid referrals and, therefore, was the claimant's responsibility. Respondents further maintained that the claimant did not sustain any permanent impairment as the result of the admitted injury.

The claimant was the only witness to testify at the August 4, 2003, hearing. Several medical reports were introduced by both parties. The aforementioned two issues were then presented for determination based upon the transcript of the August 4, 2003, hearing, together with the evidentiary depositions of Dr. Robert H. May, and Dr. Jim J. Moore which were introduced

as respondent's exhibits "B" and "C," respectively, and retained in the Commission file in bound form.

An Interim Order and Opinion was filed on September 23, 2003. After a thorough review of the record as a whole, this administrative law judge found significant and conflicting medical evidence which were extremely difficult to reconcile. In addition, after a personal observation of a part of the claimant's anatomy which was the subject of disagreement between Dr. May and Dr. Moore in their respective depositions, specifically, the presence or absence of discoloration which is an objective finding, it was concluded that an independent medical examination and evaluation was necessary in this case. Accordingly, the Interim Order and Opinion was filed selecting Dr. Kenneth Rosenzweig, an orthopedic specialist with Arkansas Specialty Orthopedics, to perform an examination and evaluation at respondents' expense. By necessity, claimant's entitlement to permanent impairment benefits, if any, was held in abeyance pending receipt of a narrative report from Dr. Rosenzweig. The parties were directed to communicate with each other, and with Dr. Rosenzweig's office in arranging a mutually convenient time for the examination and evaluation. In addition, the parties were to provide Dr. Rosenzweig with any diagnostic studies and/or reports to assist him, in avoiding a duplication of studies. The parties cooperated, and the claimant subsequently underwent an independent medical examination and evaluation by Dr. Rosenzweig on

November 18, 2003. Dr. Rosenzweig then issued a ten (10) page narrative report which was sent to both parties. By letter/fax dated December 17, 2003, claimant's attorney submitted Dr. Rosenzweig's report. In another letter/fax dated December 23, 2003, claimant's attorney amended his contentions, maintaining that claimant was entitled to the thirty-three percent (33%) impairment rating assigned by Dr. Rosenzweig rather than the eleven percent (11%) whole body impairment originally contended at the August 4, 2003, hearing.

Another prehearing conference was conducted on January 14, 2004. Respondents requested the opportunity to cross-examine Dr. Rosenzweig. By agreement of the parties, Dr. Rosenzweig's deposition was scheduled for March 1, 2004. Rather than conduct another hearing, the parties agreed to submit the issues presented at the most recent hearing based upon the record of said hearing, conducted August 4, 2003, the report issued by Dr. Rosenzweig following the November 18, 2003, IME, and his evidentiary deposition. The deposition of Dr. Rosenzweig was received on March 22, 2004, at which time the claim was submitted for decision.

From a review of the record as a whole, to include medical reports, documents, depositions, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On July 17, 1999, the claimant sustained a compensable injury arising out of and during the course of his employment with Jennifer Construction Company, as which time he earned sufficient wages to entitle him to compensation rates of \$324.00 per week for temporary total disability and \$243.00 per week for permanent partial disability.
3. The Opinion and Award filed October 13, 1999, was not appealed by either party and the findings of fact and conclusions of law reached therein are now final, and the law of the case.
4. Respondents have paid all appropriate temporary total disability to which the claimant is entitled.
5. The claimant's healing period ended on or before March 15, 1999.
6. Respondents have paid for all medical expenses awarded in the prior decision.
7. The claimant has failed to prove, by a preponderance of the credible evidence, that any of his outstanding medical expenses are reasonably necessary, authorized, and related to the admitted injury and, therefore, the responsibility of the respondents. Specifically, treatment by Dr. Ed

Engelhoven, D.C., Dr. Harold Chakales, and Dr. Robert H. May were self-referrals, outside the chain of authorized, treating physicians previously awarded. Under A.C.A. §11-9-514, any unauthorized medical treatment is at the claimant's expense.

8. The claimant has proven, by a preponderance of the credible evidence, that he is entitled to permanent impairment benefits of five percent (5%) to the body as a whole for his compensable back injury, as well as a twenty-five percent (25%) impairment to the right lower extremity related to the claimant's compensable post-traumatic deep vein thrombosis and chronic lymphedema of the right lower extremity.
9. Respondents have controverted all benefits beyond those previously paid.
10. Issues not addressed herein, including, but not limited to claimant's entitlement to wage-loss disability is specifically reserved.

#### DISCUSSION

As previously noted, the parties agreed to litigate two (2) issues. Specifically, the issues presented for determination included, first, whether the respondents were responsible for outstanding medical expenses beyond those previously paid, and, second, claimant's entitlement to permanent impairment benefits. By necessity, any additional issues, including claimant's entitlement to vocational rehabilitation and wage-loss disability are specifically reserved.

### ADDITIONAL MEDICAL TREATMENT

A hearing was conducted in this claim on September 13, 1999, to determine whether the claimant was entitled to additional workers' compensation benefits. In an Opinion filed October 13, 1999, it was found, *inter alia*, that the claimant had failed to prove entitlement to additional temporary total disability; but, that the claimant had proven entitlement to continued, reasonably necessary medical treatment for his compensable injury. Further, it was determined that the claimant was entitled to a change of treating physicians, and, in fact, that the claimant could change treating physicians and seek medical treatment for his compensable injury from any physician he selected, and that respondent, Cincinnati Insurance Company, would be responsible for the outstanding medical and related expenses through the date of the prior hearing, reimburse the claimant for any out-of-pocket medical and related costs, and remained responsible for additional medical treatment by a provider selected by the claimant. No appeal was taken from the prior decision. It is undisputed that the respondents paid the medicals awarded in the prior decision, including follow-up medical care by the physician selected by the claimant.

At the August 4, 2003, hearing, claimant testified that based upon the prior Award, he selected Dr. Simpson at UAMS to provide his follow-up treatment. Dr. Simpson ran additional diagnostic studies, including an

ultrasound previously recommended. The claimant stated that he remained under the care of Dr. Simpson for approximately six (6) months, at which time he was released to return on an as-needed basis. Thereafter, the claimant elected to discontinue all treatment because he did not feel he was improving. The claimant stated that he went without treatment for approximately one year. Thereafter, the claimant, on his own and without prior approval, made a self-referral to Dr. Ed Engelhoven, a chiropractor. Later, the claimant went to Dr. Harold Chakales, an orthopedic surgeon in Little Rock, Arkansas. The claimant personally paid for the unauthorized treatment provided by Dr. Engelhoven and Dr. Chakales. In addition, in June, 2002, the claimant was examined one-time only by Dr. Robert H. May, an orthopedic surgeon in Russellville, Arkansas. Dr. May was a former classmate of the claimant's brother. The sole purpose of claimant's examination by Dr. May was to assess permanent impairment. (Tr.10-17)

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13

S.W.3d 218 (2000).

However, both A.C.A. §11-9-508 and A.C.A. §11-9-514 provide for a one-time only change of physicians which as reflected above, the claimant has already selected. Under our law, the claimant has already exercised his rights and respondents have paid for the treatment provided following the claimant's change of physicians and treatment previously awarded. The Act clearly states that all medical treatment or services furnished or prescribed by any physician other than the ones selected according to A.C.A. §11-9-514, except for emergency treatment, shall be at the claimant's expense. A.C. A. §11-9-514(b).

The claimant has previously exercised his right to change treating physicians. The treatment provided by Drs. Engelhoven, Chakales, and May was not emergency treatment. Accordingly, said treatment is at the claimant's expense and is not reimbursable.

#### PERMANENT IMPAIRMENT

The claimant has been examined and evaluated by several physicians since his release by Dr. Simpson at UAMS, which was his last authorized physician. The claimant began receiving chiropractic treatment from Dr. Ed Engelhoven on April 2, 2001. Dr. Engelhoven did not assess any permanent impairment while recommending continued chiropractic treatment. He opined that, with proper treatment, the claimant should be able to partially or possibly

completely recover from his injury. (Cl. Ex. A, p.1)

The claimant next went to see Dr. Harold H. Chakales, an orthopedic surgeon in Little Rock, Arkansas, on his own. Dr. Chakales initially examined the claimant on August 20, 2001, at which time he diagnosed a lumbar disc syndrome, as well as deep venous thrombosis involving the right lower extremity by history which was being treated with medication. Dr. Chakales opined that he did not believe the claimant was a candidate for rehabilitation. He further exceeded his authority by opining that the claimant was permanently totally disabled, which is not a medical decision while, at the same time, failing to assess any permanent impairment. The claimant maintained that Dr. Chakales did not assess impairment because he did not, "want to get involved." (Cl. Ex. A, p.4)(Tr.41)

The claimant was next examined and evaluated by Dr. Jim J. Moore, a neurosurgeon in Little Rock, Arkansas, at respondents' request. Dr. Moore initially evaluated the claimant on May 16, 2002. He concluded that the claimant's diagnosis was post-traumatic deep vein thrombosis right lower extremity, resolved; musculoligamentous sprain/strain and contusion lumbar; symptoms consistent with radiculitis to the left buttock but without evidence of disk herniation. He opined that this was soft tissue trauma, superimposed on degenerative changes. Because of claimant's deconditioned state he recommended a functional capacity evaluation, as well as a possible EMG/NCV

study of the back and lower extremity which the claimant eventually underwent. Apparently, the FCE indicated that the claimant displayed the ability to perform medium work; however, wage-loss disability has been reserved. Dr. Moore did not change his diagnosis following the additional studies. (Cl. Ex. A, pp.9-18)

The claimant was next examined and evaluated by Dr. Robert H. May. In a report dated July 31, 2002, he assessed an eleven percent (11%) permanent partial impairment, solely related to the claimant's admitted back injury without consideration of the claimant's compensable deep vein thrombosis which will be discussed further below. However, Dr. May utilized the AMA Guide to Permanent Impairment, Fifth Edition in assessing impairment, and also included three percent (3%) impairment for pain which is not permissible under the Workers' Compensation Act. (Cl. Ex. A, p.22)

As previously noted, respondents took the evidentiary depositions of both Dr. May and Dr. Moore which were introduced and retained in the Commission file as respondents' exhibits "B" and "C", respectively.

Following a thorough review of the record as a whole, to include substantial conflicting evidence, which was difficult to reconcile, together with my personal observations, previously noted, it was determined that an independent examination and evaluation was necessary in this case. An Interim

Order and Opinion was filed September 23, 2003, appointing Dr. Kenneth Rosenzweig, an eminently, well qualified medical provider, often utilized by this Commission, to perform an independent medical evaluation. Dr. Rosenzweig is also Board Certified by both the American Board of Orthopedic Surgery, as well as the American Board of Independent Medical Examiners. His expertise in evaluating impairment far exceeds the qualifications of most medical experts. Dr. Rosenzweig was selected for the purpose of assessing permanent impairment. He evaluated the claimant on November 18, 2003, and issued a ten-page narrative report which is set out in limited part below :

**Permanent Impairment**

He has been rated by Dr. May. According to his visit today, he is a candidate for the following PPI rating:

- Regarding the abdominal wall injury, he is a candidate for a 5% impairment using table 7 on page 247.
- In regard to his crushing back injury, he is a candidate for a 5% impairment using table 72 on page 110.
- In regard to his chronic lymphedema and DVT, he is a candidate for a 25% impairment using table 14 on page 198.

Using the Combined Values Chart, he has a total body impairment of 33% as a result of these injuries.

Based upon the foregoing report, another prehearing conference was conducted on January 14, 2004, and a Prehearing Order was filed on January 15, 2004. Respondents requested the opportunity to cross-examine Dr. Rosenzweig. By agreement of the parties, his deposition was scheduled for

March 1, 2004. Rather than conduct another hearing, the parties agreed to submit the issues presented at the August 4, 2003, hearing based upon the record of said hearing, together with the ten-page narrative report and Dr. Rosenzweig's evidentiary deposition.

Rather than conduct an exhaustive analysis of Dr. Rosenzweig's deposition, suffice it to say that a fair and impartial reading of the deposition, in its entirety, reflects that Dr. Rosenzweig, in his November 18, 2003, report, assessed permanent impairment without regard to whether the impairment was causally related to the July 17, 1998, admitted injury. Further, it is apparent, and, in fact, Dr. Rosenzweig conceded, that using the appropriate tables in the AMA Guide to Permanent Impairment, Fourth Edition, the permanent impairment for the claimant's chronic lymphedema and DVT should actually be rated to the right lower extremity as a whole. Dr. Rosenzweig was specifically asked to address the permanent impairment tables. A portion of his deposition is set out below. Further, a copy of the table was introduced as an exhibit to Dr. Rosenzweig's deposition.

Q And I want to make sure that the Commission knows. Table 69 is exactly the same table as Table 14 except it's to the lower extremity, is that correct?

A Table 69 heading says, "Lower Extremity Impairment Due to Peripheral Vascular Disease."

Q And that's all we're talking about here, right?

A Lower extremity impairment. But Table –

Q I'm talking about the classes and what's listed under the classes and the numbers are all –

A It appears to be word for word –

Q Word for word.

A – the same table.

Q And as we sit here today, do you know in what situation you would use Table 69 versus Table 14?

A I don't have a good answer for that.

Q Okay.

A I mean, they're the exact same table. The table I used is a little more definitive in its heading than this one.

Q And definitive is it uses the whole body as opposed to the lower extremity rating, right?

A Can you refresh my memory of that page number, the one I used?

Q I think it's – I actually turned to it, 198.

A All right. On Page 198 compared to –

Q It uses impairment of the whole person as opposed to impairment –

A Well, the heading of the table, Table 69, says, "Lower Extremity Impairment Due To Peripheral Vascular Disease," and Table 14, it says, "Impairment of lower Extremity Due to Peripheral Vascular Disease." The discrepancy is in the class definition itself where it says percent impairment of the whole person, and on Table 69 it just says – it doesn't have whole person written down.

Q It just has parentheses?

A It just has parentheses.

Q Let me ask you, if you go –

A But the heading is the same, both say lower extremity impairment.

Q Right. If you go up these other tables, would you agree with me that they all have parentheses around lower extremity?

A Typically a table will have foot, lower extremity, whole person, or the corresponding. And, invariable, if we report – most generally we're asked for a whole person or vice versa. (D. 42-43) (Exhibit 1)

Dr. Rosenzweig further conceded that the five percent (5%) impairment for the abdominal wall injury was related to a prior hernia injury, the etiology of which is unknown. Accordingly, after a review of all the medical evidence, it is herein concluded that the claimant has proven, by a preponderance of the credible evidence, that he sustained a five percent (5%) impairment with regard to his crushing back injury, as well as a twenty-five percent (25%) impairment to the right lower extremity with regard to his chronic lymphedema and DVT.

#### AWARD

Respondent, Cincinnati Insurance Company, is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$243.00 per week for a total of 68.5 weeks, representing a five percent (5%) whole body impairment related to the claimant's low back (22.5 weeks)

and a twenty-five percent (25%) impairment related to the claimant's lymphedema and DVT (46 weeks).

All permanent disability having previously accrued, respondents are directed and ordered to pay same in lump sum of \$16,645.50 and without discount.

Additionally, claimant's attorney, Mr. Kenneth A. Olsen, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715; Coleman vs. Holiday Inn, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc., Arkansas Workers' Compensation Claim #E019760, (March 5, 1992).

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge