

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F203901

LARRY YOUNG, Employee	CLAIMANT
ROCKLINE INDUSTRIES, Employer	RESPONDENT
UNITED STATES FIRE INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED JULY 1, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GAIL PONDER GAINES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 2, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 7, 2004, and a pre-hearing order was filed on April 8, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained compensable injuries to his cervical spine and right upper extremity on November 16, 2001.
4. Respondent has paid compensation at the rates of \$285.00 per week for total disability benefits and \$214.00 for permanent partial disability benefits.
5. Respondent has accepted liability for an 11% permanent impairment to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensation rate.
2. Claimant's entitlement to additional medical treatment.
3. Additional temporary total disability benefits from December 16, 2003 through a date yet to be determined.
4. Alternatively, wage loss.
5. Attorney fee.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$285.00 per week for total disability benefits and \$214.00 per week for permanent partial disability benefits.

Claimant contends that although his treating surgeon has released him and assessed a permanent impairment rating, he is in need of additional medical treatment and that he reentered his healing period on or about December 16, 2003 and is entitled to temporary total disability from that date until a date yet to be determined. In the alternative, if the commission determines that the claimant is not entitled to additional temporary total disability benefits, claimant contends he is entitled to permanent disability benefits greatly in excess of his 11% impairment rating. Claimant contends that his attorney is entitled to an appropriate attorney's fee.

Respondents contend claimant has been treated, rated, and released by his surgeon and respondents have accepted and paid for all of this treatment and have accepted and are paying the impairment rating issued. Respondents contend that additional medical treatment is not reasonable and necessary treatment for the compensable injury, but for some other unrelated medical condition suffered by the claimant. Respondents further contend that the claimant is not within his healing period and is not totally incapacitated from working. Respondents further contend that claimant is not entitled to wage loss disability benefits as he has been returned to work by his treating physician and an FCE and work was provided to him by Rockline within whatever

restrictions applied for the same rate of pay he received prior to his injury.

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, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 7, 2004, and contained in a pre-hearing order filed April 8, 2004, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$285.00 per week for total disability benefits and \$214.00 per week for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his right shoulder as a result of the November 16, 2001 compensable injury.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment as a result of the injury to his cervical spine.

5. Claimant has failed to prove by a preponderance of the evidence that he is temporarily totally disabled as a result of his compensable injury. Specifically, claimant has failed to prove that he suffers a total incapacity to earn wages.

6. Having found that claimant remains within his healing period for his right shoulder, his condition has not become stable and permanent; therefore, claimant's alternative request for permanent partial disability benefits is premature.

FACTUAL BACKGROUND

The claimant is a 57-year-old man who obtained his GED and attended business college for approximately one year. Claimant worked in the respondent's shipping department and suffered a compensable injury to his cervical spine and right upper extremity when he was struck in the back with a pallet on a forklift on November 16, 2001.

After some initial medical treatment the claimant eventually came under the care of Dr. David Davis and Dr. Luke Knox. Dr. Davis diagnosed the claimant as suffering from a probable disc herniation at the C5-6 level and carpal tunnel syndrome on the right side. Dr. Davis recommended that claimant undergo a carpal tunnel release. Dr. Knox concurred in Dr. Davis' opinion and indicated that further treatment for the claimant's cervical spine would be deferred until the claimant underwent the carpal tunnel release. The carpal tunnel release was performed by Dr. Knox on April 1, 2002. Following that release the claimant still had complaints of pain and numbness in his right arm and hand. As a result, claimant underwent a cervical fusion which was performed by Dr. Knox in July 2002.

After the cervical fusion claimant still had complaints in his right arm and hand and he underwent an independent medical evaluation by Dr. Standefer in March 2003. Dr. Standefer in a report of that date noted that claimant had residual symptoms consistent with nerve root dysfunction. Dr. Standefer also noted that those symptoms might not improve but recommended that claimant undergo an additional myelogram and post-myelogram CT. This testing had already been recommended by Dr. Knox. Following the myelogram/CT myelogram claimant was again evaluated by both Dr. Davis and Dr. Knox. Dr. Knox in a report of May 13, 2003 indicated that the testing revealed a small central disc herniation and encroachment at the C3-4 and C4-5 levels. Dr. Knox said he would consider removing the fusion at the C5-6 level and operating on the levels above in an attempt to relieve the claimant's complaints. However, Dr. Knox indicated that he wanted

a second opinion from Dr. Davis. In a report dated May 13, 2003, Dr. Davis noted that an NCV performed on the claimant showed compatibility with distal median neuropathy. Dr. Davis recommended that the claimant use splints on his hand in an effort to determine whether the symptoms would be alleviated. Dr. Davis stated that if the symptoms improved this would indicate that claimant's symptoms were distal in nature, not radicular.

Claimant returned to see Dr. Knox on July 15, 2003 and Dr. Knox noted that Dr. Davis had diagnosed claimant as suffering from possible radial tunnel syndrome. As a result, Dr. Knox referred claimant to Dr. Jim Moore, a hand specialist, for further evaluation. Dr. Knox also stated at that time that he did not believe that further surgery on claimant's cervical spine would be beneficial. Claimant was evaluated by Dr. Jim Moore on August 14, 2003. Dr. Moore stated in his report that the weakness in claimant's hand was not explained by the NCV study. Dr. Moore opined that claimant was not suffering from radial tunnel syndrome and that claimant's symptoms were not coming from his forearm or hand. Dr. Moore stated that claimant might need an MRI of the brachial plexus and cervical spine, but would defer to the opinions of Drs. Davis and Knox.

Claimant was again evaluated by Dr. Knox on October 3, 2003 and he stated in his report that he would not recommend any further surgical option. It was Dr. Knox's opinion that claimant had reached maximum medical improvement with respect to his cervical spine condition. Dr. Knox assigned a permanent physical impairment rating in an amount equal to 13% to the body as a whole and ordered a functional capacities evaluation to determine the claimant's level of function.

The functional capacities evaluation was performed on November 12, 2003 and indicated that claimant was capable of performing medium work. Following that evaluation Dr. Knox in a report dated November 20, 2003 released the claimant to return to medium work as outlined in the functional capacities evaluation. Also subsequent to that date Dr. Knox indicated that claimant's permanent physical impairment rating equaled 11% to the

body as a whole, not 13% to the body as a whole. Respondent has accepted liability for the 11% impairment rating.

Following claimant's release by Dr. Knox the claimant returned to work for the respondent for one day. Instead of returning to the respondent's shipping department the claimant was placed in the respondent's receiving department. According to Ronny Mooneyham, claimant's supervisor, the claimant was to unload paper by operating a clamp truck, a forklift-type device. Claimant was also required to use a scan gun to identify various pallets of paper and their location in the warehouse. Claimant was also required to use a bar to set a dock plate onto trucks for unloading.

Claimant testified that on the date he returned to work he had trouble operating the scan gun due to problems in his hand. He also testified that he had pain in his neck caused by twisting to look while operating the clamp truck. Claimant testified that he did not mention any of these problems to the respondent that day but that the next day Ronny Mooneyham asked him how his day had gone. Claimant informed Mooneyham that he had had pain and that he did not sleep well that night. As a result, Mooneyham told claimant that before he performed any additional work he needed to talk to Michael Coleman, the respondent's human resource representative. Claimant returned home and telephoned Coleman later that morning. According to claimant's testimony Coleman did not offer to change the claimant's job duty, but indicated that claimant had been released to return to work and that the job offered to him was within the restrictions imposed by Dr. Knox. Coleman testified that he instructed claimant to contact his nurse case manager who would help him get an appointment with Dr. Knox. Coleman testified that he did not hear from the claimant after that date.

After his attempt to return to work the claimant did not return to Dr. Knox for additional medical treatment. Instead, claimant sought medical treatment from his family physician, Dr. Norys. Dr. Norys in a report dated December 16, 2003 indicated that

claimant continued to have significant pain and suggested that claimant remain off work until a second neurosurgical opinion could be obtained. Claimant subsequently filed for a change of physicians and in an order filed February 26, 2004, Pat Capps Hannah of the Commission's Medical Cost Containment Department authorized a change of physician to Dr. Raben. Dr. Raben in a report dated April 26, 2004 stated that it was most likely that claimant has significant osteophytosis which was present on the last CT/myelogram. Dr. Raben suggested a repeat CT/myelogram followed by other interventions including selective nerve blocks.

In addition to Dr. Raben claimant has also been evaluated by Dr. Sites who has diagnosed claimant as suffering from right shoulder rotator cuff tendinopathy, with impingement. He also diagnosed claimant as suffering from right acromioclavicular joint arthrosis with impinging osteophytes. Dr. Sites has recommended that claimant receive injections and therapy in an effort to alleviate claimant's symptoms. If claimant's symptoms are not relieved, surgery may be necessary.

Claimant has filed this claim contending that he is entitled to additional medical treatment as a result of his compensable injury. He also seeks payment of additional temporary total disability benefits beginning December 16, 2003 and continuing through a date yet to be determined. Alternatively, claimant seeks payment for wage loss as a result of his compensable injuries.

ADJUDICATION

ADDITIONAL MEDICAL.

RIGHT SHOULDER.

_____ Claimant contends that he is entitled to additional medical treatment for his right shoulder. The claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury.

Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 16, 1989 (D612291).

I find after reviewing the evidence presented that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to medical treatment for his right shoulder injury.

It should be noted that the parties have stipulated that claimant suffered a compensable injury on November 16, 2001 to his cervical spine and right upper extremity. Claimant's right upper extremity would include his shoulder. The respondent contends that claimant's right shoulder complaints did not appear until he saw Dr. Raben in 2004, more than two years after his compensable injury. However, this is incorrect. After claimant's injury he sought medical treatment from Dr. William Kendrick on December 3, 2001. Dr. Kendrick's medical report of that date indicates that claimant was not to engage in any repetitive activity that involved the neck or "shoulder." Furthermore, claimant's next visit occurred on December 7, 2001 with Dr. Robert Wilson. Dr. Wilson's medical report of that date indicates that claimant is "Still having discomfort in the right shoulder..." (Emphasis added.)

More recently the respondent carrier referred claimant to Dr. Standefer for an independent medical evaluation in March 2003. Dr. Standefer's medical report of March 5 indicates that claimant was complaining of pain in his neck and right shoulder. In addition, Dr. Davis' medical report of May 8, 2003 indicates that claimant was complaining of right shoulder pain which Dr. Davis stated was probably musculoskeletal with probable impingement syndrome.

Thus, claimant's right shoulder complaints did not appear only after he sought medical treatment from Dr. Raben. Instead, the initial medical reports approximately two weeks after claimant's injury indicate that he was complaining of right shoulder pain. Complaints of right shoulder pain were also confirmed by Dr. Standefer and Dr. Davis in

2003.

Claimant has been referred to Dr. Sites for medical treatment relating to his right shoulder condition. Dr. Sites has recommended that claimant undergo injections and therapy in an effort to alleviate his complaints. Dr. Sites has stated that claimant's failure to improve from that treatment may result in a surgical procedure.

After consideration of all this evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his right shoulder as a result of the compensable injury on November 16, 2001. The medical evidence indicates that claimant was making complaints of right shoulder pain at the time of his initial medical treatment. Furthermore, claimant also complained of right shoulder pain to Dr. Standefer and Dr. Davis in 2003. Based upon this evidence as well as the medical report and opinion of Dr. Sites, I find that claimant is in need of additional medical treatment relating to his right shoulder.

CERVICAL SPINE.

_____After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he is in need of any additional medical treatment relating to his cervical spine. In support of his contention that he is in need of additional medical treatment claimant relies upon his own testimony as well as the opinion of Dr. Raben that a repeat CT/myelogram is necessary along with possible injections. However, I note that claimant underwent a CT myelogram at the request of Dr. Knox in May 2003. After reviewing that myelogram Dr. Knox was of the opinion that additional surgery was not needed. Dr. Knox also opined that claimant had reached maximum medical improvement as a result of his cervical injury, assigned claimant a permanent physical impairment rating, and released him to return to work at medium work in accordance with a functional capacities evaluation.

With respect to this issue, I also believe it is important to note that on March 22,

2004 Dr. Miles Johnson performed an electrodiagnostic study of the claimant's right upper extremity and cervical paraspinal musculature. Dr. Miles' report states the following:

IMPRESSION: Essentially normal electrodiagnostic study of the right upper extremity and corresponding cervical paraspinal musculature. There is no electrodiagnostic evidence to suggest cervical radiculopathy, brachial plexopathy, generalized peripheral neuropathy, or peripheral nerve entrapment syndrome or injury.

Based upon the testing performed by Dr. Johnson, the fact that claimant had already undergone a CT/ myelogram in May 2003 and the opinion of Dr. Knox, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his cervical spine injury. Dr. Knox has opined that additional surgery would not be necessary and has opined that claimant has reached maximum medical improvement with respect to his cervical spine condition. I find that Dr. Knox's opinion is credible and entitled to greater weight than the opinion of Dr. Raben.

Because claimant was granted a change of physician to Dr. Raben, respondent is liable for payment of his initial evaluation. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W. 3d 153 (2003).

TEMPORARY TOTAL DISABILITY BENEFITS.

Claimant contends that he is entitled to additional temporary total disability benefits beginning December 16, 2003 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I have previously found that claimant has reached the end of his healing period with respect to his cervical

spine condition. However, I have also found that claimant is in need of additional medical treatment for his right shoulder condition. As previously noted, Dr. Sites has recommended additional medical treatment and potential surgery relating to claimant's right shoulder condition. Given this evidence, I find that claimant does remain within his healing period with respect to his right shoulder injury.

However, I find that claimant has failed to prove by a preponderance of the evidence that he suffers a total incapacity to earn wages. While claimant testified that he believes that he is incapable of working, I note that claimant testified that he can probably sit for one and a half hours at a time; can lift and carry 30 to 50 pounds; walk one to two hours; drive a vehicle; and perform some brush hogging.

As previously discussed, claimant was released by Dr. Knox as reaching maximum medical improvement in November 2003. Dr. Knox ordered a functional capacities evaluation to determine the claimant's level of function. That functional capacities evaluation revealed that claimant was capable of performing work within the medium category. Claimant returned to work for respondent for one day under circumstances previously discussed. I believe it is important to note that claimant admitted that the job offered to him by the respondent did not require lifting in excess of the functional capacities evaluation or the limits imposed by Dr. Knox. I also note that claimant contended that his biggest problem was the inability to use his right hand but that the functional capacities evaluation did not restrict the use of his right hand.

I also note that even though claimant did seek additional medical treatment from Dr. Raben for his cervical spine condition, Dr. Raben's medical reports do not indicate that claimant is totally incapacitated from working. Furthermore, claimant is being evaluated and treated by Dr. Sites for his right shoulder condition. Although Dr. Sites has recommended additional medical treatment, he also indicated that claimant was capable of performing work as long as the work activity on his right side was limited to no work

above the waist and no lifting more than 5 pounds. Thus, it was the opinion of Dr. Sites that claimant was capable of working with limitations.

In support of his contention that he is entitled to temporary total disability benefits, claimant relies upon the opinion of his family physician, Dr. Norys. Claimant sought medical treatment from Dr. Norys on December 16, 2003. At that time Dr. Norys stated that claimant continued to have significant pain with moderate activity which caused elevations of his blood pressure. Dr. Norys indicated that claimant should remain on medical leave until a second surgical opinion was obtained. In a report dated February 6, Dr. Norys again opined that claimant was unable to work because of his injuries.

I find that Dr. Norys' opinion is entitled to little weight for several reasons. First, Dr. Norys is a general practitioner, not a specialist. The specialists who have evaluated the claimant including Drs. Knox, Raben, and Sites, have not indicated that claimant is totally incapacitated from working. To the contrary, Dr. Knox has released the claimant to return to work and Dr. Sites has also indicated that claimant could return to work with restrictions. Dr. Raben's medical reports do not state an opinion. Furthermore, I also note that Dr. Norys has not been treating claimant for his compensable injuries. Dr. Norys is simply the claimant's family physician. Given this evidence, I find that the opinion of Dr. Norys is entitled to less weight in comparison to the remaining evidence.

PERMANENT PARTIAL DISABILITY BENEFITS.

In the alternative, claimant contends that if he is not entitled to additional temporary total disability benefits, that he is entitled to permanent partial disability benefits attributable to wage loss as a result of his compensable injuries. Although I have determined that claimant is not entitled to temporary total disability benefits because he does not suffer a total incapacity to earn wages, I find that a determination of claimant's entitlement to permanent disability benefits attributable to wage loss is premature. In *Bradley v.*

Standard Register Company, Full Commission Opinion filed April 13, 2004 (F211782), the Commission stated:

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent.

In this particular case, I have found that claimant is in need of additional medical treatment for his right shoulder condition and that he remains within his healing period. Thus, the claimant's underlying shoulder condition has not become stable and Dr. Sites has opined that further treatment may improve his shoulder condition. Therefore, claimant's underlying compensable condition has not become stable and permanent at this point. Therefore, a determination of permanent benefits would be premature.

As previously noted, claimant's contention that he is entitled to permanent disability benefits was an alternative contention. Until claimant's right shoulder condition has stabilized, this determination cannot be made.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable right shoulder injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his cervical spine condition. Claimant has also failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits. Specifically, claimant has failed to prove by a preponderance of the evidence that he suffers a total incapacity to earn wages. Finally, claimant's alternate contention of permanent partial disability benefits for wage loss is premature given the fact that claimant remains within his healing period for his right shoulder condition.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's

attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE