

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F002244

BILLY R. BATES, EMPLOYEE

CLAIMANT

J. A. RIGGS TRACTOR COMPANY, EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT COMPANY, CARRIER/TPA

RESPONDENT

OPINION FILED JANUARY 14, 2005

A hearing in this case was conducted on October 27, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Robert L. Henry, III, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on May 4, 2004; a Prehearing Order was filed in this matter on May 5, 2004. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations; three of these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing, while the fourth was agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The relationship of employee-employer existed on February 11, 2000, the date upon which Claimant sustained a compensable injury to his neck.

2. Claimant's compensation rate for temporary total disability is \$363.00 per week; his compensation rate for permanent partial disability is \$272.00 per week.

3. Respondents have already paid Claimant permanent partial disability benefits based on a permanent impairment rating of 15% to the body as a whole.

4. Respondents controvert Claimant's entitlement to additional benefits.

At the October 27, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved, as amended at the hearing, are limited to the following:

1. Whether Claimant's January 9, 2002 and November 20, 2003 surgeries and related medical treatment are causally related to, or compensable consequences of, the February 11, 2000 injury.

2. Whether Claimant's surgeries and related medical treatment are reasonable and necessary medical services.

3. Whether Claimant is entitled to temporary total disability benefits for two periods: from January 9, 2002 to March 25, 2002, and then from November 20, 2003 to March 15, 2004.

4. Whether Claimant is entitled to additional permanent partial disability benefits due to an increase in his permanent impairment rating.

5. Whether Claimant is entitled to wage-loss disability benefits over and above his permanent impairment rating.

6. Whether attorney's fees should be awarded to Claimant.

Claimant contends that the two contested surgeries are causally related to his February 11, 2000 compensable injury. Claimant further contends that these surgeries were reasonably necessary, as was any related medical treatment, so that Respondents should be responsible for these surgeries and related medical treatment. Claimant seeks

temporary total disability benefits for the two periods specified above; permanent partial disability benefits due to an increase in his permanent impairment rating; wage-loss disability benefits; and an attorney's fee.

Respondents contend that Claimant has been paid all benefits to which he is entitled. They specifically controvert any liability for benefits owed as a result of treatment by Dr. Redding and Dr. Covey and those circumstances having to do with the two subsequent surgeries. Respondents question whether these surgeries and related medical treatment are related to the February 11, 2000 injury. Respondents also argue that the medical evidence does not show by a preponderance of the evidence that there is a physical impairment rating in excess of 15% to the body as a whole.

DISCUSSION

Claimant worked for the respondent employer as a mechanic servicing heavy equipment such as bulldozers, excavators, front-end loaders, and road graders. He began this job in August of 1997. His work required him to disassemble, repair, and reassemble heavy equipment components such as engines or transmissions. On February 11, 2000, the date of Claimant's stipulated compensable injury, he was working on the hydraulic valve of a front-end loader. This was a large, heavy piece of equipment that had to be lifted out of the loader. Claimant testified: "And later that day after I got it on the table, I got to hurting, and that's when I went and told Danny [Claimant's supervisor] that something had happened." Claimant hurt "[d]own my left arm, down to my back, my left arm."

Claimant confirmed that, prior to working for the respondent employer, he had never had any problems with his neck, left arm, or numbness and tingling in the fingers on his left hand. He had not previously seen a doctor for his neck or ever been diagnosed with a

herniated disc. Although some days might be better than others, Claimant affirmed that his problems had never really gone away since the date of his compensable injury, February 11, 2000.

After treatment from his family doctor, Claimant was referred to Dr. P. B. Simpson. A study dated February 18, 2000 resulted in an impression of “[n]egative MRI examination of the cervical spine.” However, a cervical myelogram of that same date confirmed Dr. Simpson’s suspicion of a herniated disc on the left side at level C6-7. Dr. Simpson performed an “[a]nterior cervical interbody fusion, Smith-Robinson type, with autograph” on February 21, 2000; Dr. Simpson’s discharge summary notes that Claimant “was found to have large extruded fragments of disk material that were ruptured out pressing on his C7 nerve root.” On March 23, 2000, Dr. Simpson assessed Claimant with a 15% permanent impairment rating to the body as a whole; Respondents paid this rating.

Although Claimant experienced some relief from Dr. Simpson’s treatment, “the pain never went away,” although it was better on some days than others. This pain continued in Claimant’s left arm and hand. Nonetheless, he continued to work after the surgery. Claimant testified that the pain finally bothered him enough that he returned to Dr. Simpson in October, 2000. Dr. Simpson’s note dated October 4, 2000 states: “[Claimant] did well until about a week or two when he started having pain in the neck and pain in the left shoulder and upper arm. He was slightly worried about this, but it was nothing like before the surgery.” An x-ray performed October 27, 2000 notes “some narrowing of the disc space at C6-7” but “is otherwise unremarkable.” Nerve conduction tests were performed on December 28, 2000, with no actionable finding. Dr. Simpson explained that there was nothing further he could do, and Claimant continued working.

Claimant again returned to Dr. Simpson in August 2001. A note dated September 10, 2001 records that Claimant “has recovered function in his arm and has good triceps now, but a week or so ago he began having pain in the neck going down the left arm again. This was fairly severe for several days. This has gotten a little bit better in the past 24-48 hours.” Dr. Simpson did not offer Claimant further treatment; on September 17, 2001, Dr. Simpson opined that Claimant should be able to return to his normal activities, and he released Claimant from his care. On March 25, 2002, Dr. Simpson wrote: “With Mr. Bates new complaints of pain approximately a year later from his surgery, with the information given to me it would be my medical opinion that his injury on 2/11/00 definitely does not attribute greater than 51% to the cause of his present condition.”

Although he continued to work during this period, Claimant testified that his pain did not subside. His family doctor subsequently referred Claimant to Dr. David Reding. In a note dated December 7, 2001, Dr. Reding recorded Claimant’s history that “[h]e has consistently had the same pain from the shoulder all the way down the left arm to the hand, with a little vague numbness which seems to involve the middle 3 fingers.” Dr. Reding performed a cervical spine myelogram, followed by a CT scan of the cervical spine. Dr. Reding interpreted the results as revealing “very small or minor abnormalities at a couple of levels,” including C5-6; at this point, Dr. Reding did not believe that further surgery would be effective in relieving Claimant’s pain. After further complaints of pain, Claimant underwent a cervical MRI; a note dated January 7, 2002 states that “the cervical MRI shows a new disc protrusion at C5-6 on the left side.” Dr. Reding recorded: “[t]he disc at C5-6 may well be the source of his discomfort and I don’t believe there is any way to avoid additional surgery here, given the level and duration of his pain.” Claimant underwent a

second surgery on January 9, 2002. In his deposition of August 23, 2004, Dr. Reding explained that he “removed a soft disc rupture at C5-6 and also did a decompression at C6-7.” Claimant testified that after the surgery, “[t]he pain eased off for a little while,” but that it returned in a couple of months. When it returned, the pain was the same as previously experienced. Claimant continued to work after he was released from surgery.

Dr. Reding’s notes dated January 28, 2002 and February 25, 2002 indicate that Claimant’s pain continued, although with less severity than prior to the January 2002 surgery. On April 12, 2002, Dr. Reding wrote:

[Claimant] had a cervical disc rupture at C5-6 which we determined was likely not related to his initial injury. He was released to return to work in early March. I don’t believe this recent surgery is a result or a continuation of the original neck problem from 2000.

Nonetheless, notes dated April 19, 2002 and May 20, 2002 record Claimant’s continuing complaints of pain. Claimant underwent an MRI on May 17, 2002; Dr. Reding characterized its findings as “fairly unimpressive.”

Dr. John Wilson examined Claimant on August 8, 2002. After recording Claimant’s history and performing an examination, Dr. Wilson offered the following impression:

1. Mr. Bates is status post op anterior cervical fusion, C6-7.
2. Posterior decompression at C5-6 and C6-7 on the left.
3. His problems have continued uninterrupted from the time of his initial injury through this date. It is my opinion with a reasonable degree of medical certainty, without history of injury after his initial insult and with the continuity of discomfort throughout this period of time, that [h]is neck problems do, indeed, exist as a result of his injury on February 11, 2000.
.....
5. His permanent impairment as a result of multiple levels of surgery and multiple operations without relief of residual symptoms is 4% to the body. This is according to AMA Guidelines, page 315, table 75, D, f and g. This is

in addition to the previous estimation.

Claimant continued to experience pain in his arm, neck, and fingers; he continued to work. The medical records indicate that Claimant again presented to Dr. Reding on February 24, 2003; he recorded Claimant's history of "persistent pain in his left arm" and "pain every day." Claimant chose Dr. Reding's option of pain management, and began to receive treatment from Dr. Carl Covey. Dr. Covey administered epidural steroid injections on April 15, 2003; May 1, 2003; and August 14, 2003. Dr. Covey recorded on June 9, 2003 that Claimant "sustained 40% improvement or so" with his first two injections, but a record dated August 25, 2003 records that Claimant was "still in lots of pain...." Claimant testified that Dr. Covey's treatment provided some temporary relief, but nothing permanent.

Claimant returned to Dr. Reding on October 20, 2003, complaining of "persistent pain in the back of his neck and in the posterior aspect of his arm on the left side only." Dr. Reding interpreted an MRI taken September 4, 2003 as depicting, in part, "a little lateral defect at C5-6 on the left. ... In part, this may be postoperative changes, but there really looks to be a moderate disc protrusion." On November 20, 2003, Dr. Reding performed another surgery on Claimant (his third overall); this was a fusion at C5-6. A note dated December 4, 2003 records that "[c]linically [Claimant] has done well and his pain is much improved." However, a note dated February 2, 2004 records that "[t]he pain has returned in his left arm and at this point it's the same as it was before this last operation." On March 15, 2004, Claimant presented to Dr. Reding again. The doctor wrote:

His pain is really the same. He has now had 3 operations trying to relieve this pain which began years ago. None of the surgery has been of any benefit. It appears that this is pain that he will have to learn to live with.

.....

I am going to release Mr. Bates from my care today. ... He could certainly return to work, from my standpoint, and his neck is well healed. However, he reports that he cannot do the same type work he has done in the past.

Claimant testified that the third surgery gave him “very little” relief, and that he is currently taking medications prescribed by Dr. Covey. He testified that his condition remains the same.

Q. Tell us, if you will, Bill, your symptoms that you’re feeling as you sit here today.

A. It’s just hard to sit here. You can’t sit still. You can’t stand up long. You just have pinchings in the neck, pinched feelings.

Q. What about any symptoms in your arm or hand?

A. Yes, sir.

Q. What?

A. Just the numbness, and then the pain down the back of my arm.

Q. And how is that different than your pain and problems have been in the past, if it is?

A. It’s the same.

Q. Has it gotten better, the same, or worse?

A. Just about the same.

Claimant denied having any other injuries at work or home between his work injury in February 2000 and the date of the hearing.

At his August 23, 2004 deposition, Dr. Reding observed that the pain Claimant experienced after Claimant’s second surgery “is the same pain since the very beginning, since his initial injury.” He subsequently observed that “we’re all treating pain that is, comes from his original injury. I mean, he hurt himself, and two doctors have tried to fix

it, tried to fix the original pain that occurred after the injury, but we have failed to fix it....”

Dr. Reding explained the basis for his April 12, 2002 comments: “[T]he original studies of his neck showed no abnormality at C5-6, and so, those were the studies done after his injury. ... I took the position that if he subsequently developed a disc rupture at C5-6, it was a new problem, unrelated to the original injury.” However, Dr. Reding agreed that the February 2000 fusion at C6-7 “probably” contributed to the problems Dr. Reding treated because “fusing one level increases the stresses at adjacent levels,” and he later confirmed his belief “that fusions accelerate problems at adjacent levels....” Additionally, Dr. Reding characterized Dr. Wilson’s August 2002 statement concerning causation as “fair” and “reasonable.” Nonetheless, he held firm to his belief that Claimant’s second surgery was unrelated to Claimant’s injury: “[T]here is no way to prove it. He had a fusion at C6-7, and then he later developed problems at C5-6.”

A. Causal Connection

Claimant argues that his January 9, 2002 (“second”) surgery and November 20, 2003 (“third”) surgery and related medical treatment are causally related to, or compensable consequences of, his February 11, 2000 compensable injury; Respondents disagree. Claimant must prove two things: (1) that there is a causal connection between the compensable injury and the alleged consequential episodes; and (2) that there are objective medical findings of a compensable consequence. See Lowe v. University of Arkansas at Pine Bluff, Full Workers’ Compensation Commission Opinion filed January 14, 2004 (E511115). “If an injury is compensable, then every natural consequence of that injury is also compensable. The basic test is whether there is a causal connection between the two episodes.” Air Compressor Equip. v. Sword, 69 Ark. App. 162, 167, 11 S.W.3d 1,

____ (2000) (citations omitted). Claimant must prove this causal connection by a preponderance of the evidence. Lowe, supra; see Ark. Code Ann. § 11-9-704(c)(2). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ____ (1947).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that a causal connection exists between his February 11, 2000 compensable injury and his second surgery, third surgery, and related medical treatment. Claimant credibly denied experiencing any other injury, and credibly testified that his pain has remained “just about the same” since his compensable injury. Dr. Reding explained at his deposition that “we’re all treating pain that is, comes from his original injury. I mean, he hurt himself, and two doctors have tried to fix it, tried to fix the original pain that occurred after the injury, but we have failed to fix it....”

I acknowledge the existence of contrary evidence in the record. Dr. Simpson’s March 25, 2002 letter and recorded histories, as well as Dr. Reding’s April 12, 2002 letter and some of his deposition testimony, all call Claimant’s argument into question.

However, the levels of Claimant’s second and third cervical surgeries support a finding that these surgeries are natural consequences of his February 11, 2000 compensable injury. Claimant’s first surgery, which the Respondents accepted, was a fusion at level C6-7. Claimant’s second surgery involved, in part, a decompression at that same level, C6-7. This second surgery also involved C5-6; this was the only level involved in Claimant’s third surgery. Dr. Reding opined that the fusion at C6-7 involved in Claimant’s first surgery “probably” contributed to the problems that Dr. Reding treated,

because “fusing one level increases the stresses at adjacent levels.” Dr. Reding has “always felt that fusions accelerate problems at adjacent levels....” This testimony explains the connection between these surgeries despite the absence of C5-6 abnormalities in the original post-injury studies - the first fusion at C6-7 “probably” contributed to Claimant’s later need for treatment.

Finally, Dr. Wilson’s August 8, 2002 letter states that Claimant’s “neck problems do, indeed, exist as a result of his injury on February 11, 2000.” Dr. Reding characterized Dr. Wilson’s statement as “fair” and “reasonable.” Because Dr. Wilson and Dr. Reding have had greater long-term involvement with Claimant, I find their opinions to be more persuasive than Dr. Simpson’s.

Claimant must also establish the compensability of his second surgery, third surgery, and related medical treatment by medical evidence supported by objective findings. Lowe, supra.; see Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those which cannot come under the voluntary control of the Claimant. Ark. Code Ann. § 11-9-102(16)(A)(i). A medical opinion addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B).

The record contains the required medical evidence supported by objective findings. A cervical MRI prior to Claimant’s second surgery revealed a new disc protrusion at C5-6 on the left side; in that same surgery, Dr. Reding removed a soft disc rupture at C5-6; and, prior to Claimant’s third surgery, Dr. Reding interpreted Claimant’s September 4, 2003 MRI as depicting, in part, “a little lateral defect at C5-6 on the left.” These observable findings are all outside the voluntary control of the Claimant.

Further, at least two medical opinions are stated within a reasonable degree of

medical certainty. Dr. Wilson's August 8, 2002 letter offers his opinion "with a reasonable degree of medical certainty" that Claimant's "neck problems do, indeed, exist as a result of his injury on February 11, 2000." And, Dr. Reding stated that the fusion at C6-7 involved in Claimant's first surgery "probably" contributed to the problems that Dr. Reding treated at C5-6. The Arkansas Court of Appeals has held that "use of the word 'probably' is sufficient to satisfy the requirement ... that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty." Wackenhut Corp. v. Jones, 73 Ark. App. 158, 162, 40 S.W.3d 333, ___ (2001). I acknowledge Dr. Reding's deposition statement that "the problems at C5-6 are probably not work-related." But, I find his statements relating Claimant's pain and treatment to his original injury, and his statements concerning the stress caused by the initial C6-7 fusion, to be more to the point and thus more convincing.

To summarize, the evidence of greater convincing force establishes that Claimant's second surgery, third surgery, and related medical treatment are causally related to his February 11, 2000 compensable injury. While some days may be better than others, Claimant's pain has been relatively consistent, with no intervening injury to explain his condition.

B. Medical Treatment

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). Medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Lewis v. WSD Turner, Full Workers'

Compensation Commission Opinion filed July 12, 2004 (F212623). Claimant need not establish that his compensable injury is the major cause for his need for medical treatment; rather, it is sufficient if his compensable injury is a factor in his resulting need for medical treatment. See Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, ___ S.W.3d ___ (2004); Ballance v. K. C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (May 19, 2004).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that additional medical treatment in connection with his injury is reasonably necessary. The preceding section of this opinion finds that Claimant's need for treatment is causally connected to his compensable injury. Dr. Reding's deposition testimony establishes that Claimant's treatment subsequent to his first surgery was intended "to fix the original pain that occurred after the injury...." Certainly, Dr. Covey's treatment was rendered for the purpose of pain management. As noted, medical treatment intended to reduce pain or to enable Claimant to cope with pain attributable to his compensable injury may constitute reasonably necessary medical treatment. See Lewis, supra.

C. Temporary Total Disability Benefits

Claimant's second surgery occurred on January 9, 2002. Claimant testified that he worked up to the date of the surgery and was then off work for "three months probably, maybe a little more." Claimant did not dispute a release date of March 25, 2002. However, during his August 23, 2004 deposition, Dr. Reding made reference to his February 25, 2002 note, which states:

I believe Mr. Bates is doing well and has mostly recovered now six weeks following laminectomy for soft cervical disc rupture. We will allow him to return to work next week, but I would like light duty for two weeks. He can return to full activity at that time.

Claimant's third surgery occurred on November 20, 2003. Claimant testified that he "worked all the way to" the date of surgery, and did not dispute a release date of March 15, 2004. Dr. Reding's note of March 15, 2004 states that he is "going to release [Claimant] from my care today. ... He could certainly return to work, from my standpoint, and his neck is well healed."

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889, ___ (2002). "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 228, 79 S.W.3d 414, __ (2002). A claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 9, 2002 to February 25, 2002, and then from November 20, 2003 to March 15, 2004. The evidence of greater convincing force, recited above, indicates that Claimant underwent surgery on

the beginning date of each of these two periods. Dr. Reding's February 25, 2002 note indicates that Claimant's healing period after his January 9, 2002 surgery had ended, and specifically allows Claimant to return to work the following week. Similarly, Dr. Reding's March 15, 2004 note indicates that Claimant's healing period had ended after his November 20, 2003 surgery. Claimant was incapacitated within these periods to earn wages, while undergoing and recovering from surgeries related to his original February 11, 2000 compensable injury.

D. Additional Permanent Partial Disability Benefits

The parties stipulated that Respondents have already paid Claimant permanent partial disability benefits based on a permanent impairment rating of 15% to the body as a whole. On August 8, 2002, Dr. Wilson assigned Claimant an additional 4% impairment rating to the body, based upon Claimant's "permanent impairment as a result of multiple levels of surgery and multiple operations without relief of residual symptoms...." It should be noted that Dr. Wilson's rating occurred between Claimant's second and third surgeries. Claimant has actually had three surgeries without any relief.

There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, ___ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings.

Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993) (hereinafter "Guides"). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34. A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to additional permanent partial disability benefits for an additional 4% permanent impairment rating to the body as a whole. The statutory elements will be discussed in turn.

Claimant's February 11, 2000 compensable injury is the major cause of the impairment at issue. After Claimant's accepted first surgery, the fusion at C6-7, Claimant underwent a second surgery at that level and C5-6; his third surgery involved level C5-6. In his deposition well after these surgeries, Dr. Reding explained that "we're all treating pain that is, comes from his original injury." And, he opined that the fusion at C6-7 involved in Claimant's first surgery "probably" contributed to the problems that Dr. Reding treated, because "fusing one level increases the stresses at adjacent levels." Dr. Wilson opined that Claimant's "neck problems do, indeed, exist as a result of his injury on February 11, 2000." Claimant credibly denied experiencing any other injury.

The record contains objective and measurable physical findings supporting the existence or extent of Claimant's physical impairment which necessitated his multiple surgeries. To repeat the findings noted above: a cervical MRI prior to Claimant's second surgery revealed a new disc protrusion at C5-6 on the left side; in that same surgery, Dr.

Reding removed a soft disc rupture at C5-6; and, prior to Claimant's third surgery, Dr. Reding interpreted Claimant's September 4, 2003 MRI as depicting, in part, "a little lateral defect at C5-6 on the left." These objective findings supported the need for multiple operations at multiple levels.

Claimant's request for benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides. "The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. Moreover, the Commission may assess its own impairment rating rather than rely solely on ratings assigned by physicians." Williams v. Willamette Industries, Inc., Full Workers' Compensation Commission Opinion filed July 7, 2004 (E700242) (citations omitted).

I find that, based upon Claimant's history of multiple operations at multiple levels and utilizing the Guides, Claimant is entitled to an additional permanent impairment rating of 4% to the whole body. Claimant has had operations at two levels: C6-7 and C5-6. In addition, Claimant has undergone three operations. Utilizing Table 75 on page 3-113 of the Guides, Claimant is entitled to an additional 4% rating: 1% should be added for the second level, 2% should be added for the second operation, and 1% should be added for the third operation.

E. Wage-loss Disability Benefits

Claimant seeks benefits for a decrease in his wage earning capacity. At the time of the hearing Claimant was 43 years old; he has a GED and a certificate from EMT school. His past work history includes part-time service as a deputy coroner; driving for an ambulance service; serving as an orderly at a hospital; work for a company that drilled

irrigation wells; and his employment by the respondent employer. Claimant does not believe that he has the skills necessary to transfer into a profession that is a “desk-job profession.”

Although he worked up to the time of his third surgery, Claimant did not believe that he was physically capable of performing his job as a service technician after the third surgery: “I just didn’t feel I could tug on them wrenches and pull on that equipment no more.” Claimant drew unemployment compensation for a few months; he searched for jobs at two local automobile dealerships and three or four farms during this time period. Claimant’s search has not been fruitful. Claimant has not looked in the paper for jobs. He did pursue entry into a nursing program through the state rehabilitation agency. However, Claimant testified that “[a]fter I seen the doctor through the rehabilitation, they had to deny my claim.... [They] [s]aid I would not be able to tug and pull on a patient.”

Q. Any other place that you’ve checked as far as trying to find another job?

A. No, sir.

Q. Have you gotten job assistance from anyone else, Bill?

A. No, sir.

Q. Is there any place in the area in which you live within a reasonable distance that you think you can find work at this point?

A. No, sir, not right off I don’t.

Claimant testified that he helps out with chores around the house and he has taken some trips. He affirmed that, if he could find work, he would be willing to do it.

Upon cross-examination, Claimant admitted that when he sought a job while on unemployment compensation, he mentioned that he was asking because he was drawing

unemployment compensation. He has not sought out the help of a private employment agency. He confirmed that he could work as a cashier if he wanted to; that he is able to stand for a short time or sit for a short time; that he could do a mechanic's job if there was no lifting over fifty pounds; and that he's still interested in doing some sort of work in the medical field.

Claimant's supervisor, Danny Buntin, testified at the hearing. He confirmed that Claimant is honest and not a complainer; he did not find Claimant to be lazy, and his work attendance was good.

Dr. Reding's March 15, 2004 report notes: "[Claimant] could certainly return to work, from my standpoint, and his neck is well healed. However, he reports that he cannot do the same type of work he has done in the past. However, he will talk with the company about something a little bit lighter, which he should be able to accomplish." During his August 23, 2004 deposition, Dr. Reding elaborated:

It depends on the level of his pain and what he is able to do. ... [H]e worked after the first operation, after the second operation, and there is nothing about having surgery that prevents you from doing that kind of work. And, indeed, he had continued to do the same kind of work. I mean, it may have to be adjusted, but, in general, I think working and being active in this situation is probably preferable to sitting at home.

.....

There is nothing about the fact that he has had surgery on two discs that prevents him from doing heavy work. The factor here is the pain. And he is the one that lives with that and experiences it and can tell you what he can and can't do.

Dr. Reding found Claimant to be a credible patient, and believed his complaints of pain.

Since Claimant has been assessed two separate permanent physical impairment ratings as a result of his compensable injury, the Commission may consider his claim for

wage-loss disability in excess of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1); McKinney v. Plastics Research & Development, Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. ... In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

McKinney, supra; see Douglas Tobacco Products Co. v. Gerrald, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A).

At the time of the hearing Claimant was 43 years of age, had a GED and a certificate of EMT training, and had a history employment in fields requiring manual labor. Claimant's supervisor testified that Claimant is neither lazy nor a complainer, and that he is honest. He has undergone three surgeries involving two levels in his cervical spine. Dr. Reding testified that Claimant is physically able to work, except to the extent that he is inhibited by pain; Claimant credibly testified to continuing pain following his injury, and having observed Claimant at the hearing, I find his testimony concerning his constant pain to be entirely credible. On the other hand, Claimant is physically able to work to some degree; he has not engaged in activities such as looking in the paper or contacting a

private employment agency in order to find work; and his attempts to find work in his local area appear to be somewhat limited. After considering all relevant wage-loss factors, I find that the Claimant has established a decrease in his wage earning capacity equal to 10% to the body as a whole. He is entitled to benefits for this decrease in his wage earning capacity.

Further, I find that Claimant did prove by a preponderance of the evidence that his compensable injury was the major cause of his decrease in earning capacity. Claimant testified to his injury, and his continuing pain since that time; Dr. Reding's testimony indicates that Claimant's pain could inhibit his ability to work. Claimant denied that any other injury occurred from February 11, 2000 to the date of the hearing. In short, Claimant's compensable injury is the sole (and thus the major) cause for his decrease in earning capacity.

F. Attorney's Fee

Since Claimant's injury occurred prior to July 1, 2001, his attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. See Estridge v. Waste Management, Full Workers' Compensation Commission Opinion filed July 12, 2004 (E500479); compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). Respondents stipulated to controverting Claimant's entitlement to the additional benefits addressed in this opinion. Thus, I find that, with regard to those benefits awarded in this opinion, Claimant is entitled to the maximum statutory attorney's fee allowed pursuant to Ark. Code Ann. § 11-9-715 (Repl. 1996).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The relationship of employee-employer existed on February 11, 2000, the date upon which Claimant sustained a compensable injury to his neck.
3. Claimant's compensation rate for temporary total disability is \$363.00 per week; his compensation rate for permanent partial disability is \$272.00 per week.
4. Respondents have already paid Claimant permanent partial disability benefits based on a permanent impairment rating of 15% to the body as a whole.
5. Respondents controvert Claimant's entitlement to additional benefits.
6. Claimant sustained his burden of proving that his January 9, 2002 surgery, November 20, 2003 surgery, and related medical treatment are causally related to, or compensable consequences of, his February 11, 2000 compensable injury. Claimant credibly denied experiencing any other injury, and testified that his pain has remained consistent since his compensable injury. The levels operated on during Claimant's second and third cervical surgeries suggest that they are natural consequences of his compensable injury. The opinions of Dr. Wilson and Dr. Reding establish a causal connection between the compensable injury and subsequent treatment. Further, the record contains medical evidence supported by objective findings such as studies and Dr. Reding's removal of a soft disc rupture at C5-6. The medical opinions of Dr. Wilson and Dr. Reding are offered within a reasonable degree of medical certainty.
7. Claimant sustained his burden of proving his entitlement to reasonably necessary medical treatment in connection with his compensable injury. As noted in Finding #6, Claimant's need for medical treatment is connected with his compensable injury. This

treatment has been offered in order to address Claimant's consistent complaints of pain, and is therefore reasonably necessary.

8. Claimant sustained his burden of proving his entitlement to temporary total disability benefits from January 9, 2002 to February 25, 2002, and then from November 20, 2003 to March 15, 2004. Claimant underwent surgery at the beginning of both of these periods; he was recovering from surgery related to his compensable injury during the course of these periods; and medical records mark the end of his healing period at the conclusion of these periods.

9. Claimant sustained his burden of proving his entitlement to additional permanent partial disability benefits based upon an additional 4% impairment rating to the body as a whole. Claimant's February 11, 2000 compensable injury is the major cause of his need for multiple surgeries at multiple levels; objective and measurable physical findings, including studies, support his need for these surgeries; utilizing Table 75 of the Guides, a 4% additional rating is appropriate for multiple surgeries at multiple levels.

10. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in wage earning capacity equal to 10% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits.

11. Claimant's attorney is entitled to the maximum statutorily prescribed attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 1996). Respondents stipulated that they controverted the additional benefits addressed and awarded in this opinion.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

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 (Repl. 1996) and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W. 3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml