

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS NOS. E812147 & F012662

MICHAEL BOWDEN

CLAIMANT

KETCHER & CO., INC.

RESPONDENT EMPLOYER

TRANSCONTINENTAL INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED AUGUST 9, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on June 2, 2005, in Little Rock, Arkansas. A prehearing conference was held on March 8, 2005 and a prehearing order was filed on March 8, 2005. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable September 18, 1998, specific incident neck injury and a gradual onset injury to the claimant's hands and wrists.
2. The compensation rates agreed to are the maximum for a 1998 injury, those being \$359/269.

The claimant contends he is entitled to temporary total disability benefits from May 16, 1999 through May 22, 2002, pertaining to his carpal tunnel syndrome. The claimant contends he is entitled to permanent impairment ratings of 5% to the left hand

and 10% to the right hand, which has been accepted and paid by respondents. The claimant next contends he is entitled to wage loss benefits in excess of the 8% permanent impairment rating to the cervical spine, as well as payment for a \$170 medical bill relating to the cervical spine. The claimant also requests attorney's fees.

Respondents contend that it overpaid the claimant \$10, 163.57 for the cervical neck claim. Respondents further contend that temporary total disability benefits were paid for carpal tunnel from August 3, 2000 through October 8, 2000, and from October 12, 2001 through December 12, 2001. Respondents contend its total exposure for temporary total disability benefits pertaining to the carpal tunnel condition is 83.2 weeks. Respondents controvert any liability for wage loss and also controvert the \$170 medical bill, contending it is pertaining to the claimant's low back, not a compensable condition. Respondents request credit for the overpayment of benefits should wage loss or temporary total disability benefits be awarded.

ISSUES TO BE LITIGATED

1. Temporary total disability benefits.
2. Additional medical.
3. Wage loss benefits.
4. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable September 18, 1998, specific incident neck injury and a gradual onset injury to the claimant's hands and wrists.

2. The compensation rates agreed to are the maximum for a 1998 injury, those being \$359/269.

3. The claimant has proven by a preponderance of the evidence that the \$170 in medical bills he has submitted into evidence were reasonable and necessary and related to his compensable injury and is the responsibility of respondents.

4. The claimant has proven by a preponderance of the evidence that he remained in his healing period and had not returned to work from August 3, 2000, through February 1, 2001, and from October 12, 2001, through April 22, 2002.

5. Respondents are entitled to credit for any overpayment of indemnity benefits.

6. The claimant has proven by a preponderance of the evidence that he has sustained a 30% diminished wage earning capacity over the impairment ratings that have been paid.

DISCUSSION

The claimant, 48 years old, worked for the respondent employer about six years before his compensable September 18, 1998, injuries. The claimant worked as a journeyman sheet metal worker, a welder. The claimant carried an excessive load of tools and material from a rooftop job out to the parking lot and began experiencing pain. The injury was reported and the claim was accepted and benefits paid. The last

attempt to work for the respondent was November 1998 and that attempt was unsuccessful.

The claimant underwent physical therapy for his neck but eventually had surgery and was released at maximum medical improvement on May 15, 1999 and assigned an 8% permanent impairment rating. The claimant was unable to return to work in the construction industry but continued to experience severe upper body problems with his neck, shoulder and arm. The claimant last spoke with his employer about returning to work in a supervisory position before he entered school in 2000. The employer advised he could return to work only if he could return to full unrestricted duties. The claimant testified that Dr. Anthony Russell had given him permanent limitations of no lifting over 50 pounds and no bending, twisting, stooping, pushing, and pulling activities. The claimant continues to have upper body weakness and weakness in both hands.

The claimant did not work between May 16, 1999 and April 22, 2002. The claimant attempted to find work but could not find employment that would tolerate the limitations. In 2000, the claimant entered Pulaski Technical College with assistance from Arkansas Rehabilitation Services. According to the claimant, the insurance company declined to assist in the retraining. According to the claimant, he began reading for visually impaired students while in college in late 2002 and he assisted in their on-line tests. The claimant did some cashier work for E-Z Mart and Flash Market. The claimant is now back at work for Ironwood Communications where he began in mid-December 2004, making just under \$300 per week. The claimant received an associate's degree in computer maintenance and work station support in May 2003. The claimant received assistance from the school and made many applications;

however, the computer industry had a downturn and jobs were not available. With the claimant's current job, he is paid by the job, not an hourly wage.

According to the claimant, he can no longer work in the construction industry since he no longer has strength in his hands or mobility to climb ladders and carry loads and use hand tools. The claimant is seeing only Dr. Reginald Rutherford at this time for pain management with medication and a theragesic patch.

The claimant had lung surgery in February 2004 and had a mass removed. This condition will require follow-up care and Medicaid has paid the associated medical. Developing pneumonia is something that can easily happen with the claimant's condition. Shortness of breath is associated with the lung problem.

The claimant contends he is entitled to temporary total disability benefits from May 16, 1999 through May 22, 2002, because of his carpal tunnel syndrome. When the injury is a scheduled injury, the claimant is entitled to temporary total disability compensation while he/she is within his/her healing period and has not returned to work. See, Ark. Code Ann. §11-9-521(a)(Supp. 1999); *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

In the present case, the medical evidence supports the claimant remained in his healing period from August 3, 2000 through February 1, 2001, for the right hand and from October 12, 2001 through April 22, 2002, for the left hand. The claimant's testimony was that he had not returned to work during that period of time. I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and had not returned to work from August 3, 2000 through February 1, 2001 and from October 12, 2001 through April 22, 2002. Respondents are liable for

temporary total disability benefits for that time period. The claimant underwent the right hand carpal tunnel surgery on August 3, 2000 and was assigned a rating and considered at maximum medical improvement on February 1, 2001, and underwent the left carpal tunnel surgery on October 12, 2001, and was assigned a rating and considered at maximum medical improvement on April 22, 2002.

Respondents contend that an overpayment of temporary total disability/permanent partial disability benefits was made and requests credit for that overpayment. I find that respondents are entitled to a credit for any overpayment in indemnity benefits that has been made.

The claimant next requests that \$170 in outstanding medical bills be paid by respondents and contend these bills are related to the claimant's compensable injuries.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

Respondents' counsel acknowledged that the \$60 bill in question was related to the compensable injury and would be submitted for payment, but still contended the

\$110 bill to Dr. Russell was related to a back problem. During testimony of the claimant, he stated that Dr. Rutherford referred him to Dr. Russell to determine if his right leg pain could be related to his cervical problem. The claimant testified that Dr. Russell did not find any connection and ordered a MRI but the claimant cancelled the MRI. Based on the claimant's testimony and a referral from the authorized treating physician, I find that the July 24, 2002, doctor's visit was reasonable and necessary and related to the compensable injury. Respondents remain responsible for the \$110 charge.

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

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

In the present case, the claimant has proven by a preponderance of the evidence that he has sustained a 30% diminished wage earning capacity. The claimant has permanent limitations that now prevent him from working in the higher paying construction industry. He can no longer carry the heavier weight of tools and materials and get into awkward positions for installing and fabricating. The claimant has demonstrated a strong desire to return to gainful employment and has pursued an associate's degree in a field where the work is lighter. Because of a downturn in the economy, the claimant has not found a job exactly in his career field from his schooling, but has been gainfully employed since December 2004, working with satellite television installation. The claimant is paid by the job but makes about \$19,000 per year. The claimant was making between \$26,000 and \$29,000 when he worked for the respondent employer. After taking into consideration the claimant's testimony, physical limitations, and all the wage loss factors, I find the claimant has proven by a preponderance of the evidence that he has sustained a 30% diminished wage earning capacity resulting from his compensable injuries in excess of his 8% impairment rating.

ORDER

The claimant has proven by a preponderance of the evidence that the \$170 in medical bills he has submitted into evidence were reasonable and necessary and related to his compensable injury and is the responsibility of respondents. The claimant has proven by a preponderance of the evidence that he remained in his healing period and had not returned to work from August 3, 2000 through February 1, 2001, and from October 12, 2001 through April 22, 2002. Respondents are entitled to credit for any overpayment of indemnity benefits. The claimant has proven by a preponderance of

the evidence that he has sustained a 30% diminished wage earning capacity over the impairment ratings that have been paid.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**