

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201235

LARRY CONNER	CLAIMANT
BLACK DIAMOND EXPRESS	RESPONDENT
COMMERCE & INDUSTRY, INSURANCE CARRIER	RESPONDENT
AIG CLAIM SERVICES, TPA	RESPONDENT

OPINION FILED SEPTEMBER 28, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 5, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on June 7, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that they could agree upon an additional stipulation concerning the end of the claimant's healing period. The parties also announced that they could no longer agree on the amount of permanent physical impairment produced by the claimant's compensable lumbar injury, and that this, too, had become an issue. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The opinion of August 31, 2004, has become final and is res judicata of all issues raised and addressed therein.
2. The respondents have accepted liability for permanent partial disability benefits attributable to a 13% permanent partial impairment.
3. The claimant's healing period for his back ended on March 14, 2005.

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

1. whether the claimant's right knee difficulties, represent a compensable consequence of this compensable back injury.
2. The claimant's entitlement to the payment of medical expenses, for services rendered him for his right knee difficulties.
3. whether the claimant's right shoulder difficulties represent a compensable injury that occurred in the employment accident of January 27, 2002.
4. The claimant's entitlement to the payment of medical expenses for services rendered him for his right shoulder difficulties.
5. The extent of permanent partial disability for both permanent physical impairment and permanent functional disability (wage loss).

6. Controversion and attorney's fees.

In regard to these issues, the claimant contends:

- A. The claimant contends that in September of 2004, he fell as a result of severe back pain arising out of his job related injury and injured his knee. The claimant contends that the respondents are liable for medical treatment in regard to the knee injury.
- B. The claimant contends that he is still having difficulties with his right shoulder and that he is entitled to additional medical treatment in regard to that condition because the condition is the result of his January 27, 2002 job related injury.
- C. The claimant contends that he is entitled to permanent disability benefits in an amount to be determined by the Commission. He contends that he has at least a 13% permanent impairment to the body as a whole.
- D. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend:

"Respondents contend that all appropriate benefits have been and are being paid in this matter. Respondents contend that claimant did not suffer a compensable injury to his knee and that his right shoulder difficulties after September of 2002 are unrelated to the accident of January 27, 2002, or the claimant's use of crutches for his knee difficulties. With regard to permanent impairment, respondents have accepted and are paying the 13% impairment rating assigned by Dr. Stephen Eichert. While Dr. Clio Robertson has assigned additional impairment, respondents contend that his rating includes range of motion and is per the 5<sup>th</sup> Edition to the AMA Guides. Respondents contend that a 13% rating is appropriate and has been accepted."

DISCUSSIONI. COMPENSABILITY OF THE CLAIMANT'S RIGHT SHOULDER DIFFICULTIES

The first issue to be addressed concerns the question of whether the claimant also sustained a "compensable injury" to his right shoulder in the employment related accident on January 27, 2002. The burden rests upon the claimant to prove all of the elements necessary to establish this alleged "compensable injury."

First, he must prove by medical evidence the actual existence of the physical injury or condition, involving his left shoulder, that he alleges to be compensable. Further, he must show that the actual existence of this physical injury or condition is supported by "objective findings," as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

Immediately following the employment related accident on January 27, 2002, the claimant was seen at the emergency room of Turner Memorial Hospital in Ozark, Arkansas. Although some radiology reports have been tendered by the parties and admitted into evidence, neither party has tendered the actual emergency room reports, records, or notations, which would contain the claimant's history, a description of his symptoms, physical examination, results, etc. There is no mention, whatsoever, in the reports that have been introduced of any injury to or complaints with the claimant's right shoulder.

Apparently, the claimant was seen for follow up on January 30, 2002 and received treatment some physical therapy. Again, none of the reports and records generated by these visits or treatment have

been tendered by either of party. The claimant also appears to have been seen and treated by a Dr. Norman McAlester in McAlester, Oklahoma, during February and March of 2002. However, none of his reports or records have been tendered by either party.

Following the initial radiology reports, the next medical records that have been introduced consist of a narrative report by Dr. Jeffrey P. Pardee and various MRI studies performed at his request. All of these reports are dated April 11, 2002. In his initial narrative report, Dr. Pardee recorded that, in the accident of January 27, 2002, the claimant fell and landed on his buttocks and right shoulder. Dr. Pardee further notes that the claimant experienced immediate pain in his right shoulder and tailbone. On that date, the claimant's complaints were described as continued constant pain in his right shoulder, continued difficulties with his lower back, and episodic difficulties with his lower extremities. Dr. Pardee further observed that x-rays taken of the claimant's right shoulder revealed lateral acromial down slopping, hypertrophy and narrowing of the acromial clavicular joint, and a small inferior clavicular spur. No objective findings were noted by Dr. Pardee on his physical examination of the claimant's right shoulder. His only subjective findings were recorded as tenderness to palpitation that involved only the deltoid area and mildly limited range of motion.

The MRI study performed on the claimant's right shoulder at the request of Dr. Pardee was interpreted by the radiologist as showing:

“1. There is mild narrowing of the supraspinatus outlet secondary to type II acromion and lateral acromial down sloping.

2. There are mild degenerative changes of the acromioclavicular joint with some capsular hypertrophy and mild inferior degenerative spurring.

3. There is some mild fluid accumulation within the subacromial-subdeltoid bursa suggesting some mild bursitis. There is some fluid in the region of the subcoracoid bursa as well.

4. Findings suggest tendinosis of the supraspinatus tendon with what appears to be a very small partial thickness bursal surface tear near its attachment to the greater tuberosity.

5. There appears to be some mild focal tendinosis of the distal subscapularis tendon near its attachment to the greater tuberosity. Some fluid overlying this region may lie within the subacromial bursa or could possibly represent some minimal residual hematoma related to focal contusion.

6. There is some significant subchondral cyst formation within the humeral head adjacent to the bicipital groove with some mild reactive marrow edema. There is no other evidence to suggest focal bone contusion.”

Dr. Pardee’s report that began with the date April 11, 2002, subsequently becomes dated April 16, 2002, and discusses the result of the April 11, 2002 MRI of the claimant’s right shoulder. In this continuing report, Dr. Pardee simply noted the MRI findings of a type II acromion, a possible very small partial thickness bursal surface tear involving the supraspinatus tendon near its attachment to the greater tuberosity of the humerus, and evidence of bursitis. However, he ultimately diagnosed the claimant’s right shoulder

difficulties as a “strain.”

In a subsequent report, dated May 13, 2002, Dr. Pardee noted continuing complaints involving the claimant’s right shoulder in the area of the “anterior glenohumeral.” However, since his physical examination apparently revealed no objective abnormalities, Dr. Pardee opined that the claimant had reached maximum medical improvement from all of his conditions and difficulties, including his right shoulder. He also expressed the opinion that the claimant appeared to be magnifying his symptoms and that the claimant could return to regular employment, apparently without any restrictions.

The claimant subsequently came under the treatment of Dr. R. Clio Robertson. Dr. Robertson’s initial evaluation is dated September 9, 2002. In this initial evaluation, he recorded a history that the claimant sustained various injuries in the accident on January 28, 2002. Dr. Robertson described this accident as a fall with the claimant striking his buttocks, right shoulder, and head on the pavement. He noted that the claimant experienced immediate pain in his right shoulder, as well as his low back and pelvis. In this initial report, Dr. Robertson appears focused entirely on the claimant’s back complaints and there is no indication that his physical examination even included the claimant’s right shoulder. Dr. Robertson’s subsequent reports are silent, concerning any difficulties with the claimant’s right shoulder a report that is dated October 13, 2004. In this report, Dr. Robertson noted that the claimant was experiencing pain in both

his shoulders which began with his use of crutches following the fracture of his left kneecap. However, these symptoms do not appear to be similar to those which the claimant exhibited in April of 2002.

The final mention of any difficulties with the claimant's right shoulder is found in the office notation of Dr. Robertson, which is dated January 24, 2005. In this notation, Dr. Robertson remarked that the claimant was making substantial progress in the resolution of his symptoms related to his lower back injury, but further stated:

“He incidently does tell me he continues to have pain about his right shoulder which he injured on January 28, 2002. I told him I would be happy to evaluate his right shoulder in greater detail if approved by the work comp carrier.”

No further mention of any right shoulder difficulties is found in any subsequent medical reports and records of Dr. Robertson or any other physician.

After consideration of all the evidence presented, it is my opinion that the claimant has presented sufficient medical evidence, supported by objective findings, to establish the actual existence of a physical injury or abnormality involving his right shoulder. The medical reports of Dr. Pardee and the accompanying results of the MRI study of the claimant's right shoulder are sufficient, in and of themselves, to prove this fact. Therefore, the claimant has satisfied the requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

However, the claimant must prove that this medically

established and objectively documented physical abnormality or injury to his right shoulder satisfies the definitional requirements for a “compensable injury” found in Ark. Code Ann. §11-9-102(4)(A)(i). These requirements are:

- A. The physical injury must arise out of and be in the course of the employment.
- B. The physical injury must be caused by a specific incident.
- C. The physical injury must be identifiable by time and place of occurrence.
- D. The physical injury must result in internal or external physical harm to the claimant’s body.
- E. The physical injury must require medical services or result in disability.

The claimant’s testimony is the only evidence presented to establish the existence of a causal relationship between the employment related fall of January 27, 2002 and the subsequently diagnosed defects involving his right shoulder. While the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If such testimony is found to be credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address.

In his testimony, the claimant described the mechanics of his accidental fall as follows:

\_\_\_\_\_ “I got up on the truck, poured water in it, water and anti-freeze, and had anti-freeze on my hand; put the top on and started back down and my hands—there’s no rails, no steps, no nothing; my hands slipped off the rails and I went from truck tire height to the ground.”(T.13)

“I hit on my seat or my buttocks and I spun around because—hanging by the right—left hand; I spun around and I bumped my shoulder and my head.” (T.13)

“The step—I hit the side that I swung around, I was holding—both hands slipped and when I started over on my right, I swing back around. I was holding on as tight as I could, trying to prevent the fall.”

“And I hit the step and hit my head on the—I hit my head on the battery box and my shoulder on the steps.” (T.27)

In his testimony, the claimant stated that he experienced immediate pain or discomfort with his right shoulder. He also described a bruise on either the top or the front of his right shoulder (T.27). The claimant further testified that his symptoms, in the form of constant sharp pain in his right shoulder and the inability to lift or pull with his right arm, have been constantly present since the initial injury in January of 2002. He testified that his use of crutches, following the injury to his knee, increased the magnitude of these symptoms, but did not in any way change the form or the nature of his symptoms or cause any new symptoms to appear.

The claimant’s testimony describing the mechanics of the actual fall and the resulting blow to his right shoulder are nebulous and confusing. In fact, the gyrations described by the claimant would appear to be extremely unlikely and almost physically impossible. The claimant has offered none of the initial emergency room records to substantiate his testimony, concerning the immediate onset of his shoulder complaints and the presence of

a bruise to the right shoulder area. In fact, all of the initial emergency room records that have been offered note only complaints of symptoms involving the claimant's low back and right hip or pelvic area. The first mention in the medical evidence of any complaints or injury involving the claimant's right shoulder does not occur until April 11, 2002, some two and a half months following the employment related fall. It should also be noted that the descriptions of the trauma contained in these reports do not coincide with the descriptions given by the claimant in his testimony.

It must be noted that most, if not all, of the defects observed during the MRI of the claimant's right shoulder are degenerative in nature or appear to be the result of chronic difficulties over time rather than a single acute traumatic event. These include the mild degenerative changes of the acromial clavicular joint, the mild capsular hypertrophy, and the mild inferior degenerative spurring. The various fluid accumulations are noted to be indicative of bursitis or tendinosis, which are generally considered to be caused by "over use," rather than a single traumatic event or blow. Even the possible small partial thickness bursal surface tear would not be an injury that would be caused by a single direct blow. The type II acromion with the acromial down sloping, and the subchondral cyst are congenital or developmental abnormalities unrelated to any type of direct trauma.

The only abnormalities indicative of direct trauma from a blow or contusion would be the MRI defects noted under impressions

numbered 5 and 6 of the MRI study. This study further shows that these defects “could possibly” be indicative of a focal contusion, but could also apparently represent other types of physical defects. The MRI goes on to expressly note that there is no other evidence to suggest a focal contusion of either the bone or the adjacent tissue of the right shoulder joint.

The symptoms described by the claimant in his testimony also seem to far outweigh any objective findings concerning the claimant’s right shoulder. His description of constant substantial pain and significant physical restrictions is also inconsistent with the absence of any continued complaints or observation of any real limitations involving this area on the claimant’s numerous physical examinations.

After consideration of the evidence presented, it is my opinion that the claimant’s testimony is not sufficiently credible to prove that he sustained a physical injury to his right shoulder in the employment related fall of January 27, 2002. Thus, the claimant has failed to prove that his alleged physical difficulties with his right shoulder satisfies the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). His failure to prove all of these necessary requirements mandates a finding that he has failed to prove the occurrence of a “compensable injury” to his right shoulder on January 27, 2002. All claims for benefits attributable to this alleged injury must be denied and dismissed.

## II. COMPENSABILITY OF THE CLAIMANT’S LEFT KNEE FRACTURE

The next issue is whether the accidental fracture of the

claimant's left kneecap constitutes a compensable consequence of the compensable injury to his low back or lumbar spine. Thus, entitling the claimant to benefits, under the Act, for his right knee injury and resulting difficulties. The burden rests upon the claimant to prove that his fall and left knee injury on September 21, 2004, represents a natural and proximal consequence of his prior compensable lumbar injury.

Once again, the claimant's own testimony is the only evidence presented to prove the existence of a causal relationship between his compensable lumbar injury and his subsequent fall at home and the resulting injury to his left knee. In this regard, the claimant testified:

"I was getting out of the house, coming down the steps; my left-I had a real sharp pain in my back; it went down into my left knee and my leg gave away and going down the steps, I got my legs tangled up in the steps, bent over on my left side and broke my knee.

What caused you to fall?

The sharp pain from my back and it went down into my left leg."

Once again, the initial records on the claimant's left knee injury (from the emergency room of McAlester, Oklahoma) have not been introduced by either party. Thus, any description of the injury contained in these records is unavailable for consideration.

The first medical report concerning the claimant's fall and injury to his left knee are found in the office evaluation of Dr. Robertson, which is dated September 24, 2004. At least, this record was made only three days after the fall and injury. The

history of the claimant's fall recorded in this report essentially coincides with that related by the claimant in his testimony. A subsequent undated notation from Dr. Robertson's office does indicate that the claimant's left knee fracture is "not work comp." However, this form appears to have been signed and possibly completed by someone other than Dr. Robertson. This note gives no explanation for this statement. However, it must also be noted that the decision as to whether this left knee injury was or was not "workers' comp" is a decision that rests exclusively in the province of this Commission.

After consideration of all the evidence presented, it is my finding that the greater weight of the credible evidence (which includes the claimant's testimony) establishes the existence of a causal relationship between the claimant's compensable lumbar injury and his subsequent accidental fall and resulting injury to his left knee on September 21, 2004. Clearly, lumbar injuries, such as that experienced by the claimant, can reasonably produce periodic radicular symptoms sufficient to affect the claimant's gait and stance. The various medical records, prior to the claimant's fall on September 21, 2004, note complaints involving the claimant's lower extremities, such as periodic numbness and weakness. This is the exact symptoms described by the claimant as precipitating his fall on September 21, 2004. Thus, the claimant has proven that his fall and resulting left knee injury, on September 21, 2004, represents a natural and probable consequence of his compensable lumbar injury of January 27, 2002. As such,

this injury is a compensable consequence of the initial compensable lumbar injury and the claimant is entitled to appropriate benefits for this subsequent compensable consequence. This would include reasonably necessary medical services for the claimant's left knee fracture.

III. THE EXTENT OF PERMANENT PHYSICAL IMPAIRMENT FROM THE CLAIMANT'S COMPENSABLE LUMBAR INJURY

\_\_\_\_\_The next matter concerns the extent of permanent physical impairment produced by the claimant's compensable lumbar injury. Once again, the burden rests upon the claimant to prove the existence and extent of such permanent physical impairment. Such permanent physical impairment must be based upon or supported by "objective measurable physical findings," Ark. Code Ann. §11-9-704(c)(1)(B). The term "objective" findings are defined by Ark. Code Ann. §11-9-102(16)(A)(i) as those findings which cannot come under the voluntary control of the claimant. Complaints of pain and, in the instance of spinal injuries (such as that experienced by the claimant), straight leg raising tests and range of motion tests are expressly excluded from the definition of "objective" findings. Assessments of permanent physical impairment must also be calculated in a manner that conforms to the Commission's official rating guide, which at the present is the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, Ark. Code Ann. §11-9-522(g). Finally, the claimant must also prove that the compensable injury was the "major cause" (more than 50%) of the permanent physical impairment, Ark. Code

Ann. §11-9-102(4)(F)(ii)(a).

Clearly, expert medical opinion can be relevant to the issue of the existence and extent of permanent physical impairment. However, it is the duty and obligation of this Commission, rather than some medical expert, to ultimately determine the degree or percentage of permanent physical impairment in the manner required by the Act. In order for expert medical opinions to even be considered on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B).

In the present case, the medical evidence contains two expert medical opinions on the extent of permanent physical impairment due to the claimant's compensable lumbar injury. The first of these opinions contained in the January 13, 2004, is the narrative report to the respondents from Dr. Stephen Eichert, a neurosurgeon. The second opinion is contained in a narrative report to the claimant's attorney from Dr. Clio Robertson, an orthopaedic surgeon and the claimant's primary treating physician.

Dr. Eichert had apparently only evaluated the claimant at the respondents' request. In his report of January 13, 2004, he opines that the claimant has reached maximum medical improvement (MMI) and had sustained a permanent physical impairment of 13% to the body as a whole, under the Guides to the Evaluation of Permanent Impairment. He indicated that this was the recommended percentage for a two-level spinal fusion with residual pain. In his previous reports, Dr. Eichert had also opined that the claimant did not require further medical treatment for his compensable lumbar

injury, including the surgical removal of the previously implanted “hardware” or instrumentation. The previous Opinion entered in this case held otherwise and the additional surgery, which had been recommended by Dr. Robertson, was held to be reasonably necessary. This second surgery was ultimately performed by Dr. Robertson in November of 2004.

In his narrative report to claimant’s counsel, dated May 11, 2005, Dr. Robertson assessed a 29% permanent physical impairment to the body as a whole for the claimant’s compensable lumbar injury. He, too, relates that this percentage of permanent physical impairment was calculated in a manner that conformed to the American Medical Association’s Guides to the Evaluation of Permanent Impairment, Fourth Edition. However, it is clear from his narrative report that Dr. Robertson used a portion of the guides that give substantial consideration to loss of range of motion of the spine, which by the express terms of the Act cannot represent an “objective finding” and cannot be used to make an assessment of permanent impairment.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant’s compensable lumbar injury of January 27, 2002 and the subsequent surgeries it required resulted in a permanent physical impairment of 15% to the body as a whole. As observed by Dr. Robertson, this is the degree of permanent physical impairment recommended by table 75, section IV (D) ,(E), and (E)(1), of the American Medical Association’s Guides to the

Evaluation of Permanent Impairment, Fourth Edition, for a two-level fusion of the lumbar spine that involves two separate surgical operations. I would note that this is essentially the same rating that was expressed by Dr. Robertson, less that portion of his rating that was based upon consideration of the “non objective” loss of range of motion of the lumbar spine. I would also note that this is essentially the same rating that was assessed by Dr. Eichert, with the additional of another 2% permanent impairment for the second operation that had not taken place at the time of Dr. Eichert’s assessment on January 13, 2004.

The compensable injury of January 27, 2002 was the sole and, thus, the “major cause” of this 15% permanent physical impairment. This degree of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this Commission. This degree of permanent physical impairment is based upon and supported by purely objective and measurable physical findings demonstrated by radiographic studies and visual observation of the actual fusion of three vertebral bodies at two levels (L4 to L5 to S1), and the subsequent removal of the initial “hardware” or instrumentation. This assessment of permanent physical impairment gives no consideration to “subjective” findings, including the expressly prohibited findings of pain and loss of range of spinal motion. [I recognize that the Appellate Courts have held that, under certain circumstances, loss of range of motion may be an “objective finding.” However, the legislature has seen fit to expressly prohibit it from being considered as an

“objective finding” in regard to all injuries to the spine, including injuries such as that experienced by the claimant. The clear legislative prohibition contained in Ark. Code Ann. §11-9-102(16)(A)(ii) cannot be judicially altered].

IV. PERMANENT PARTIAL DISABILITY FOR PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE EARNING CAPACITY

\_\_\_\_\_The final issue concerns the existence and extent of permanent partial disability attributable to permanent functional disability or loss of wage-earning capacity. The claimant’s compensable injury to his lumbar spine represents an “unscheduled” injury. Thus, his entitlement to permanent partial disability benefits is controlled by the provisions of Ark. Code Ann. §11-9-522. Under subdivision (b), the claimant can be entitled to permanent partial disability benefits in excess of his permanent physical impairment for “functional disability” or loss of wage-earning capacity caused by his compensable injury. The burden rests upon the claimant to prove the existence and extent of any loss of wage earning capacity caused by the compensable unscheduled injury.

Ark. Code Ann. §11-9-522(b)(2) and (c) prohibit any award of benefits for loss of wage-earning capacity, if he has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of his employment related accident and compensable injury. He is also prevented from receiving permanent partial disability benefits for loss of wage-earning capacity if his actual loss of wage-earning capacity only

exists because of his voluntary refusal to accept suitable employment at wages equal to or greater than those he was receiving at the time of his compensable injury, or exists only because of his discharge for misconduct in connection with the work. The burden rests upon the respondents to prove all of the elements necessary to prohibit the claimant from an award of permanent partial disability benefits for loss of wage-earning capacity for the foregoing reasons.

The evidence presented in this case shows that the claimant's compensable lumbar injury has permanently restricted him from any employment position requiring occasional lifting in excess of 40 pounds, frequent lifting in excess of 20 pounds, or constant lifting in excess of 10 pounds. He is also restricted from engaging in any employment position requiring bending, stooping, or twisting at the waist, and any employments requiring prolonged sitting, standing, or walking. In determining the nature and extent of the claimant's physical limitations that are due to his compensable lumbar injury, I have given primary consideration to the medically established restrictions of Dr. Robertson, and some consideration to the restrictions described by the claimant in his testimony. The restrictions given by Dr. Robertson and some of the restrictions described by the claimant in his testimony are those generally seen in surgically treated injuries such as those experienced by the claimant. Some of the restrictions described by the claimant would appear to be excessive for the type and extent of the lumbar injury he sustained. Even more importantly, some of

these described restrictions would be inconsistent with the physical capabilities he demonstrated on the surveillance video.

Clearly, the physical restrictions, as established by the greater weight of the evidence would prevent the claimant from performing the employment position he held at the time of his compensable injury. These restrictions would also prevent the claimant from holding many of his previous employment positions. However, when these physical restrictions are considered in light of the claimant's high school education, knowledge of small engine mechanics, relatively young age, and obvious level of intellectual function demonstrated at the hearing, there would clearly remain a sufficient number of suitable employments (within the claimant's physical limitations and restrictions) to provide him with a reasonable expectation of obtaining regular gainful employment in the open job market. This is further demonstrated by the fact that the claimant has actually obtained and performed gainful employment, since his medical release from his compensable lumbar injury. It is apparent from Dr. Robertson reports that it would be medically acceptable for the claimant to perform any employment position that would fall under the definition of medium work, as defined by the U. S. Department of Labor's Dictionary of Occupational Titles.

This does not mean that the claimant has failed to prove that he has experienced any permanent functional disability or loss of wage-earning capacity. The jobs or positions for which he was qualified and which he was performing both at the time of his

compensable injury and prior thereto (i.e. a tractor-truck driver), would pay substantially more than the jobs that remain available to him with his current physical restrictions. These remaining potential employments consist primarily of the positions, such as part-time or short haul driving, self employed small engine repair, light delivery, dispatching, general sales, light clerical positions, and some light factory work. Undisputably, these remaining positions (particularly at the entry level) would pay significantly less than the almost \$500.00 per week the claimant was earning at the time of his compensable lumbar injury.

After consideration of all the factors mandated by Ark. Code Ann. §11-9-522(b)(1), I find that the claimant has proven that he has sustained an additional permanent partial disability of 15% to the body as a whole for permanent functional disability or loss of wage-earning capacity. This permanent partial disability is in addition to the 15% permanent partial disability for his permanent physical impairment.

The respondents have failed to prove that the claimant has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of his accident and compensable injury. They have further failed to prove that the claimant's current functional disability, in excess of his permanent physical impairment, exists only because of the claimant's discharge from work for misconduct in connection with the work or because the claimant left his employment position

voluntarily and without good cause connected with the work. The claimant testified that, after his release by Dr. Robertson, he had made no attempt to return to work for the respondent. However, the evidence fails to show that the respondent made any offer to return the claimant to any employment position, at any wage. The respondent has failed to show that the claimant has voluntarily refused any suitable employment or bona fide offer of employment at wages equal to or greater than those he was receiving at the time of his compensable injury. There is also no evidence that the claimant has been terminated for good cause connected with his work. Therefore, the claimant is not barred from receiving permanent partial disability benefits for his permanent functional disability or loss of wage-earning capacity by the provisions of Ark. Code Ann. §11-9-522(b)(2) or (c).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 27, 2002, the relationship of employee-employer carrier-TPA existed between the parties.
3. On January 27, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$327.00 for total disability and \$245.00 for permanent partial disability.
4. On January 27, 2002, the claimant sustained a compensable injury to his back or lumbar spine that resulted in a surgical fusion of L4 to the L5 vertebrae and L5 to the

S1 vertebrae, with a subsequent surgery to remove the previous implanted “hardware” or instrumentation and explore the stability of the fusion sites.

5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his right shoulder in the employment related incident or accident of January 27, 2002. Specifically, he has failed to prove by the greater weight of the credible evidence that any physical damage or abnormalities to this portion of his body and any difficulties he has experienced as a result thereof, were in any way caused by the specific employment related incident or accident on January 27, 2002. Thus, he has not met the requirements for a “compensable injury” to this portion of his body as set out in Ark. Code Ann. §11-9-102(4)(A)(i). Any claim for benefits attributable to this alleged injury, including medical services must be denied.
6. The claimant has proven by the greater weight of the credible evidence that the fall and resulting injury to his left knee, on September 21, 2004, represents a compensable consequence of his previous compensable lumbar injury. Specifically, he has proven by the greater weight of the credible evidence that his fall and resulting knee injury, on September 21, 2004, was a natural and probable consequence of the effects of his

compensable lumbar injury of January 27, 2002.

7. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services for his compensable lumbar injury.
8. The medical services rendered to the claimant by Dr. Robertson for his right knee injury and difficulties occasioned by the fall of September 21, 2004, represent reasonably necessary medical services for this compensable consequence. The claimant is entitled to the payment of these expenses by the respondents, pursuant to Ark. Code Ann. §11-9-508. This liability is subject to the medical fee schedule established by this Commission.
9. The claimant has proven by the greater weight of the credible evidence that he has sustained a permanent physical impairment of 15% to the body as a whole, due to his compensable lumbar injury. His compensable lumbar injury was the "major cause" of this degree of permanent physical impairment. This degree of permanent physical impairment is supported by "objective findings" and gives no consideration to subjective matters, including pain and loss of range of spinal motion. This degree of permanent physical impairment is calculated in a manner that conforms to the official rating guide currently adopted by this Commission. Thus, the claimant is entitled to permanent partial disability benefits for this degree of permanent physical impairment, under Ark.

Code Ann. §11-9-522(a).

10. The claimant has proven by the greater weight of the credible evidence that his compensable lumbar injury was also the “major cause” of an additional 15% permanent partial disability for permanent functional disability or loss of wage-earning capacity. Thus, the claimant is entitled to additional permanent partial disability benefits for this loss, under Ark. Code Ann. §11-9-522(b).
11. The respondents have failed to prove that the claimant would be barred from receiving permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity by the provisions of Ark. Code Ann. §11-9-522 (b)(2) and (c).
12. The claimant’s healing period from the effects of his compensable lumbar injury ended on March 14, 2005.
13. The respondents have controverted the claimant’s entitlement to any benefits for his alleged compensable right shoulder injury, any benefits for his right knee difficulties, any benefits for permanent physical impairment from his compensable lumbar injury in excess of 13% to the body as a whole, and any permanent partial disability benefits for permanent functional disability for his compensable lumbar injury.
14. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on the controverted

permanent partial disability benefits herein awarded for permanent physical impairment in excess of 13% to the body as a whole, and all permanent partial disability benefits herein awarded for permanent functional disability or loss of wage-earning capacity.

ORDER

The respondents shall be liable for all reasonably necessary medical expenses incurred by the claimant for his right knee injury of September 21, 2004. This liability is subject to the medical fee schedule.

The respondents remain liable for reasonably necessary medical services required by the claimant for his compensable lumbar injury. This liability is also subject to the medical fee schedule.

The respondents shall not be liable for any medical expenses required by the claimant for the alleged injury to his right shoulder.

The respondents shall be liable to the claimant for permanent partial disability benefits in the amount of 30% to the body as a whole for the claimant's compensable lumbar injury. This includes permanent partial disability benefits for a permanent physical impairment of 15% to the body as a whole and permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity in the amount of 15% to the body as a whole.

The respondents shall be entitled to credit for the permanent partial disability benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded, which are in excess of 13% to the body as a whole. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

For the reasons heretofore set forth in this Opinion, any claim for benefits attributable to an alleged compensable injury to the claimant's right shoulder on January 27, 2002, should be and hereby is denied and dismissed.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

---

MICHAEL L. ELLIG  
Administrative Law Judge