

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305558

WILLIE L. DAVEY, EMPLOYEE	CLAIMANT
RICELAND FOODS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED AUGUST 30, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 1, 2005 at Helena, Phillips County, Arkansas.

Claimant represented by the HONORABLE MIKE ETOCH, Attorney at Law, Helena, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional temporary total disability benefits, an anatomical impairment rating and attorney's fees.

At issue is whether or not the claimant remained in his healing period, totally unable to work pursuant to Ark. Code Ann. §11-9-102(12); and whether or not the impairment rating conforms to the AMA Guidelines pursuant to Ark. Code Ann. §11-9-102(16) and Rule 34. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the claimant is not entitled to temporary total disability benefits but has established permanent impairment to the body as a whole.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on March 29, 2003 at which time the claimant sustained a compensable back injury at a compensation rate of \$226.00/\$170.00. Medical expenses were paid by the respondents and the claimant receives Social Security Disability benefits. This claim has been the subject of a previous determination with an Opinion filed October 6, 2004.

The claimant seeks payment of additional temporary total disability benefits from August 18, 2003 to the present and permanent partial disability benefits based on Dr. Bauer's October 19, 2004 rating of 10-13%.

The respondents contend all appropriate benefits have been paid and the rating does not conform to the 4th Edition of the AMA Guidelines.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant, age 40 (D.O.B. June 21, 1964) has a high school education and history of work as a manual laborer. His health history includes a speech impediment, hearing loss, arthritis, and chronic obstructive pulmonary disease. He has smoked a pack of cigarettes daily for 15 to 20 years. The claimant was emotionally distraught throughout the hearing and his testimony is vague on a number of issues. He frequently stated, "ain't for sure" when asked a question.

The claimant was hired on January 18, 2003 and twisted his back on March 29, 2003 trying to clean out rice from a pipe. He reported the injury to his supervisor and came under the care of Dr. Saer who released him for light duty. The employer did provide the claimant with light duty but the claimant stated that sweeping and bending aggravated his condition and he was physically unable to perform the light duty work. The claimant began drawing Social Security Disability effective June 30, 2003.

The claimant moved back to Indiana to be with his family and came under the care of Dr. Bauer and Dr. Holt. Surgery has been recommended but the claimant is financially unable to pursue medical treatment. The claimant remains symptomatic and is unable to drive while taking his pain medication. No medical report could be found in the exhibit packet recommending surgery.

MEDICAL EVIDENCE

The claimant's medical history was detailed in the previous decision filed October 6, 2004 and will not be repeated here. In summary, the claimant was diagnosed with mild disc desiccation,

a right disc protrusion and annular tear at L4-5. He was not considered a surgical candidate and was treated conservatively (medication, physical therapy, steroid injections) by Drs. Hord, Saer, Safman, and Ackerman. His physicians recorded symptom magnification and felt he was capable of performing light duty.

After the claimant moved to Indiana, he came under the care of Drs. Bauer and Holt. No curriculum vitae was provided for either physician. The same course of conservative treatment was repeated and the claimant still did not find that treatment beneficial. A repeat MRI scan showed no change in his condition. Dr. Saer has reviewed the most recent test results and reaffirmed that the claimant is not a surgical candidate.

Dr. Saer noted that the out-of-state MRI was performed in an open scanner and certain angles were not provided. He opined that if the claimant's condition showed a protrusion or nerve root compression, the claimant would be a surgical candidate. However, that change would need to be confirmed by a new MRI or CT myelogram. Based on the most recent MRI scan, however, Dr. Saer saw nothing that would change his opinion.

TEMPORARY TOTAL DISABILITY

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of his physical capabilities. Moreover, the persistence of pain is not

sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant has requested temporary total disability from August 18, 2003 to the present. The claimant's Social Security Disability became effective June 30, 2003, and he was unemployed when he began treating with Drs. Bauer and Holt in October, 2003.

The claimant saw Dr. Bauer on October 14, 2003 who recommended a repeat MRI scan and excused him from work beginning October 14, 2003. The doctor began treating the claimant with physical therapy and epidural steroid injections and renewed his work excuse slip on October 21, 2003. It is noted that the claimant had this same conservative treatment in Arkansas, but his physicians felt he was capable of performing light duty. Dr. Bauer referred the claimant to Dr. Holt on December 9, 2003, with a diagnosis of lumbar disc disease. No reports from Dr. Holt could be found in the exhibits.

ANATOMICAL IMPAIRMENT

Physical impairment must be assessed in accordance with Rule 34 which requires objective findings.

Initially, Dr. Bauer assessed a rating based on the 5th Edition of the AMA Guidelines. He corrected that assessment using the 4th Edition, however, the section he cited is used to determine upper extremity impairment. It is not relevant to a back injury.

The assessment of the spine is found at 3.3, p. 94 of the 4th Edition of the AMA Guidelines. Categorizing the rating under the Diagnosis Related Estimate (DRE) or Range of Motion (ROM) Model is discussed at p. 99, under "Differentiators." The DRE ratings can be found at Table 70 or page 108 and Table 72 or page 110 of the 4th Edition. The ROM Model is found at Table 75 or page 113. Using either the DRE or ROM model, I find the claimant's condition best fits a 0-5% rating characterized by "clinical signs of lumbar injury" (the annular tear) at Table 72 or Disorder II B Intervertebral disk "medically documented unoperated on injury."

The 10-13% rating assessed by Dr. Bauer was based on “degenerative disc herniation” or a DRE lumbar category III. Category III of the DRE refers to objective signs of radiculopathy such as loss of reflexes or atrophy of muscles. These findings of radiculopathy can be verified by EMG/NCV studies. To the best of my knowledge, the claimant has not had an EMG/NCV study to corroborate any radiculopathy.

Dr. Bauer commented, “Based on his history of herniated disc level at this level, it would be expected for non-objective clinical findings associated with radiculopathy...” “It is certainly not unusual to have non-objective clinical findings or no significant weakness, no significant dermatomal numbness, or significant reflex change and still have a radicular pattern of pain.” It is also noted that Dr. Bauer refers to a “herniation” instead of a “bulge” and “L5 nerve root impingement” which no other physician or radiologist has identified.

As I interpret the medical evidence, the only objective indication of injury is an annular tear. Therefore, Dr. Bauer has considered subjective criteria in assessing the rating which I find to be invalid.

FINDINGS AND CONCLUSIONS

The evidence of record shows the claimant injured his back at work, reported the incident, and received conservative medical treatment (medication, physical therapy, steroid injections) which he did not find beneficial. Throughout his treatment, his physicians opined that he was capable of performing light duty work which was provided by his employer. Dr. Saer diagnosed the claimant with a disc bulge, annular tear, and preexisting disc degeneration based on an MRI scan. He opined the claimant was not a surgical candidate.

The claimant moved out of state and repeated the same course of diagnostic testing and conservative treatment but this time a different physician excused him from work. The claimant has asked for temporary total disability benefits during this period of time. As I interpret the evidence, the claimant voluntarily removed himself from the workforce and applied for disability benefits after Dr. Saer opined there was nothing further he could do to improve the claimant’s condition.

Accordingly, I find the claimant's healing period has ended and his continued complaints of pain do not entitle him to temporary total disability benefits.

The claimant has also requested permanent partial disability benefits. As I interpret the medical records, the claimant does suffer from an annular tear, which is objective evidence of injury. Although he also suffers from degenerative disc disease, he is a relatively young man and there is no evidence that a back condition prevented him from working or required medical treatment prior to the work-related injury. Accordingly, I find his injury is the major cause of his impairment.

There is no objective evidence of radiculopathy to support Dr. Bauer's rating of 10-13%, and indeed, Dr. Bauer appears to have considered some subjective elements in arriving at his conclusion. As I understand the AMA Guidelines, the claimant's rating should be categorized at 5% to the body as a whole based upon the annular tear, which is objective evidence of injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed between the parties on March 29, 2003 at which time the claimant sustained a compensable back injury at a compensation rate of \$226.00/\$170.00.
2. The claimant has failed to prove by a preponderance of the credible evidence of record that he remained in his healing period, totally unable to work after Dr. Saer released him for light duty and opined he was not a surgical candidate.
3. The claimant has proven by a preponderance of the credible evidence of record that he is entitled to permanent partial disability benefits equivalent to 5% to the body as a whole based upon objective evidence of an annular tear in the lumbar spine, caused by his work-related injury which is the major cause of his impairment.
4. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of

the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

5. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge