

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412578

KIRK D. HARDIN

CLAIMANT

WILLIAMS TIRE & SERVICE, INC.

RESPONDENT EMPLOYER

WESTPORT INSURANCE CORPORATION

RESPONDENT CARRIER NO. 1

SECOND INJURY TRUST FUND

RESPONDENT NO. 2

ORDER AND OPINION FILED DECEMBER 5, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on October 5, 2005, in Little Rock, Arkansas. A prehearing conference was held on August 24, 2005, and a prehearing order was filed the same date. 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 June 17, 2004, cervical injury.
2. The compensation rates are \$370/278.
3. Respondents accepted a 3% permanent impairment rating.

Claimant contends that he sustained an injury on June 17, 2004 and again on November 3, 2004, and is entitled to medical benefits associated with a back injury and temporary total disability benefits from November 16, 2004 through July 21, 2005. The claimant also contends that he is entitled to a 15% permanent impairment rating for his cervical condition as well as attorney's fees.

Respondents have controverted the back injury in its entirety and have accepted a 3% permanent impairment rating for the cervical.

ISSUES TO BE LITIGATED

1. Compensability of a back injury.
2. Temporary total disability benefits.
3. Medical benefits.
4. A 15% permanent impairment rating for the cervical.
5. 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 June 17, 2004, cervical injury.
2. The compensation rates are \$370/278.

3. Respondents accepted a 3% permanent impairment rating.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on June 17, 2004 or November 3, 2004.
5. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to work because of his cervical injury from November 16, 2004 through December 9, 2004, and from February 2, 2005 through July 21, 2005.
6. The claimant has failed to prove by a preponderance of the evidence that he has sustained a permanent impairment rating that exceeds the 3% rating accepted and paid by respondents.
7. Respondents have not controverted medical benefits associated with the cervical injury but have controverted all medical related to the back injury.
8. The late payment issue was reserved, as it was not identified at the prehearing conference.
9. The claimant's attorney is entitled to the maximum attorney's fees to be paid in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 57 years of age, worked for the respondent employer seven or eight years. The claimant lifted two gallons of antifreeze on November 3, 2004 and contended he hurt his neck and back. On June 17, 2004, the claimant had an injury when he was lifting a wheel off a large truck and sustained a compensable neck injury. The claimant performed mechanic work for the respondent. The claimant first saw a

doctor following his June 17, 2004, injury on August 19, 2004, when he saw Dr. Richard Calhoun. The claimant received three cortisone shots in his neck over a nine-week period beginning in September 2004.

The claimant reported his November 3, 2004, injury to the manager, Rob Kelly. The claimant was laid off from his employment because of missed work and absence. The claimant underwent colon surgery in December 2004 and this was unrelated to his work injury, but underwent cervical surgery on February 21, 2005. The first notation in the medical records of back problems is an April 2005, notation from Dr. Zachary Mason. The claimant testified that he discussed his back problems with Dr. Mason before that date even though there is no notation in the medical notes. The claimant confirmed that he gave a telephone statement to the claims adjuster on December 15, 2004, and mentioned that his problems are with his neck, arms and down into his back. The claimant last saw Dr. Mason on April 28, 2005, but continues to have problems if he sits, stands or lays very long.

Arvin Lee Williams, owner of the respondent business, testified that the claimant reported a neck injury on June 17, 2004. Mr. Williams testified that the claimant also reported an injury when he picked up antifreeze in November 2004; however, there was no mention of low back or leg problems. Mr. Williams testified the claimant was laid off because he missed too much work.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused

internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury in either the June 17, 2004, incident or a November 3, 2004, incident. The claimant had given testimony in a deposition taken August 31, 2005, that he picked up some antifreeze in October 2004 and hurt his back and has also indicated that this incident happened in November 2004. The contemporaneous medical evidence simply does not support the claimant's contention of an October or November 2004, injury. The first report of a back problem is in Dr. Mason's April 27, 2005, report when it is noted that the claimant picked up blocks and felt low back pain. In April 2005, the claimant was off work from the respondent. Further, no diagnostic tests were introduced into evidence to support any objective findings for a back injury. Certainly, without objective findings, there can be no compensable injury. For all these reasons, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury in the course and scope of his employment.

The claimant next contends he is entitled to temporary total disability benefits from November 16, 2004 through July 21, 2005. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages beginning November 16, 2004 (Dr. Mason's report) through December 9, 2004 and from February 2, 2005 through July 21, 2005 (five months post surgery per Dr. Mason's April 28, 2005, report). Dr. Mason, on November 16, 2004, opined that the claimant's work required constant bending, lifting and stooping and that he should remain off work until after his cervical surgery. That surgery was performed on February 21, 2005 and Dr. Mason did not release the claimant to return to work until five months out from the surgery. The claimant underwent colon surgery on December 14, 2004 and was discharged from the hospital on December 22, 2004, and had some recovery period from that. The medical is sparse as to this condition. While the claimant was already off work for his cervical condition during the time of the colon surgery, the claimant did confirm that the stomach/colon doctor took him off work from December 10, 2004 through February 1, 2005.

After considering all the credible medical evidence and testimony, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to work because of his cervical condition from November 16, 2004 through December 9, 2004, and from February 2, 2005 through July 21, 2005.

While the claimant was unable to work from December 10, 2004 through February 1, 2005, his disability was related to his colon surgery. The claimant's colon surgery no doubt delayed his ability to undergo the cervical surgery and this was verified by the claimant's wife.

The claimant also mentioned an issue at the hearing of a late payment penalty, since the benefits were not timely paid. Since that was not an issue identified at the prehearing conference, that issue must be reserved for all parties to be prepared to litigate.

The claimant next contends that he is entitled to a 15% permanent impairment rating as assigned by Dr. Zachary Mason. Respondents have accepted a 3% permanent impairment rating.

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period had ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Further, the *AMA Guides* define "permanent impairment" as an "impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment." The *AMA Guides* further qualify the definition by noting that "[a] permanent impairment is considered to be unlikely to change substantially and by more than [three percent] in the next year with or without medical treatment." *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Further, the Commission was required to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted

the *AMA Guides* to be used in this assessment. Ark. Code Ann. §11-9-522(g)(1)(A) (Repl. 2005); W.C.C. Rule 34. 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*; the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Avaya v. Bryant*, 83 Ark. App. 273, 105 S.W.3d 811 (2003).

In the present case, the claimant had pre-existing problems with his cervical spine. He had undergone a procedure by Dr. Jim Moore on or about 1979 and in 2000, Dr. Zachary Mason performed cervical surgery after the claimant was dropped in the hospital. The claimant underwent an anterior cervical discectomy and arthrodesis, C6-7 about March 21, 2000. The claimant's cervical surgery following his work injury was the anterior partial corpectomy, C4, C5 and C6 with fusion using dowel grafts performed by Dr. Zachary Mason on February 21, 2005.

On April 28, 2005, Dr. Zachary Mason assigned a 15% permanent impairment rating to the claimant's condition and related this rating to the surgery in February 2005. Dr. Mason was questioned in his September 12, 2005, deposition about his assignment of the impairment rating and he reviewed the *AMA Guides* and responded:

A [Dr. Mason] Okay. Here's the table we usually use.
'Single level spinal fusion with or without decompression
with residual signs or symptoms, 10.'

Q [Mr. Frye] Okay. When you have a second operation
where multiple levels are operated on, what do you normally
add?

A Well, if I did, you know, I guess if you follow this strictly, you would add two percent for the second operation. Multiple levels, another percentage, though.

Q Okay.

A So that would be like three percent.

Q So if he had a second operation, which this one was a separate operation, that would be an additional two percent? (D., p. 24, lines 15-25; p. 25, line 1.)

Utilizing Table 75, page 113, of the *AMA Guides to the Evaluation of Permanent Impairment, 4th Ed.*, provides that multiple levels get 1% per level and a second operation adds 2%. In light of those parameters, the claimant underwent a second cervical surgery and two levels were involved, resulting in a 3% permanent impairment rating. Respondents have accepted and paid this rating. I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to a permanent impairment rating that exceeds 3%.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on June 17, 2004 or November 3, 2004. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to work because of his cervical injury from November 16, 2004 through December 9, 2004, and from February 2, 2005 through July 21, 2005. The claimant has failed to prove by a preponderance of the evidence that he has sustained a permanent impairment rating that exceeds the 3% rating accepted and paid by respondents. Respondents have not controverted medical benefits associated with

the cervical injury but have controverted all medical related to a back injury. The late payment issue was reserved as it was not identified at the prehearing conference.

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 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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**