

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400680

JOHN HARDING, EMPLOYEE	CLAIMANT
S.M.I. JOIST HOPE, EMPLOYER	RESPONDENT NO. 1
PACIFIC EMPLOYERS INS. CO., CARRIER	RESPONDENT NO. 1
DEATH & PERM. TOTAL DIS. TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 16, 2005

Hearing before Administrative Law Judge J. Mark White on July 14, 2005, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Nelson Shaw, Attorney at Law, Texarkana, Texas.

STATEMENT OF THE CASE

On July 14, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on June 6, 2005, and a Prehearing Order was entered that same day. A copy of the June 6, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including November 7, 2003; that on November 7, 2003, the claimant sustained a compensable injury to his back; that respondents accepted the November 7, 2003, injury as compensable and paid some benefits, including temporary total disability benefits through on or about May 8, 2004; that the claimant reached the end of his healing period as of September 7, 2004; that the claimant earned an average weekly wage of \$476, entitling him to a compensation rate of \$317 for total disability benefits and \$238 for permanent partial disability benefits; and that the Commission granted the claimant a change of physician to Dr. William Ackerman on March 17, 2005.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether additional medical treatment, including the claimant's surgery, related treatment, and impairment rating assignment, was reasonably necessary in connection with the compensable injury; whether the additional treatment recommended by Dr. Ackerman is reasonably necessary in connection with the compensable injury; whether the surgery and medical treatment received by the claimant was authorized treatment; whether the claimant is entitled to permanent partial disability benefits; whether the claimant is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his assigned anatomical impairment

rating; the liability, if any, of the Death & Permanent Total Disability Trust Fund; and controversion and attorney's fees.

The claimant contends that he should be paid temporary total disability benefits from on or about May 8, 2004, to September 7, 2004, when it appears he reached maximum medical improvement; that his primary treating physician was Dr. Freddie Contreras, until the Commission ordered a change of physician to Dr. Ackerman, and that the claimant did not change doctors until after entry of the change of physician order; that his surgery was reasonable, necessary and related to his compensable injuries; in the alternative, that the additional medical treatment was "emergency treatment" and that respondents are still liable for payment pursuant to Ark. Code Ann. § 11-9-508; that the assignment of an impairment rating by Dr. John Sklar was reasonable, necessary and related to his compensable injuries; that he is entitled to permanent partial disability benefits of at least 8% pursuant to Table 75 of the *AMA Guides*, rather than the 5% assigned by Dr. John Sklar pursuant to the DRE II model of the *AMA Guides*; that he is now totally and permanently disabled, or in the alternative, entitled to wage-loss disability benefits in excess of the assigned anatomical impairment rating; that the treatment recommended by Dr. Ackerman is reasonably necessary in connection with the compensable injury; and that attorney's fees should be paid as permitted by law.

Respondents no. 1 contend that the claimant did not comply with medical treatment and medical recommendations; that the claimant did not comply with the requirements of Ark. Code Ann. § 11-9-514(a) for a proper change of physician; that the claimant did not undergo “emergency treatment” as an exception to a change of physician, as defined under Ark. Code Ann. § 11-9-514(b); that the claimant’s surgery was not reasonable and necessary treatment pursuant to Ark. Code Ann. § 11-9-508(a); and that the claimant is entitled to no permanent benefits.

The Death & Permanent Total Disability Trust Fund contends that respondents no. 1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant’s compensable injury before payment of permanent total disability benefits; and that respondents no. 1 are not entitled to credit against their \$75,000 maximum for payment of the claimant’s permanent partial anatomical ratings for the compensable injury. The Trust Fund waived its appearance at the hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that the treatment and surgery provided by and at the referral of Dr. Contreras has been reasonably necessary in connection with the compensable injury.
4. The claimant has proven by a preponderance of the evidence that the treatment rendered by and at the referral of Dr. Ackerman has been reasonably necessary in connection with the compensable injury, and that additional medical treatment remains reasonably necessary for management of the claimant's compensable injury.
5. The claimant has proven by a preponderance of the evidence that the treatment and evaluation provided by Dr. Sklar has been reasonably necessary in connection with the compensable injury.
6. The change of physician rules do not apply to any treatment rendered after May 4, 2004, the date the respondents controverted further benefits.

7. The claimant has proven by a preponderance of the evidence that Dr. Contreras was his authorized treating physician at all relevant times herein.
8. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from the date his benefits were terminated, on or about May 8, 2004, until September 7, 2004.
9. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 8, 2004, until September 7, 2004.
10. The claimant has proven by a preponderance of the evidence that he has sustained permanent anatomical impairment of 5% to the body as a whole as a result of his compensable injury.
11. The claimant has proven by a preponderance of the evidence that this anatomical impairment rating is supported by objective and measurable physical findings.
12. The claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his permanent anatomical impairment.
13. The claimant has therefore proven by a preponderance of the evidence that

he is entitled to permanent partial disability benefits for an impairment of 5% to the body as a whole.

14. The claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled.
15. The claimant has proven by a preponderance of the evidence that he has sustained wage loss in the amount of 5% over and above his permanent anatomical impairment of 5%, for a total impairment of 10% to the body as a whole.
16. The respondents have controverted all benefits sought herein.
17. The Death & Permanent Total Disability Trust Fund has no liability herein.

DISCUSSION

I. History

The claimant worked for the respondent-employer for about three years. He initially worked a maintenance job, but by 2003 he was working what he described as “a desk job where I was I guess more troubleshooting than anything.” Prior to working for the respondent-employer, he had worked as an insurance agent for twenty-four years. He testified that he left that line of work to obtain better retirement benefits.

Sometime prior to this injury, the claimant sustained a non-work related foot injury. He underwent surgery on November 5, 2003, and was on crutches thereafter. On November 7 at the request of his supervisor he returned to work. That afternoon, as he sat down in a rolling chair, the chair rolled out from under him and caused him to fall to the floor, knocking him unconscious. He was seen at the hospital that afternoon by Dr. Clemens Soeller with complaints of back pain, and he returned to Dr. Soeller for treatment a few days later. An MRI exam performed November 10 revealed a "small right paracentral extrusion" at L4-5 and a "small right paracentral protrusion" at L5-S1, with degenerative changes at other levels.

At the claimant's request, Dr. Soeller referred him to a neurosurgeon, Dr. Freddie Contreras. The claimant testified that Leo Smith, safety director for the respondent-employer, approved the referral to Dr. Contreras. Dr. Contreras ordered a CT scan and myelogram; the CT scan revealed "multiple levels of stenosis." The claimant returned to Dr. Contreras on December 2, at which time Dr. Contreras wrote in his treatment notes:

John and Tina come in today for follow-up and to review his myelogram/CT scan. Unfortunately he has a very difficult problem in his back. He has a combination of diffuse disk bulging at multiple levels combined with significant facet disease which is subsequently causing lateral recess stenosis. This is most severe at L3-4, L4-5, and L5-S1.

I strongly encouraged John to try and avoid surgical intervention. I'm afraid that surgery would leave him with continued back problems and would not alleviate his symptoms.

I've indicated to him I think this will take a minimum of 12 weeks and possibly as long as a year for this problem to resolve. We're going to keep him off work and I will reevalutate him in 6 weeks.

The claimant went to the ER complaining of back pain on December 22 but was released. He returned to Dr. Contreras on January 6, 2004, at which point Dr.

Contreras noted:

John and Tina come in today for evaluation of his lumbar spine pain. He continues to describe pain starting in the middle of his back radiating into both buttocks and then down into both legs. He indicates he is the same and that he is no better. He would rate his pain level at an 8 with a range of 6 to 8. He indicates his right leg is slightly worse.

He was accompanied by someone from his place of employment who questioned whether or not John could return to work at this time. I have indicated to them that he is unable to return to active employment now and that in fact he may not return to work. I think there's a high likelihood that John may need to seek out disability retirement. He has significant degenerative disease at multiple levels in his lumbar spine which makes surgical intervention difficult and less likely to succeed.

The claimant returned to the ER complaining of back pain on January 21. On February 2, he was brought to the ER by ambulance for a decreased level of

consciousness. He was admitted and then transferred to St. Michael's in Texarkana, on a doctor's suspicion that the claimant's pain medications were responsible. The claimant was released from St. Michael's on February 4 and instructed to "continue your same medications."

Dr. Contreras sent the claimant to Dr. Edward Saer for a second opinion. Dr. Saer indicates in his notes of February 12 that Dr. Contreras had "possibly recommended surgery" and "wanted to know if a disk excision or a fusion would be recommended." Dr. Saer diagnosed a "probable sprain" and said "there is really no surgery necessary." He instead recommended physical therapy and medication, as well as epidural injections, and Dr. Contreras indicated he agreed with this approach. It does not appear from the record that any of these recommendations were actually followed at that time, however.

On March 2 the claimant saw Dr. Jim Moore for a third opinion. Dr. Moore noted that the claimant was "showing evidence of some long tract signs." He opined, in contrast to Dr. Saer and Dr. Contreras, that much of the claimant's problems were the result of a sacroiliac sprain/strain. He recommended a direct injection to the sacroiliac trigger, use of a TENS unit, and different medication. There is no indication in the record that any of this treatment was attempted. In a later note, Dr. Moore indicated his concern that the claimant was taking too many

narcotic medications, and he even suggested the possibility of inpatient drug rehab.

On March 13, the claimant returned to the emergency room complaining of back pain. On March 30, because of the claimant's worsening condition, Dr. Contreras agreed to perform surgery. In a letter of that date to the claimant's family physician, Dr. Contreras wrote: "At this point his pain has intensified and he is unable to function and is walking with a cane. As you are aware, he is requiring huge amounts of narcotics analgesics. In an effort to ameliorate some of his pain, I have offered him the option of a decompressive laminectomy at L-3-4 and 5." The surgery was scheduled for May.

On April 1, the claimant was admitted to the hospital for treatment of seizures and memory loss. On April 14 and April 22, he returned to the emergency room for back pain. Because of the ER visits Dr. Contreras moved the surgery up, performing it on April 28. After visually observing the spine in surgery Dr. Contreras ruled out any herniation, but he did note "significant lateral recess stenosis at L3, L4 and L5 bilaterally." The respondents terminated the claimant's benefits shortly thereafter.

The claimant initially reported significant improvement in his condition after the surgery. But on June 29, he reported to Dr. Contreras with "severe left hip and left leg pain." The claimant testified that he experienced a "slight pop in my back

one day” and that his pain then returned. From the claimant’s testimony and the medical records, it appears that this pain was eventually confined to just his back. Though the June 29 note mentions leg pain, I can find no subsequent mentions of leg, hip, or buttock pain in the record, and the claimant testified that his remaining pain is in his low back.

The claimant continued to treat with Dr. Contreras until September 7. At some point thereafter, Dr. Contreras refused to see him anymore because he had filed a malpractice lawsuit against Dr. Contreras regarding an earlier, unrelated neck surgery. On December 8, Dr. John Sklar administered a functional capacity evaluation, finding that the claimant was capable of medium-level work and assigning an impairment rating of 5% to the body as a whole. On March 17, 2005, the Commission entered a change of physician order, allowing the claimant to see Dr. William Ackerman. Dr. Ackerman saw the claimant a couple of times for pain management and prescribed various medications, but he then moved out of state. Dr. Ackerman referred the claimant to another pain management specialist, but as of the hearing the claimant had not yet seen this specialist.

II. Adjudication

A. Medical Treatment

An employer must 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). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Initially, Dr. Contreras recommended against surgery. When they evaluated the claimant, Dr. Saer and Dr. Moore likewise recommended against surgery. It does not appear that the conservative treatment they recommended was ever attempted. Dr. Contreras agreed to perform surgery only because the claimant's symptoms had become so severe and had failed to respond to other treatment. Initially after surgery the claimant noted substantial improvement in his pain, but some weeks later he experienced a recurrence of back pain and by his testimony he continues to have significant pain in his back.

However, before the surgery the claimant also complained of significant pain radiating into his buttocks and legs, particularly the left leg. It appears from the record that the surgery successfully alleviated this leg pain, and the claimant's symptoms are now limited to his low back. It is well established that success of a

treatment is a relevant factor to be considered in determining whether a treatment was reasonably necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Because the claimant's surgery successfully alleviated his leg pain, I find that the claimant has proven by a preponderance of the evidence that the treatment and surgery provided by and at the referral of Dr. Contreras has been reasonably necessary in connection with the compensable injury.

It is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Dr. Ackerman has recommended continuing pain management treatment for the claimant since the surgery, and nothing in the record contradicts his recommendation. I find that the claimant has proven by a preponderance of the evidence that the treatment rendered by and at the referral of Dr. Ackerman has been reasonably necessary in connection with the compensable injury, and that additional medical treatment remains reasonably necessary for management of the claimant's compensable injury.

The claimant saw Dr. John Sklar for assignment of an impairment rating, at the referral of the claimant's attorney, and Dr. Sklar did in fact assign an impairment rating of 5% to the body as a whole. As discussed below, I find that the claimant's

compensable injury is the major cause of this impairment. Therefore, I find that the claimant has proven by a preponderance of the evidence that the treatment and evaluation provided by Dr. Sklar has been reasonably necessary in connection with the compensable injury.

B. Authorization

The change of physician rules do not apply once a claimant's entitlement to treatment has been controverted. *Sanyo Mfg. Corp. v. Farrell*, 16 Ark. App. 59, 696 S.W.2d 779 (1985); *Kenney v. Siloam Springs School District*, A.W.C.C. E907076 (Aug. 31, 2001); *Barnett v. Daniel*, A.W.C.C. E600078 (May 25, 2001). The record contains a Form AR-2 filed by the respondents on May 4, 2004, controverting the claimant's entitlement to further treatment or benefits. Therefore, the change of physician rules do not apply to any treatment rendered after May 4, 2004, and the question of authorization is irrelevant.

The only treatment contested by the respondents and rendered prior to May 4, 2004, is that of Dr. Contreras. The claimant testified that the employer authorized him to see Dr. Contreras, and nothing in the record contradicts his testimony. In fact, I note that nothing whatsoever in the record before me supports the respondents' contentions in this regard, nor does anything in the record support

their stated reasons for controverting this claim – that the claimant had “not been compliant with medical treatment” and that he had “changed doctors without requesting change of physician.” I find that the claimant has proven by a preponderance of the evidence that Dr. Contreras was his authorized treating physician.

C. Temporary Total Disability

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The respondent-carrier terminated the claimant’s total disability benefits as of May 8, 2004, apparently when it learned the claimant had undergone surgery by Dr. Contreras. The claimant had been taken off of work by Dr. Contreras and remained off after his surgery. The parties have stipulated that the claimant reached the end of his healing period on September 7, 2004, and there is no evidence to show

that Dr. Contreras or any other physician instructed the claimant to return to work prior to then. As discussed above, I find that the surgery was reasonably necessary in connection with the compensable injury.

Given Dr. Contreras' notes and the other medical evidence in the record, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from the date his benefits were terminated, on or about May 8, 2004, until September 7, 2004. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from May 8, 2004, until September 7, 2004.

D. Permanent Partial Disability

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any determination of permanent physical impairment must be supported by objective and measurable

physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Benefits for permanent impairment may be awarded only upon a showing that the compensable injury was the major cause of the impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a).

Dr. John Sklar has assigned the claimant a permanent impairment rating of 5% to the body as a whole. In light of the criteria established by the *AMA Guides*, 4th Edition, this rating appears to be consistent both with the *Guides* and with the claimant's physical condition. No other rating has been assigned, and I can see no justification in the *Guides* for raising or lowering the rating assigned by Dr. Sklar. I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent anatomical impairment of 5% to the body as a whole as a result of his compensable injury. Given the MRI findings documented in the record, I find that the claimant has proven by a preponderance of the evidence that this anatomical impairment rating is supported by objective and measurable physical findings. I can find no evidence to suggest or establish any other causal factor for the claimant's impairment rating, other than his compensable injury. I note there is no evidence of pre-existing low back problems, though the claimant did have some prior neck problems. I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his permanent anatomical

impairment. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits for an impairment of 5% to the body as a whole.

In making this finding, I note that the claimant contends he is entitled to a higher rating under Table 75 of the *Guides*. The Fourth Edition of the *Guides* provides two models for determining permanent impairment to the spine: the Injury Model, also referred to as the Diagnosis-Related Estimates Model (DRE), and the Range of Motion Model, of which Table 75 is a part. *AMA Guides* § 3.3. The *Guides* specifically provide that the DRE model should be referenced first, and the Range of Motion model should be used only if an accurate impairment cannot be determined using the DRE model. *Id.* In the present case, a rating can in fact be reached utilizing the DRE model. By the terms of Table 70, patients exhibiting a “previous spine operation without loss of motion segment integrity or radiculopathy” – an accurate description of the claimant – may be placed in DRE categories II, III, or IV. Reviewing the more specific criteria set forth in Tables 72 and 73, it is clear the claimant falls into DRE category II, entitling him to an impairment rating of 5% to the body as a whole. Because a rating can be assigned using the DRE model, reference to Table 75 and the Range of Motion Model is not appropriate.

E. Permanent Total Disability & Wage Loss

The claimant contends that he is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519 (e). The claimant bears the burden of proving that he is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant is relatively young at 54, and he has two years of college. His work experience indicates he possesses a diverse set of work skills that could be readily transferred to any number of supervisory, professional, or office positions. Although he testified he is unable to work, the claimant does have a relatively active

lifestyle. I can see no physical limitation which would prevent the claimant from returning to his prior job of insurance agent, a job he held for more than twenty years. Admittedly, the claimant's back may prevent him from working a full forty-hour week, but I am convinced he is capable of earning meaningful wages as an insurance agent or in some similar sedentary line of work. I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. However, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss in the amount of 5% over and above his permanent anatomical impairment of 5%, for a total impairment of 10% to the body as a whole.

AWARD

The claimant has proven by a preponderance of the evidence that the treatment provided by and at the referral of Dr. Contreras, Dr. Ackerman, and Dr. Sklar, has been reasonably necessary in connection with the compensable injury; that additional medical treatment remains reasonably necessary in connection with the compensable injury; that he is entitled to temporary total disability benefits from May 8, 2004, through September 7, 2004; that he is entitled to permanent partial disability benefits for an impairment of 5% to the body as a whole; and that he is

entitled to additional wage-loss disability benefits in the amount of 5% to the body as a whole. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

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 Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge