

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F000600

ROBERT LOWERY,
EMPLOYEE

CLAIMANT

ZIMDAHL ELECTRIC, INC.,
EMPLOYER

RESPONDENT

STATE AUTOMOBILE MUTUAL INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 25, 2005

Case submitted on a documentary record before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL.

The claimant was represented by HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE A. GENE WILLIAMS, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case was submitted for a decision based on documentary evidence which includes a prehearing order filed January 10, 2005, claimant's answers to prehearing questionnaire and 54 pages of attached medical exhibits, respondents' response to prehearing questionnaire with attached Exhibit 1 (35 pages), Exhibit 2 (11 pages), Exhibit 3 (1 page), respondents' Supplemental Exhibit 1 filed February 22, 2005 (1 page), the oral deposition of Robert Lowery taken on September 24, 2004, and the oral deposition of Dr. Anthony McBride taken on February 22, 2005.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The employer-employee-carrier relationship existed on September 23, 1999.
2. The claim was accepted as compensable.
3. Claimant received a three percent (3%) permanent partial impairment rating of [sic] his left knee, for which benefits were paid by respondents.
4. Claimant sustained a compensable injury to his back on 6/4/91 while employed by Little Rock Electrical Contractors.
5. Claimant had a laminectomy on 10/18/95 for an L5-S1 HNP.

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

1. Permanent partial disability benefits (permanent anatomical impairment).
2. Controverted attorney fee.

Respondent:

1. Compensability of a permanent impairment rating assigned by Dr. McBride for an alleged back injury.

DISCUSSION

Mr. Lowery sustained admittedly compensable injuries when he fell from scaffolding at work on September 23, 1999. Mr. Lowery required treatment for both his knee and his low back. His knee injury and benefits for that injury are not at issue. However, Dr. Anthony McBride ultimately assigned Mr. Lowery an 8% permanent impairment to the body as a whole for the condition of the L5-S1 and L4-5 discs in his lower back for which Dr. McBride apportioned one-half, or 4%, to Mr. Lowery's September 23, 1999 injury. Mr. Lowery seeks benefits for the 4% rating assigned by Dr. McBride.

With regard to Dr. McBride's apportionment, the record establishes that Mr. Lowery sustained prior back injuries in 1991 and in 1995. An MRI following the 1995 injury revealed a large disc herniation at the L5-S1 level of the spine, in addition to severe facet hypertrophy on the right side at L5-S1 and moderate facet and ligamentum flavum hypertrophy at L4-L5. Mr. Lowery underwent L5-S1 disc surgery for the 1995 disc herniation, and returned to normal activities prior to the fall off of scaffolding on September 23, 1999. After conservative treatment, and based on clinical observations and an MRI performed after the 1999 fall at work, both Dr. Anthony McBride and Dr. Edward Saer concluded

that Mr. Lowery is not a candidate for any additional surgery to his low back.

During his deposition, Dr. McBride explained his diagnosis that Mr. Lowery's 1999 injury was a pull to the muscles and joint ligaments in his lower back aggravating symptoms from his previous injury and surgery and degenerative changes in the joints of Mr. Lowery's lower back. Dr. McBride explained that the objective findings supporting the impairment rating which he assigned would include Mr. Lowery's prior back surgery and bony degenerative changes. With regard to his medical decision to apportion 4% of the 8% rating for abnormalities at L5-S1 and L4-5 to the most recent 1999 injury, Dr. McBride explained as follows:

Q. And so far as apportioning any part of an impairment rating to his injury, then that's based solely on the fact that he now complains of pain?

A. I try to be fair to the patient, and if he states he had an injury and that he did not have pain prior to that injury, I try to be fair and at least accept some of his complaint at, you know, face value for what he tells me.

The Arkansas Court of Appeals thoroughly discussed the requirements necessary to establish an entitlement to benefits for a permanent anatomical impairment in Excelsior Hotel v. Squires, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

First, benefits for permanent impairment must be based on an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). The Commission may review the Guides even if the Guides are not in the record, and the Commission may determine its own impairment rating under the Guides, rather than simply assessing the validity of impairment ratings assigned by doctors. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

Second, benefits for permanent anatomical impairment shall be awarded only if the claimant's compensable injury is the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The provisions of Ark. Code Ann § 11-9-102(4)(F)(ii)(b) do not apply in determining a claim for permanent anatomical impairment. Michael v. Keep & Teach, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (CA 03-978 filed June 16, 2004). Major cause means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

Third, a determination of the existence and extent of physical impairment must be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). "Objective findings" are defined as "those findings which cannot come under the voluntary control of

the patient.” Ark. Code Ann. § 11-9-102(16)(A)(i). When determining the permanent physical impairment, neither a doctor or the Commission may consider complaints of pain. For purposes of assigning impairment ratings to the spine, straight-leg-raising tests and range-of-motion tests do not qualify as objective findings. Ark. Code Ann. § 11-9-102(16)(A)(ii).

In the present case, there appears to be no dispute that Dr. McBride has accurately determined that the abnormalities that he observed on the MRI indicate a permanent anatomical impairment of at least 7% to the L5-S1 disc and an additional 1% for the L4-5 disc, pursuant to Table 75 II. C. F. on page 113 of the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition. In fact, since the L5-S1 disc is actually a surgically treated disc, by my understanding of Table 75, Mr. Lowery has actually experienced an 8% permanent anatomical impairment to the body as a whole based on a surgically treated L5-S1 disc in the lumbar spine and an additional 1% impairment for the abnormalities at L4-5. However, as even Dr. McBride has conceded, the abnormalities at L4-5 and L5-1 for which Dr. McBride calculated an 8% impairment, and for which I calculate a 9% impairment, all pre-existed the occurrence of

Mr. Lowery's 1999 pull injury to the muscles and joint ligaments. Because the abnormalities on which Mr. Lowery's impairment is based pre-existed his 1999 injury at issue, I find that Mr. Lowery has failed to establish that his work-related injury is the major cause of any impairment to which he might be assigned for his compensable low back condition, and I find that Mr. Lowery has failed to establish the existence and/or the extent of any physical impairment attributable to his 1999 injury supported by objective and measurable physical findings.

In reaching these conclusions, I recognize that the Commission and the Courts have on a number of occasions now found circumstances from which to conclude that a work-related injury which aggravates a pre-existing condition can be the major cause of a resulting impairment, or at least some portion of a resulting impairment. For example, in Second Injury Fund v. Stevens, 62 Ark. App. 255, 970 SW2d 331 (1998), the Arkansas Court of Appeals held that the major cause requirement was satisfied by evidence that an injury necessitated surgery at the site of a previous injury, and that the surgery was the reason for an additional 2% impairment rating. Likewise, in Pollard v. Meridian Aggregates, ___ Ark. App. ___, ___ S.W.3d ___

(September 29, 2004), the Arkansas Court of Appeals found that Mr. Pollard proved his work-related injury, which aggravated pre-existing stenosis, was the major cause of his impairment where his stenosis was asymptomatic prior to the work-related injury, but he subsequently required surgery resulting in impairment after the aggravation injury. Likewise, in Wal-Mart Stores, Inc. v. Westbrook, 77, Ark. App. 167, 72 S.W.3d 889 (2002), the Arkansas Court of Appeals affirmed a Full Commission decision which relied on a doctor's apportionment of anatomical impairment to establish that of a 50% impairment to the shoulder, a work-related injury was the major cause of 5% of that 50% impairment. In Westbrook, the claimant likewise underwent reconstructive surgery following the work-related injury to repair the acromioclavicular joint, a synovial cyst, and to attempt to repair a rotator cuff tear.

I find that the circumstances in the present case are distinguishable from the circumstances presented in the above cited cases since, as discussed above, in the present case the claimant had surgery before his work-related injury, and under the AMA Guides, the claimant sustained an 8% post-surgical impairment at the L5-S1 level which pre-existed the 1999 work-related injury. In addition, Dr.

McBride has acknowledged in the present case that the L4-5 abnormality likewise pre-existed the work-related injury, and as also discussed above, the claimant has never undergone additional surgery following the 1999 work-related injury. Under these circumstances, I find that the claimant has failed to establish that his 1999 work injury is the major cause of any degree of anatomical impairment assigned by Dr. McBride or assignable under the AMA Guides for his lumbar injury.

I also find that the claimant has failed to establish any permanent anatomical impairment attributable to the 1999 injury supported by objective and measurable medical findings. As discussed above, the objective medical findings from which Dr. McBride assigned an impairment rating under the AMA Guides by his own admission all pre-existed the 1999 injury. In addition, I note on one occasion Dr. Ackerman detected the presence of two nodular trigger points in the right lower aspect of Mr. Lowery's lumbar spine on January 12, 2000, approximately three months after the work-related injury and approximately four months before Dr. McBride assigned an 8% impairment rating. However, even if an impairment rating could be assigned for the presence of objective nodular trigger points in the

lumbar spine under the AMA Guides, I point out that the trigger points were only noted on this one occasion, and I therefore find that the claimant has failed to establish that the trigger point abnormalities in his lumbar spine were permanent. Therefore, I find that one notation of trigger points on January 12, 2000 would be insufficient to establish the presence of a permanent anatomical impairment by objective and measurable findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee-carrier relationship existed on September 23, 1999.
2. The claim was accepted as compensable.
3. Claimant received a three percent (3%) permanent partial impairment rating of [sic] his left knee, for which benefits were paid by respondents.
4. Claimant sustained a compensable injury to his back on 6/4/91 while employed by Little Rock Electrical Contractors.
5. Claimant had a laminectomy on 10/18/95 for an L5-S1 HNP.
6. The claimant has failed to establish by a preponderance of the evidence that he has sustained any permanent anatomical impairment to his lumbar spine

attributable to his 1999 work-related injury. Specifically, the claimant has failed to establish that his 1999 injury is the major cause of any degree of assignable impairment under the AMA Guides to the Evaluation of Permanent Anatomical Impairment (4th ed.), and the claimant has failed to establish by a preponderance of the evidence the existence of any permanent anatomical impairment from the 1999 injury supported by objective and measurable findings in the lumbar spine.

ORDER

For the reasons discussed herein, this claim for permanent impairment compensation and associated attorney's fees must be and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge