

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302010

ERNEST MOORE,
EMPLOYEE

CLAIMANT

CONTINENTAL EXPRESS INC.,
EMPLOYER

RESPONDENT

GIBRALTAR NATIONAL INS CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 18, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Texarkana, Miller County, Arkansas.

The claimant was represented by HONORABLE NEAL L. HART, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE JOHN D. WEBSTER, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 26, 2004 in Texarkana, Arkansas. A prehearing order was entered in this case on September 9, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the hearing and are hereby accepted:

1. The employer/employee/carrier relationship existed on February 5, 2003.
2. The claimant sustained a compensable injury on February 5, 2003.
3. The claimant was earning sufficient wages to entitle him to the maximum compensation rate.
4. The respondents accept liability for a 13% permanent anatomical impairment rating to the claimant's whole body.
5. The respondents have controverted liability for any wage loss disability compensation and for any degree of permanent anatomical impairment above the 13% rating to the body as a whole which the respondents accepted at the start of the hearing.
6. The parties stipulate that the Change of Physician Order to Dr. Contreras previously entered by Administrative Law Judge Michael White must by necessity be vacated and the issue of change of physician reserved until a later date.

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

1. Whether the claimant is entitled to compensation for a twenty percent (20%) permanent physical impairment.
2. Whether the claimant sustained any impairment to his earning capacity in excess of the permanent physical impairment established by the medical evidence.
3. Attorneys fees.

The record consists of the October 26, 2004 hearing transcript and the exhibits contained therein. The parties have incorporated into the record by reference the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). In addition, I have supplemented the record by "blue-backing" each parties' Post Hearing Letter Brief.

DISCUSSION

1. Anatomical Impairment

Any determination of the existence and extent of permanent physical impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1). Objective findings are defined as those findings which cannot come under the voluntary control of the patient. In addition, when determining physical or anatomical impairment, physicians and the Commission may not

consider complaints of pain, and range of motion tests are not considered objective findings for purposes of determining anatomical impairment to the spine. Ark. Code Ann. § 11-9-102(16) (A).

Pursuant to the amendments of Act 796 of 1993, the Commission was directed, after a public hearing to adopt an impairment rating guide to be used in the assessment of anatomical impairment. The statute directed that the guide shall not include pain as a basis for impairment. The statute also provided that the impairment rating guide adopted by the Commission shall be subject to review by the General Assembly before April 1 of every odd-numbered year beginning with the regular session of 1999. Ark. Code Ann. § 11-9-522(g). Accordingly, pursuant to Commission Rule 34, the Arkansas Workers' Compensation Commission adopted Guides to the Evaluation of Permanent Impairment (4th ed. 1993) [hereinafter "Fourth Edition"] published by the American Medical Association exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine.

Although apparently not addressed by the Arkansas Courts, I note that the Full Commission has previously

recognized that for spinal impairments, physicians or the Commission may apply either the Injury Model or the Range of Motion Model contained in Section 3.3 of the Fourth Edition, subject to the limitations regarding pain and range of motion testing discussed above. See generally Dwight Murry v. Riceland Foods, Full Workers' Compensation Commission, Opinion filed January 20, 1999 (E516632). In the present case, Dr. English assessed Mr. Moore a 13% impairment based on range of motion tests and applying the Range of Motion Model of the Fourth Edition. Alternatively, Dr. English assessed the claimant a 20% impairment based on a category IV loss of motion segment integrity applying the Injury Model of the Fourth Edition. I have the following observations regarding the impairment ratings which Dr. English assessed for Mr. Moore's lumbar spine injury and two level fusion.

My legal research does not support Dr. English's statement that two level fusions are generally placed into category IV loss of motion segment integrity using the DRE categories of the Injury Model of the Fourth Edition of the AMA Guides. I note in passing that Dr. English's statement would be true if the Commission were to adopt the Guides to the Evaluation of Permanent Impairment (5th ed. 2000)

[hereinafter "Fifth Edition"] since the Fifth Edition in fact added arthrodesis as a criteria for assessment of a category IV impairment under the Injury Model. See generally Fifth Edition Table 15-3, p. 384.

My legal research also indicates that Dr. English's assessment of a category IV (20%) impairment was apparently based on the guidelines of the Texas Workers' Compensation Law, not the Arkansas Workers' Compensation Law, since Dr. English completed a Texas Workers' Compensation Commission Form 69 (Report of Medical Evaluation), and since my legal research indicates that the Texas Workers' Compensation Commission, by Advisory 2003 - 10B, adopted its own rule that multilevel fusions meet the criteria for DRE category IV in Texas, because the Texas Workers' Compensation Commission has concluded that a multilevel fusion "is equivalent to" the multilevel spine segment structural compromise discussed in DRE category IV. See Texas Workers Compensation Commission Advisory 2003-10B.

Notwithstanding the addition regarding arthrodesis in the Fifth Edition of the Guides, and notwithstanding the decision of the Texas Workers' Compensation Commission to treat a spinal fusion as "equivalent to" multilevel spine segment structural compromise under the Fourth Edition, I

note that I am constrained to use the Fourth Edition of the AMA Guides as written, and I note that the AMA chose not to establish criteria under the Injury Model in the Fourth Edition for impairment based solely for a herniated disc without radiculopathy. See Fourth Edition, Section 3.3d page 3/100. In addition, I note that the AMA chose not to increase in the Fourth Edition an impairment estimation under the Injury Model due to surgery to treat an impairment. See Fourth Edition Section 3.3d page 3/100.

In fact, as the respondents' post-hearing brief in the present case notes, Example 1 on page 3/105 of the Fourth Edition indicates that a patient who sustains a herniated disc causing radiculopathy, and who then undergoes a discectomy and fusion surgery, sustains only a category III impairment (for radiculopathy) and not a category IV impairment (for loss of motion segment integrity).

Applying the Injury Model criteria in the Fourth Edition to the present case, again I interpret that arthrodesis or fusion surgery does not meet the definition of "loss motion or structural integrity" as that term is defined on page 3/102 for a DRE Lumbosacral Category IV impairment in the Fourth Edition. In addition, I note that the claimant's medical records indicate to me that the

claimant's fusion was performed because of back pain, not for radiculopathy. In fact, I do not see the term radiculopathy anywhere in the claimant's medical reports in the record. Therefore, the medical evidence in the present case fails to support either a category III impairment or a category IV impairment under the Injury Model of the Fourth Edition.

Moreover, since the nature of the claimant's back injury and surgery are not any of the conditions listed in Table 70 (page 108) of the Fourth Edition, I interpret that I should instead use the Range of Motion Model to determine the claimant's impairment. See Fourth Edition Section 3.3 page 3/94.

I also note that Dr. English, applying the Range of Motion Model, calculated a 13% impairment to the body as a whole based on range of motion testing performed on Mr. Moore's spine. Inexplicably, however, Dr. English added to that value 0% impairment pursuant to Table 75 on page 113 of the Fourth Edition. The respondents' post-hearing brief concedes that Mr. Moore is entitled to the maximum assignable impairment of 13% under Table 75 Section IV. D and E, and as discussed above, I am precluded by Ark. Code Ann. § 11-9-102(16)(A)(ii) from considering the range of

motion testing of Mr. Moore's spine on which Dr. English calculated his 13% impairment rating.

Consequently, for all of the reasons discussed herein, I find that the Injury Model of the Fourth Edition does not assign a 20% (category IV) impairment for arthrodesis as Dr. English suggests, and I find that the claimant is entitled to benefits for a 13% permanent anatomical impairment rated to the whole body pursuant to Table 75 Section IV D and E applying the Range of Motion Model of the AMA Guides Fourth Edition.

2. Wage Loss

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work

experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In the present case, the wage loss factors which most appear to support the claimant's ability to continue earning an income are his relatively young age (44 years old) and his motivation to return to work as a truck driver notwithstanding his permanent limitations discussed below. In this regard, I note that after his post-surgical release to return to work, Mr. Moore was not able to return to work for Continental Express. However, Mr. Moore did enter into

a lease-to-own agreement driving for Dart, with some restrictions and limitations.

The wage loss factors which most limit Mr. Moore's ability to seek employment outside of trucking include his limited education, having left school in the 10th grade, and his almost nonexistent work experience outside the field of trucking. The wage loss factors which appear to me to most impair Mr. Moore's ability to earn wages as a trucker include his loss of seniority, since he was unable to meet the physical requirements of returning to work for Continental Express, his physician's permanent 50 pound lifting restriction, the results of his functional capacity evaluation indicating that he should avoid repetitive bending, stooping and prolonged flexed positions, and his need to stop and lay down for rest every two to three hours after driving. These restrictions impair Mr. Moore's ability to return to work for over-the-road trucking companies which require their drivers to be physically capable of unloading trucks (such as Continental Express). These restrictions also limit Mr. Moore's abilities to accept work requiring long hauls from coast to coast. These restrictions impair Mr. Moore's ability to accept work in

any driving position where he would not be able to stop and rest, as needed, after 2 or 3 hours of driving.

After considering Mr. Moore's age, education, work experience and all other relevant factors, I find that he is experienced a 12% impairment to his wage earning capacity in excess of the 13% permanent anatomical impairment accepted by the respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee/carrier relationship existed on February 5, 2003.

3. The claimant sustained a compensable injury on February 5, 2003.

4. The claimant was earning sufficient wages to entitle him to the maximum compensation rate.

5. The respondents accept liability for a 13% permanent anatomical impairment rating to the claimant's whole body.

6. The Change of Physician Order to Dr. Contreras previously entered by Administrative Law Judge Michael White is hereby vacated and the issue of change of physician is reserved by the parties until a later date.

7. The claimant has failed to establish that he is

entitled to benefits for any degree of permanent anatomical impairment in excess of the 13% permanent anatomical impairment accepted by the respondents.

8. The claimant has sustained a 12% impairment to his wage earning capacity in excess of the 13% anatomical impairment accepted by the respondents.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge