

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E701782/E612295

LEWIS PATTON, Employee	CLAIMANT
PETERSON FARMS, Employer	RESPONDENT
COMPCARE ADMINISTRATORS, Carrier	RESPONDENT

OPINION FILED AUGUST 9, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

This case comes on for review following a remand from the Full Commission. A prior hearing was conducted in this claim on December 29, 1999 and an opinion filed February 2, 2000 wherein I found that claimant had failed to prove by a preponderance of the evidence that medical treatment received from Drs. Raben and Piechal was causally related to his compensable left shoulder and left knee injuries. I also found that claimant had failed to prove by a preponderance of the evidence that he was entitled to additional temporary total disability benefits and that he had failed to prove by a preponderance of the evidence that he was entitled to any additional permanent partial disability benefits in excess of the 10% rating already paid by the respondent for his left knee injury. That opinion was appealed to the Full Commission, which in an opinion filed July 26, 2000 vacated and remanded the claim for further proceedings; specifically, with respect to the issue of whether claimant's back condition was causally related to his compensable left knee injury.

A hearing on remand was delayed for a significant period of time while the claimant underwent additional medical treatment including numerous surgeries and while the parties

attempted to reach a compromise settlement. Following the additional medical treatment the parties were unable to reach a settlement and this case was eventually set for a hearing which was conducted on June 8, 2005.

A pre-hearing conference was conducted on March 2, 2005, at which time the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The relationship of employee-employer existed between the parties at all relevant times.

3. The claimant sustained a compensable injury to his left shoulder on April 11, 1995 (E612295).

4. The claimant suffered a compensable injury to his left knee on November 23, 1996 (E701782).

5. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$337.00 for total disability benefits and \$253.00 for permanent partial disability benefits.

6. Respondent accepted and paid a 10% impairment rating in connection with the claimant's knee injury.

In addition, the pre-hearing order reflects that the issues to be litigated at the hearing include the following:

1. Whether claimant's back condition is causally related to his compensable knee injury.

2. Medical related to back.

3. Permanent disability benefits including a 10% rating to the shoulder, rating to the back, and wage loss.

4. Any unpaid medical relating to claimant's knee surgery in December 2004.

5. Attorney fee.

At the time of the hearing the claimant withdrew as an issue any unpaid medical benefits relating to his most recent left knee surgery in December 2004. In addition, the claimant also indicated that he was making no claim for compensation benefits relating to his right shoulder. Therefore, even though there are medical records regarding both of these medical conditions, claimant has waived entitlement to any potential benefits associated with those conditions. The parties also agreed at the time of the hearing that the issues from the first hearing which were remanded should also be litigated. These include claimant's entitlement to temporary total disability benefits and unpaid medical treatment.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 2, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that his back condition is a compensable consequence of his left knee injury.

3. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for medical treatment provided by Dr. Raben or Dr. Piechal.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable left shoulder and left knee injuries. This includes subsequent treatment and surgeries provided by Dr. Chris Arnold.

However, it does not include the knee surgery in December 2004 which is not being claimed by the claimant. Pursuant to A.C.A. §11-9-411 respondent is entitled to a credit for any medical benefits paid by a group health carrier.

5. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 26, 2000 and continuing through April 16, 2001.

6. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 5% to the body as a whole as a result of his compensable left shoulder injury.

7. As a result of claimant's compensable left shoulder and left knee injuries, claimant has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole.

8. Respondent has controverted claimant's entitlement to all unpaid compensation benefits.

FACTUAL BACKGROUND

The claimant is a 58-year-old man with a ninth grade education who obtained his GED in 1997. For the last several years claimant has primarily been employed as a working supervisor in sanitation for various companies. Claimant began working for the respondent as a sanitation supervisor on September 10, 1994. In addition to supervising the sanitation employees, claimant also performed many physical job duties himself. Claimant's job required him to pick up trash, tear down equipment, rinse equipment, foam equipment, hand scrub equipment, and reassemble equipment. Claimant testified that in order to perform these job duties he had to walk, climb, move equipment, and grip high pressure hoses.

Claimant suffered a compensable injury to his left shoulder on April 11, 1995 while

he was in the process of pulling an elevator door shut. This injury was accepted by the respondent as compensable and some compensation benefits were paid including treatment for surgery which was performed by Dr. Tomlinson on July 13, 1995. After that surgery claimant was released to return to work by Dr. Tomlinson with limitations. Claimant suffered a second compensable injury when he slipped and fell on November 23, 1996. Respondent accepted as compensable an injury to claimant's left knee as a result of that accident and paid some compensation benefits including surgery which was performed by Dr. James Arnold to repair a torn meniscus on January 17, 1997. Dr. James Arnold also assigned claimant a permanent physical impairment rating in an amount equal to 10% to the left lower extremity which was accepted and paid by the respondent.

Claimant was released by Dr. James Arnold from his care and permitted to return to work for respondent which he did until he was terminated in September 1997. While claimant was receiving medical treatment from Dr. James Arnold, he made complaints of low back pain and as a result Dr. James Arnold referred claimant to Dr. Piechal for evaluation. Since that time the claimant has continued to see Dr. Piechal on multiple occasions for a myriad of complaints. In addition, claimant was also evaluated and treated by a number of other physicians for various conditions. For instance, claimant eventually came under the care of Dr. Blankenship who performed a three-level fusion on the claimant's lumbar spine on November 20, 2001. In addition, claimant also came under the care of Dr. Chris Arnold, the son of Dr. James Arnold, who performed a second surgical procedure on the claimant's left knee on October 20, 2000 and a second surgical procedure on the claimant's left shoulder on January 12, 2001. It should also be noted that Dr. Chris Arnold has also performed surgery on the claimant's right shoulder and again on claimant's left knee in December 2004. However, as previously noted, claimant is making no claim for benefits in connection with these medical procedures.

Claimant has filed this claim contending that his back condition and subsequent

surgery is a compensable consequence of his left knee injury. Claimant seeks payment of medical benefits associated with his back condition including treatment from Drs. Raben and Piechal. Claimant also requests temporary total disability benefits, permanent total disability benefits, permanent partial disability benefits, and a controverted attorney fee.

ADJUDICATION

COMPENSABILITY.

The initial issue for consideration involves claimant's contention that his back problems are the direct result of an altered gait caused by his compensable left knee injury. In support of his contention claimant relies upon his testimony that his knee problems caused him difficulty walking and climbing stairs as well as the opinions of Drs. Piechal and James Arnold. Dr. Piechal in a report dated October 3, 2000 indicated that in his opinion that claimant's gait dysfunction was secondary to his knee injury and resulted in a low back injury and subsequent sciatica. This was also the opinion of Dr. James Arnold in reports of June 12, 1997 and September 27, 2000.

Initially, I note that claimant's current contention as well as the opinions of Dr. James Arnold and Dr. Piechal are contrary to claimant's original testimony regarding the origin of his back problems. In his deposition testimony of December 22, 1999, claimant did not attribute his back condition to an altered gait resulting from his left knee injury, but instead attributed his back injury to the actual fall itself on November 23, 1996. Claimant again expressed the fall as the original of his low back complaint at the time of the hearing on December 29, 1999.

Q. And when did you hurt - - When did the low back start hurting? Which injury caused that?

A. It was the fall on the left leg - - left side.

Thus, while claimant now contends that his low back condition is the result of an

altered gait caused by his compensable left knee injury, in December 1999 claimant attributed his low back complaints to the fall itself, not an altered gait.

Furthermore, with respect to Dr. James Arnold's opinion, I note that in both of his reports addressing this issue he indicates that claimant did not begin having sciatica or low back pain until after the arthroscopic surgery on January 17, 1997.

June 12, 1987

Lewis Patton has been a patient of mine and underwent arthroscopic procedure of his knee on January 17, 1997. Shortly following his procedure, he began having sciatica. (Emphasis added.)

September 27, 2000

I would stand by my statement that after his arthroscopic procedure on January 17, 1997 he subsequently began having sciatica.

Dr. James Arnold's statement that claimant's sciatica did not appear until after the arthroscopic procedure is contradicted by his own medical report of December 26, 1996 prior to the arthroscopic procedure wherein he notes that claimant perhaps has a minimal sciatic nerve root irritation. Thus, claimant's complaints of sciatica or low back pain appeared prior to the surgery, not after as reflected in Dr. Arnold's reports.

Finally, with respect to this issue, I note that claimant completed Form AR-N on December 5, 1996, less than two weeks after this incident. That form indicates that claimant suffered only an injury to his left knee and right foot. The form does not indicate claimant having suffered a low back injury at that time.

In summary, claimant contends that his back problems are the result of an altered gait caused by the compensable left knee injury. I find insufficient credible evidence establishing this causal connection. Initially, I note that claimant's current contention is contrary to his testimony at a deposition and a hearing in 1999 wherein he attributed his back complaints to the fall itself, not an altered gait. Furthermore, Dr. Arnold's opinion is

based upon his belief that claimant's low back complaints and sciatica did not appear until after the arthroscopic procedure of January 17, 1997. However, Dr. James Arnold's office notes of December 26, 1996 indicate a potential minimal sciatic nerve root irritation at a time prior to the arthroscopic procedure. Finally, as previously noted, claimant completed Form AR-N on December 5, 1996. Claimant did not indicate at that time that he had injured his low back as a result of the fall. Based upon the foregoing evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that his back condition is causally related to his compensable left knee injury.

UNPAID MEDICAL OF DRS. RABEN AND PIECHAL.

Having found that claimant has failed to meet his burden of proving by a preponderance of the evidence that his back condition is a compensable consequence of his left knee injury, I find that the medical treatment provided by Dr. Raben for claimant's back condition is not the liability of the respondent. With respect to Dr. Piechal, I note that claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291).

Here, I find that claimant has failed to prove by a preponderance of the evidence that Dr. Piechal's medical treatment was reasonable and necessary for his compensable left shoulder and/or compensable left knee injuries. The medical records indicate that claimant has been evaluated and treated by Dr. Piechal on numerous occasions. A review of Dr. Piechal's medical reports indicates that claimant sought medical treatment for low back pain, right shoulder pain, cervicothoracic strain, carpal tunnel syndrome, right hand pain, and depression. Dr. Piechal's medical reports are virtually void of any mention of claimant's left knee or left shoulder injuries except for an occasional reference that claimant had injuries to those body parts. However, any specific treatment for claimant's

compensable injuries to his left shoulder or left knee has been minimal to non-existent from Dr. Piechal. Instead, Dr. Piechal's medical treatment has primarily been for other non-work related conditions. For claimant's compensable left shoulder and left knee injuries, he has primarily been treated by Dr. James Arnold and Dr. Chris Arnold since December 1996.

In short, I find that claimant has failed to prove by a preponderance of the evidence that any medical treatment provided by Dr. Piechal was reasonable and necessary in relation to claimant's compensable left shoulder and/or left knee injury.

Having found that their medical treatment was for non-work related conditions the issue of whether Drs. Raben and Piechal were authorized treating physicians is moot. Assuming that pursuant to *Savage v. City of Little Rock*, Full Commission opinion filed October 7, 1999 (E708648) that their treatment was authorized, I find that it was not provided for treatment of claimant's compensable injuries.

OTHER UNPAID MEDICAL TREATMENT.

It is unclear from a review of the record exactly what medical treatment, if any, respondent has paid for since the time of the last hearing. However, I do find that respondent is liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable left shoulder and left knee injuries. I find that this includes the surgeries performed and the treatment provided by Dr. Chris Arnold. Obviously, it does not include the treatment and surgery in December 2004 for which claimant is not making a claim.

The medical records reflect that after claimant's left shoulder surgery by Dr. Tomlinson on July 13, 1995, the claimant continued to have problems with his left shoulder. Furthermore, following the surgical procedure on his left knee by Dr. James Arnold on January 17, 1997, claimant continued to have problems with that condition as

well. As a result, claimant eventually came under the care of Dr. Chris Arnold in September 2000. Dr. Chris Arnold in his report of September 26, 2000 notes that claimant has persistent pain and swelling in his left knee. As a result Dr. Chris Arnold recommended an arthroscopic procedure. Dr. Chris Arnold also noted that claimant was complaining of continued problems with his left shoulder. However, Dr. Chris Arnold postponed any further evaluation of the claimant's left shoulder until after the left knee was treated. Dr. Chris Arnold performed the second surgical procedure on claimant's left knee on October 20, 2000. His post-operative diagnosis was a tear of the medial meniscus. Following the claimant's left knee surgery Dr. Chris Arnold addressed the claimant's left shoulder condition. In a report dated November 29, 2000, Dr. Chris Arnold indicated that his impression was persistent left shoulder pain secondary to AC joint arthrosis and impingement syndrome, status post superior labral repair. Dr. Chris Arnold recommended surgery and performed same on claimant's left shoulder on January 12, 2001.

On May 3, 2002, Dr. Chris Arnold signed a letter indicating that based upon objective medical findings and within a reasonable degree of medical certainty the claimant suffered a work-related injury in November 1996 and that the injury was the major cause of his need for medical treatment and disability.

Dr. Chris Arnold's opinion coupled with the claimant's testimony that he continued to have complaints of pain in his left knee and left shoulder even after the original surgeries in both, as well as the medical evidence supporting claimant's continued complaints of pain, leads me to conclude that the treatment and surgeries provided by Dr. Chris Arnold were reasonable and necessary and causally related to claimant's compensable left knee and left shoulder injuries. Therefore, respondent is liable for payment of this medical treatment.

Claimant testified at the hearing that a portion of his medical benefits had been paid for by group health insurance. Pursuant to A.C.A. §11-9-411 respondent is entitled to a

credit for those benefits.

TEMPORARY TOTAL DISABILITY BENEFITS.

In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning on September 26, 2000, the date he was first evaluated by Dr. Chris Arnold, and continuing through April 16, 2001. As previously noted, claimant originally underwent a second surgical procedure on his left knee by Dr. Chris Arnold and then subsequently underwent a second surgical procedure on his left shoulder which was also performed by Dr. Arnold. The last surgery occurred in January 2001. Dr. Chris Arnold's last clinic note is dated April 16, 2001, at which time he indicates that claimant is markedly improved and recommended continued post-operative protocol. After that visit with Dr. Chris Arnold the claimant continued to be treated by Dr. Blankenship who performed surgery on the claimant's low back. The next medical report from Dr. Chris Arnold is a clinic note dated May 21, 2002, at which time Dr. Chris Arnold assigned claimant impairment ratings for his shoulder and left knee. Since there are no interim reports from Dr. Chris Arnold between April 16, 2001 and May 21, 2002, I do not find that claimant remained within his healing period and suffered a total incapacity to earn wages during this period of time. While Dr. Chris Arnold did not assign an impairment rating until May 21, 2002, there is no indication that it was his opinion that claimant remained within his healing period and suffered a total incapacity to earn wages through that date. However, I believe the evidence does support a finding that claimant remained temporarily totally disabled through at least April 16, 2001.

Accordingly, for the foregoing reasons, I find that claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 26, 2000 and continuing through April 16, 2001. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits for his compensable injuries subsequent to that date.

PERMANENT PARTIAL DISABILITY BENEFITS.

As previously noted, respondent has previously accepted and paid permanent partial disability benefits in an amount equal to 10% to the left lower extremity for claimant's compensable left knee injury. Claimant also contends that he is entitled to permanent partial disability benefits for permanent impairment as a result of his left shoulder injury as well as his low back condition. Having found that claimant's low back condition is not compensable, claimant is obviously not entitled to permanent partial disability benefits. However, I find based upon the opinion of Dr. Chris Arnold that claimant is entitled to permanent partial disability benefits in an amount equal to 5% to the body as a whole for his left shoulder injury. On May 21, 2002, Dr. Chris Arnold in a report assigned the claimant a permanent physical impairment in an amount equal to 5% to the body as a whole for each shoulder. Since only the claimant's left shoulder injury is compensable, claimant is limited to the 5% rating. I find that Dr. Chris Arnold's opinion assigning the claimant a permanent physical impairment rating in an amount equal to 5% to the body as a whole is credible and entitled to great weight. Therefore, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 5% to the body as a whole for his left shoulder injury.

Although the injury to claimant's left knee was a scheduled injury, the injury to claimant's left shoulder is an unscheduled injury. As a result, claimant is entitled to

benefits for any loss in wage earning capacity resulting from his compensable injuries.

In considering claims for permanent disability benefits in excess of a permanent physical impairment, the Commission may take into account in addition to the permanent physical impairment various factors including the employee's age, education, work experience, and other factors reasonably expected to affect their future earning capacity. A.C.A. §11-9-522.

After consideration of the relevant wage loss factors in this case, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole. As previously noted, the claimant is a 58-year-old man with a ninth grade education who has obtained his GED. Prior to working for the respondent as a sanitation supervisor, the claimant also worked at Tyson's in maintenance. The claimant has also worked as a sanitation supervisor for George's for three months and as a sanitation superintendent for Simmons Industries and for American Food Technology. Prior to becoming employed as a sanitation supervisor the claimant performed other types of jobs. These primarily involved sales and management. For instance, claimant drove a potato chip truck which required him to restock shelves in stores. Claimant also drove a Coca-Cola route delivering drinks from 1980 to 1982. Claimant also worked at another job driving a truck to deliver magazines and restocking shelves. Claimant also testified that while living in California he worked for Thrifty Drug as an assistant store manager. Claimant was responsible for the store and its employees, ordered inventory, scheduled employees, and performed simple book work.

Following claimant's original left shoulder surgery Dr. Tomlinson did not assign the claimant a permanent physical impairment rating but did assign claimant permanent restrictions based upon a functional capacities evaluation. In a report dated August 19, 1996, Dr. Tomlinson indicated that based upon the functional capacities evaluation the

claimant could occasionally lift above his shoulders 26 pounds on the right, 22 pounds on the left; at the desk/chair level claimant could lift 33 pounds on the right and 35 pounds on the left. Dr. Tomlinson indicated that claimant should not frequently lift above the shoulders on either the right or the left. Following claimant's original left knee surgery in 1997 Dr. James Arnold indicated that claimant could return to work as of April 1, 1997 with no limitations. Dr. James Arnold later amended that opinion to state that claimant should avoid prolonged standing or painful sitting. Even though claimant subsequently underwent additional surgical procedures on both his left knee and left shoulder, Dr. Chris Arnold did not assign specific physical limitations over and above those previously assigned to claimant. However, Dr. Chris Arnold did note that claimant was still symptomatic and might need additional surgery in the future.

According to claimant's testimony he has made some informal inquiries with respect to obtaining employment. However, it does not appear that claimant has formally interviewed for any job other than in 2004 he worked as an usher for the University of Arkansas at Razorback football games. Claimant testified that he watched a door on the ground floor of the Broyles Complex which did not require him to climb steps. Claimant performed this job activity only for five or six home games and anticipates performing the same job activity in 2005.

Finally, it should be noted that while claimant was undergoing all of this medical treatment he was approved for social security disability benefits. However, that determination was based in part upon non-work related conditions such as claimant's right shoulder and low back which did not occur until after claimant's compensable injuries. Since these conditions did not occur until after claimant's compensable injuries in 1995 and 1996, those injuries and any limitations resulting therefrom have not been considered in determining whether claimant has suffered a loss in wage earning capacity. My determination of the claimant's loss in wage earning capacity is limited solely to

consideration of the relevant wage loss factors in conjunction with claimant's compensable left shoulder and left knee injury.

After reviewing the relevant wage loss factors presented in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole. The claimant's ability to walk and climb stairs has been limited by his left knee injury. Furthermore, the claimant's ability to lift below or above shoulder level has been limited by his left shoulder injury. Given these limitations, claimant cannot return to work performing many physical labor jobs. However, claimant did work for several years as a supervisor both for a drug store and as a sanitation supervisor for various businesses including the respondent. Thus, claimant has job skills beyond his physical capabilities. Accordingly, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole.

Respondent has controverted claimant's entitlement to all unpaid compensation benefits. This includes unpaid medical benefits, unpaid temporary total disability benefits, and unpaid permanent partial disability benefits.

AWARD

Claimant has failed to prove by a preponderance of the evidence that his low back condition is causally related to his compensable left knee injury. Therefore, he is not entitled to payment for any medical treatment rendered in connection with that condition. This includes the treatment of Dr. Raben. I also find that claimant has failed to prove by a preponderance of the evidence that medical treatment provided by Dr. Piechal is reasonable and necessary and causally related to his compensable left shoulder and/or left knee injury. Claimant is entitled to payment for all reasonable and necessary medical treatment provided in connection with his compensable left shoulder and left knee injuries. This includes surgery and treatment provided by Dr. Chris Arnold. This does not include

treatment and surgery rendered by Dr. Arnold in December 2004. Claimant has also proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning September 26, 2000 and continuing through April 16, 2001. Claimant is also entitled to permanent partial disability benefits in an amount equal to 5% to the body as a whole for his left shoulder injury and has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole as a result of his compensable left shoulder and left knee injuries. Finally, respondent has controverted claimant's entitlement to all unpaid compensation benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE