

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310601

BELINDA A. RIPPER,
EMPLOYEE

CLAIMANT

CENTRAL ARK HOSPITAL,
EMPLOYER

RESPONDENT NO. 1

AMERICAN HOME ASSURANCE CO.,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT DISABILITY TRUST FUND

RESPONDENT NO. 2

SECOND INJURY FUND

RESPONDENT NO. 3

OPINION FILED JULY 19, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Searcy, White County, Arkansas.

The claimant was represented by HONORABLE ROBERT J. DONOVAN, Attorney at Law, Marianna, Arkansas.

Respondent No. 1 was represented by HONORABLE MELISSA ROSS-CRINER, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 was represented by HONORABLE DAVID L. PATE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 26, 2005 in Searcy, Arkansas. A prehearing order was entered in this case on January 14, 2005. 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 and are hereby accepted:

1. The parties stipulate to the employer/employee relationship on 7/13/03 when claimant sustained a compensable injury to her left hip.
2. The claimant's average weekly wage was such that she is entitled to the maximum total disability compensation rate of \$440.00 per week.

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

Claimant:

1. TPD from 10-5-03 to 2-24-04.
2. Total disability since 2-24-04 (or wage loss if less than permanent total disability).
3. Medical.
4. Attorney fees.
5. End of healing period.
6. Anatomical impairment.

Respondent No. 1:

No additional issues at this time.

Respondent No. 2:

1. Whether there is Second Injury Fund liability.
2. Whether Respondent No. 1 must first pay the claimant's anatomical ratings for the compensable injury prior to payment of any permanent and total disability benefits to which the claimant may be found entitled.
3. Whether Respondent No. 1 is entitled to credit for payment of permanent partial anatomical disability benefits against its \$75,000.00 maximum liability in pursuant to Ark. Code Ann. § 11-9-502(b)(1).

Respondent No. 3:

1. Temporary partial disability from October 5, 2003 to February 24, 2004.
2. Total disability since February 24, 2004.
3. Medical, attorney fees.

The record consists of the April 26, 2005 hearing transcript and the exhibits contained therein, except to the extent that certain testimony has been excluded below. In addition, the record includes the Post-Hearing Briefs filed by the claimant, respondent no. 1, and respondent no. 3, which have been "blue-backed" for identification purposes.

DISCUSSION**Evidentiary Objections**

Mr. Donovan raised relevancy objections to questions posed to Ms. Ripper regarding her ex-husband's present income, whether Ms. Ripper is presently receiving long term disability compensation, and how much Ms. Ripper currently receives in Social Security disability income. I find these questions relevant to determining whether Mr. Ripper has a financial incentive, or a financial dis-incentive, to seek work. I find the questions regarding Social Security disability and long term disability also relevant as an admission by the respondent attorney that Ms. Ripper has been determined disabled by two entities. I find the question regarding long term disability further relevant to the offset provided for in Ark. Code Ann. § 11-9-411. The proffered testimony at issue on pages 36, 41 and 42 of the hearing transcript is therefore accepted into the record.

Ms. Criner objected to Ms. Ripper's testimony on lines 20 and 21 on page 69 of the hearing transcript regarding what Dr. Green told her about working at the end of February, 2004. Dr. Green's written reports from February 2004 speak for themselves on that topic. Ms. Criner's objection to hearsay is sustained, and Ms. Ripper's

corroborating hearsay testimony at issue will not be considered in rendering a decision in this case.

Temporary Disability Compensation

An injured employee with an unscheduled injury is entitled to temporary total disability compensation during the time that she is within her healing period and is totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). An injured employee is entitled to temporary partial disability compensation during the time that she is within her healing period and suffers only a decrease in his capacity to earn the wages that she was receiving at the time of the injury. Id.

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).

In the present case, Ms. Ripper fell at work and sustained her admittedly compensable left hip injury on July 13, 2003. Ms. Ripper had previously undergone a right total hip replacement in 2001 and a left total hip replacement in 2002. After undergoing an x-ray on July 13, 2003, Ms.

Ripper returned to work and did not seek additional medical attention until approximately two weeks after the fall. Ms. Ripper's claim seeks temporary partial disability from October 5, 2003 to February 24, 2004. Respondent No. 1 asserts that Ms. Ripper's healing period ended on December 9, 2003. In addition Respondent No. 1's post-hearing brief argues that Ms. Ripper is not entitled to temporary partial disability before December 9, 2003 because "her hours worked were essentially the same as before the injury."

As a threshold matter, I respectfully point out that the wage records that respondent no. 1 submitted into evidence appear to be incomplete and essentially impossible for either Ms. Ripper or I to interpret. I further disagree with respondent no. 1's post-hearing brief argument that "there is nothing to determine whether any change in the number of hours worked was due to the compensable injury or the claimant's extensive pre-existing problems." There is no credible evidence in the record indicating that Ms. Ripper was missing work for her hips or for any other medical condition immediately prior to the fall on July 13, 2003. In light of the lack of time missed from work before July 13, 2003, Ms. Ripper's documented left hip symptoms after July 2003, and Dr. Green's records in 2003

specifically limiting the maximum hours that he would allow Ms. Ripper to work, I find that Ms. Ripper has established a causal connection between her reduced wages after the fall and her compensable hip injury. I also find that Ms. Ripper's testimony about being off work, as corroborated by what appears to be greatly reduced hours in October, November and December of 2003 in the wage records offered by the respondents, establishes that Ms. Ripper in fact worked fewer hours after the fall than she worked before the fall.

In light of Dr. Barnes' declaration on December 9, 2003 that Ms. Ripper reached maximum medical improvement on that date, and absent any more persuasive evidence establishing that Ms. Ripper received additional treatment after that date intended to improve the permanent nature of her hip injury sustained in the fall, I find that a preponderance of the evidence establishes that Ms. Ripper's healing period ended on December 9, 2003. I find that Ms. Ripper's wage-earning capacity between October 5, 2003 and December 9, 2003, as the term "wage-earning capacity" is used in Ark. Code Ann. § 11-9-520, equaled her actually weekly wages earned during the period.

Based on the above findings, and by agreement of the relevant parties on page 81 - 82 of the hearing transcript,

the parties shall therefore calculate Ms. Ripper's temporary partial disability for the period between October 5, 2003 and December 9, 2003 using the formula provided in Ark. Code Ann. § 11-9-520, and the respondents shall deduct from their liability, dollar-for-dollar, the amount of any short term or long term disability compensation which Ms. Ripper received during the period which would be subject to the offset provided for in Ark. Code Ann. § 11-9-411.

Permanent Anatomical Impairment

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, I understand Dr. Green to have opined in his December 9, 2004 letter that Ms. Ripper

sustained a 15% impairment to the body as a whole due to her left total hip arthroplasty, and an additional impairment of 15% to the body as a whole attributable to her admittedly compensable July 13, 2003 left hip injury. Neither Dr. Green's December 9, 2004 record or his April 21, 2005 record indicate which section of the Guides that Dr. Green utilized to determine an impairment, and neither document indicates what "objective and measurable findings", if any, support the permanent impairment rating that he assigned.

Dr. Hefley and Dr. Barnes appeared to have each concluded that Ms. Ripper's left hip pain is attributable to an uncemented nonbony-ingrown femoral component from her left hip replacement surgery. Dr. Barnes opined on December 9, 2003 that Ms. Ripper has no permanent impairment from her injury.

In addition to the uncemented nonbony-ingrown femoral component, Dr. Hefley also diagnosed from diagnostic testing a non-displaced fracture of the posterior lateral greater trochanter on the left which was present on an x-ray taken on the day of the 2003 fall but was not present on the day of the 2002 hip replacement surgery. Dr. Barnes disagreed that the abnormality was a fracture in light of a normal bone scan. Dr. Barnes opined that the area diagnosed as a

trochanter fracture may actually represent heterotopic ossification or a small avulsion.

In her brief on appeal, the claimant asserts that Table 46 in Section 3.2f of the Guides is applicable, that Dr. Green used Table 46, and that it is error for the Commission not to accept range of motion test results as "objective findings" so as to establish an impairment rating under Table 46.

I have the following observations. First, Ark. Code Ann. § 11-9-102(16) only prohibits the use of range of motion testing in establishing impairment to the spine and makes no reference to the hip. Further, the Arkansas Courts have found that passive range of motion testing is an objective finding within the meaning of Section 102(16). Hayes v. Wal-Mart Stores, 71 Ark. App. 207, 29 S.W.3d 751 (2000). Therefore, if the preponderance of the evidence were to establish that Dr. Green based his impairment rating on passive range of motion testing to establish ankylosis in flexion attributable to the 2003 left hip injury, then Dr. Green's rating would appear to me to meet each of the criteria to establish a compensable anatomical impairment rating.

However, in the present case, I respectfully point out that Dr. Green has given no indication that his impairment ratings are based on range of motion testing, much less passive range of motion testing. In addition, Dr. Green's assignment of a 75% impairment to the left lower extremity indicates to me that he did not use Table 46 to determine that impairment as the claimant asserts, since the criteria of Table 46 provide for, at most, a 50% impairment to the lower extremity.

It appears much more likely to me that Dr. Green considered Table 64 in Section 3.2i, which assigns a 15% impairment to the whole body for a total hip replacement with a "good result" and a 30% impairment to the whole body for a total hip replacement with a "poor result", depending on criteria rated in Table 65. However, there is no indication in the record, how if at all, that Dr. Green analyzed the criteria in Table 65, and I am not clear whether Table 65 criteria are even an acceptable method for assigning an impairment rating consistent with Ark. Code Ann. § 11-9-704(c)(1)(B). See Charles Davis v. Pulaski Technical College, Full Workers' Compensation Commission, Opinion filed August 22, 2002 (F007628).

Even if Table 65 criteria are appropriate for assigning an impairment rating, I find in the present case that the claimant has simply failed to support the requested 15% increase in her permanent anatomical impairment rated to the whole body with objective and measurable findings causally related to her post-surgical hip injury at work. In this regard, I note that the single most heavily weighted criteria in Table 65 is "pain", and in the present case, the preponderance of the evidence in the record establishes that Ms. Ripper's pain is caused by the uncemented nonbony-ingrown femoral component from her left hip replacement surgery, and not from any abnormality or other objective finding associated with the injury caused by the subsequent fall on July 13, 2003. The record does indicate that Ms. Ripper has either a non-displaced fracture of the lateral greater trochanter or heterotopic ossification or a small avulsion which occurred after surgery. However, there is no evidence in the record that this abnormality is causing any impairment ratable under Table 46 or under Table 64/Table 65.

Therefore, for the reason discussed herein, I find that the claimant has failed to establish that any physician has assigned her an impairment rating under Table 46 of the

Guides, and I find that the record contains no documentation from which I can determine an impairment rating under Table 46 of the Guides. I find that Dr. Green most likely considered Table 64 of the Guides in increasing Ms. Ripper's post-hip replacement surgery rating from 15% to 30% which he attributed to an injury sustained in the July 13, 2003 fall at work. However, I find that a preponderance of the evidence establishes that Ms. Ripper's pain is caused by the uncemented nonbony-ingrown femoral component from her left hip replacement surgery, and not from any abnormality or other objective finding associated with the injury caused by the subsequent fall on July 13, 2003. I therefore find that the record fails to contain objective and measurable physical findings to support the existence of any degree of additional physical impairment which would be ratable under the Guides and attributable to the 2003 hip injury at work.

Wage Loss Disability

To be entitled to any permanent wage-loss disability benefits in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

Because I find that Ms. Ripper failed to establish that she sustained any degree of compensable permanent anatomical impairment for her 2003 work injury, I am also constrained to deny in its entirety Ms. Ripper's claim for permanent disability benefits after her temporary disability ended on December 9, 2003. Connell, supra.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties stipulate to the employer/employee relationship on 7/13/03 when claimant sustained a compensable injury to her left hip.

2. The claimant's average weekly wage was such that she is entitled to the maximum total disability compensation rate of \$440.00.

3. The proffered testimony at issue on pages 36, 41, and 42 of the hearing transcript is accepted into the record and will be considered; the proffered testimony at issue on lines 20 and 21 on page 69 of the hearing transcript is excluded from the record and will not be considered in rendering a decision.

4. The claimant has proven by a preponderance of the evidence that she is entitled to temporary disability compensation between October 5, 2003 and December 9, 2003. The preponderance of the evidence establishes that Ms.

Ripper's healing period ended on December 9, 2003. The respondents are entitled to a dollar-for-dollar offset on the amount of any short-term or long-term disability compensation which Ms. Ripper received during that period pursuant to Ark. Code Ann. § 11-9-411.

5. Ms. Ripper has failed to prove by a preponderance of the evidence that she is entitled to any benefits for permanent anatomical impairment associated with injuries sustained on July 13, 2003. Specifically, the record contains insufficient evidence from which to determine a rating under Table 46 in Section 3.2f of the Guides, and the record fails to contain any objective and measurable physical findings causally related to the July 13, 2003 injury to support the existence of any degree of anatomical impairment which would be ratable under either Table 46 in Section 3.2f or under Table 64/Table 65 under Section 3.2i of the Guides attributable to the July 13, 2003 injury.

6. Because Ms. Ripper has failed to establish that she sustained any degree of compensable permanent anatomical impairment attributable to her 2003 work injury, Ms. Ripper cannot be awarded any wage-loss disability benefits for permanent disability after her healing period ended.

7. Because Ms. Ripper has failed to establish that she is entitled to any award of wage-loss disability benefits, I find that the issue of potential Second Injury Fund liability is moot.

AWARD

The respondents are directed to pay temporary disability 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 temporary disability 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