

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407478

CHRIS TURPIN	CLAIMANT
WEST FOODS, INC.	RESPONDENT
ST. PAUL FIRE & MARINE INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 22, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by ROBERT MONTGOMERY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 27, 2005, in Fort Smith, Arkansas. The deposition of Dr. Arthur Johnson was taken on August 25, 2005, and has been admitted as Claimant's Exhibit No. 3.

A pre-hearing order was entered in this case on March 8, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the claimant announced that he wished to withdraw the issue of whether he sustained a compensable injury to his cervical spine in the employment related incident or accident on June 28, 2004. He also wished to withdraw the issue of his entitlement to benefits for this alleged injury. Finally, the claimant withdrew the issue of his entitlement to benefits under Ark. Code Ann. §11-9-505(a). The claimant requested that the issue of his entitlement

to the cervical MRI, as recommended by Dr. Johnson, be made an issue. As there were no objections by the respondents, the issues were amended accordingly. A copy of the pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On June 28, 2004, the relationship of employee-employer-carrier existed between the parties.
2. The weekly compensation rates are \$267.00 for total disability and \$200.00 for permanent partial disability.
3. On June 28, 2004, the claimant sustained compensable injuries to his thoracic and lumbar spine.
4. There is no dispute over medical expenses incurred for treatment of the claimant's thoracic and lumbar spine.
5. There is no dispute, at present, over the payment of temporary total disability benefits.

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

1. The claimant's entitlement to a cervical MRI at the respondent's expense.
2. The claimant's entitlement to benefits for permanent physical impairment from the compensable thoracic injury.
3. Attorney's fees for claimant's attorney.

In regard to these issues, the claimant contends that he is entitled to the cervical MRI recommended by Dr. Johnson at the

respondents' expense and that the respondents deny that the cervical MRI recommended by Dr. Johnson would constitute reasonably necessary medical expenses for the claimant's compensable injuries. The claimant contends that he is entitled to additional temporary total disability benefits from the date that they were terminated until a date yet to be determined or in the alternative, benefits pursuant to Ark. Code Ann. §11-9-505(a). The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend that the cervical MRI does not represent necessary treatment or evaluation of any compensable injury, but is related only to pre-existing degenerative changes. The respondents also contend that the claimant's compensable injuries were not the "major cause" of any permanent impairment.

DISCUSSION

I. CERVICAL MRI

The first issue to be addressed concerns the claimant's entitlement to a cervical MRI, as recommended by Dr. Arthur Johnson. The burden rests upon the claimant to prove that this medical service constitutes a "reasonably necessary" medical service, under Ark. Code Ann. §11-9-508.

In order to prove this fact, the claimant must show by the greater weight of the credible evidence that the medical service in question is necessitated by or connected with a compensable injury. He must further show that this service has a reasonable expectation of accomplishing the purpose or goal for which it is intended.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that the recommended MRI of his cervical spine would be necessitated by or connected with his admitted compensable thoracic and lumbar injuries of June 28, 2004. Therefore, it would not represent reasonably necessary medical services for a "compensable injury."

In reaching this decision, I am aware that Dr. Arthur Johnson has expressed the opinion that the cervical MRI is necessary to confirm whether the claimant's difficulties with his mid-back are actually the result of a physical injury to this portion of his spine or are due to a defect (possibly a disc herniation) involving his cervical spine. However, I do not find Dr. Johnson's opinion, in this regard, to be convincing.

None of the other various physicians, who have treated or evaluated the claimant, have felt that a cervical MRI was reasonably necessary or medically appropriate to accurately determine the etiology of the claimant's vast array of complaints. Obviously, they do not concur with Dr. Johnson's conclusion that herniated cervical discs generally produce initial complaints which only involve pain in the thoracic spine (D.12). I would also note that in the multitude of cervical disc injuries, which have come before me, I am not aware of a single one that initially produced only the mid-thoracic complaints, as those described by this claimant.

It also appears that Dr. Johnson's opinion was also (at least initially) based in fact upon the assumption that the claimant's neck or cervical spine pain started at the same time of his thoracic or mid-back pain. In his deposition, Dr. Johnson stated that the claimant told him that the neck pain started "around the same time" as the thoracic pain (D.7). In his report of October 26, 2004, Dr. Johnson recited that the claimant's complaints of thoracic and neck pain "started after an injury at work." After it was pointed out to Dr. Johnson that, in his own initial history of October 14, 2004, he noted that the claimant's neck pain only started after the second epidural steroid injection (on September 21, 2004), that Dr. Johnson concluded that the claimant's initial mid thoracic pain alone was a common indicator of the occurrence of a herniated cervical disc.

The first mention of any complaints involving the claimant's neck or cervical spine or any complaints that could be of a radicular nature involving his upper extremities, did not appear until a progress notation by Dr. Cheyne on September 14, 2004. In this report, Dr. Cheyne noted that the claimant was complaining of significant pain from his cervical spine to his lumbar spine with the primary complaints being in his thoracic spine. Although this was before the second epidural steroid injection by Dr. Fisher (September 21, 2004), it may have been prior to Dr. Fisher's first epidural steroid injection.

It must also be noted that the trauma involved in the employment related incident was only the result of the claimant

bending slightly forward to prepare a sandwich on a work counter. Clearly, the mechanics of this activity would not produce very much stress or trauma to the claimant's thoracic spine and even less to his cervical spine. Following this described event, the claimant's various complaints have progressed from his mid-back or thoracic spine and lower back to involve, at times, almost all portions of his anatomy. This includes difficulties with his neck or cervical spine, which (according to the claimant's testimony) started one to two-and-a-half months following his initial injury. Bilateral pain and numbness in his hips and lower extremities which (according to the medical record) first appeared after an incident at home on July 10, 2004. The claimant's neck or cervical complaints have also evolved, at some later date, into pain that goes down both shoulders and arms. By the hearing, the claimant indicated that he was now experiencing difficulties that involved the entire left side of his body. He described these difficulties as his entire left side being numb and feeling like it was "melting off."

The claimant's testimony and the medical evidence shows that the claimant's vast array of subjective complaints have been essentially unresponsive to a multitude of conservative treatment modalities that have been attempted by his various treating physicians. He appears to have experienced little or no relief from this vast array of symptoms by an extensive and lengthy program of treatment by oral medication. This medication has consisted of various analgesics, muscle relaxers, and anti-inflammatories. Extensive physical therapy has also been recommended. However, the

claimant has indicated that this physical therapy was not only unsuccessful in reducing his symptoms and, in fact, increased them. The claimant has undergone a series of blocks or epidural steroid injections to his thoracic spine with little or no relief. According to the claimant's statements to Dr. Johnson, his cervical and neck complaints actually began with the thoracic epidural steroid injection.

The record shows that the claimant has undergone a substantial number of physical examinations by several physicians, with varying specialties. He has also received extensive testing. For a brief period of time (shortly after the claimant's compensable injury), the visible muscle spasms, primarily in the lumbar region, were noted. However, there is no record of the observation of any continuing muscle spasms after Dr. Terry Hoyt's notation of July 8, 2004. In fact, there is no record of any objective findings on the physical examinations performed after that date. X-rays of the claimant's thoracic and lumbar spine were negative for the thoracic spine and showed only a mild dextroscoliosis of the lumbar spine (these x-rays were performed at the emergency room of Sparks Regional Medical Center following the subsequent incident at home on July 10, 2004). Cervical x-rays, which were performed at the request of Dr. Johnson, were interpreted as showing only cervical "disc disease." Dr. Blankenship noted that cervical x-rays performed revealed only some mild degenerative changes. An MRI on the claimant's lumbar spine was interpreted as normal. An MRI of his thoracic spine was interpreted as revealing only a small mid-

line or central disc protrusion of the T7-8 disc with no impingement on the spinal cord or exiting nerve roots.

Clearly, the various physical examinations and objective testing performed on the claimant have failed to reveal any objective abnormalities sufficient to explain the vast and differing array of the claimant's severe subjective complaints. His failure to respond to the extensive and lengthy program of conservative treatment also casts doubt on the existence of a organic cause for most, if not all, of his continuing subjective symptoms. His failure to respond to the extensive and lengthy program of conservative treatment also casts doubt on the existence of an organic cause for most, if not all, of his continuing subjective symptoms. The functional capacity evaluation performed on the claimant also showed inconsistencies that were indicative of a non physiological component in the claimant's subjective complaints.

In summary, the cervical MRI that has been recommended by Dr. Johnson has not been proven to be reasonably necessary or medically appropriate to reasonably insure an accurate diagnosis of the nature and extent of the claimant's compensable injury of June 28, 2004. Nor is such testing necessary to formulate an appropriate treatment program for this injury. The claimant has received sufficient testing and evaluation to reasonably insure that the nature and extent of these physical injuries have been adequately determined. If the claimant is experiencing difficulties as a result of a cervical defect, this defect has not been shown to be

compensable and this test would not be necessitated by a “compensable injury.” Thus, this test would not constitute “reasonably necessary medical services” under “Ark. Code Ann. §11-9-508 and cannot be made the liability of the respondent herein.

II. PERMANENT PHYSICAL IMPAIRMENT

_____The next issue to be addressed concerns the claimant’s entitlement to permanent disability benefits for permanent physical impairment. Again, the burden rests upon the claimant to prove this existence and extent of any permanent impairment. In order to meet this burden, the claimant must prove that his compensable injury was the “major cause” (more than 50%) of some degree of this permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a). He must also show that the existence and extent of permanent physical impairment is supported by “objective and measurable physical findings,” Ark. Code Ann. §11-9-704(C)(1)(B). Any assessment of permanent physical impairment must be made in a manner that conforms with the official rating guides currently adopted by this Commission (The American Medical Association’s Guides to the Evaluation of Permanent Impairment, Fourth Edition), Ark. Code Ann. §11-9-522(g). In determining the existence or extent of permanent physical impairment for the claimant’s compensable spinal injuries, no consideration can be given to complaints of pain, straight leg raising tests, or range of motion tests, Ark. Code Ann. §11-9-102(16)(A)(ii).

It is the duty of this Commission, rather than any medical expert, to determine the existence and extent of permanent physical

impairment in a manner that satisfies all of the requirements of the Act. Clearly, expert medical opinion on this issue can be extremely helpful and can form the basis for an award of permanent physical impairment. However, in order to be considered, any medical opinion on this issue must be stated with a reasonable degree of medical certainty and must satisfy the various requirements of the Act.

In the present case, Dr. Johnson has opined that the claimant experienced a 3% permanent physical impairment to the body as a whole for the objectively documented small central or mid line disc protrusion or herniation at T7-8. He further stated that this would be the appropriate rating for this defect under Table 75 II C, page 113 of the Fourth Edition of the Guides.

In this regard, Dr. Johnson is absolutely correct. The mere presence of an unoperated objectively documented herniated thoracic disc is assessed a 3% rating by the Guides. This particular method for assessing permanent physical impairment (Table 75, II C) in no way gives consideration to pain, loss of range of motion, or straight leg raising tests the appropriate rating. The rating arrived at by the use of this method considers only "objective findings." For these reasons, Table 75 on page 113 of the Guides, is the most common method most often employed by this Commission in determining the existence and extent of permanent physical impairment due to spinal injuries.

The only real dispute involves the issue of the "major cause" of this degree of impairment. Clearly, the mere existence of the

objectively documented herniated thoracic disc is the “major cause” (actually the sole cause) for this 3% permanent physical impairment. The claimant need only show that the employment related accident played a causal role in producing or precipitating this disc herniation. The claimant need not show that the employment related accident was the “major cause” of the actual disc injury or herniation, itself.

Although expert medical opinion is not absolutely necessary to establish the existence of the causal relationship between the employment incident or accident and the subsequently demonstrated disc herniation at T7-8, such evidence, if presented, cannot be arbitrarily disregarded. In the present case, there is a conflict in the expert medical opinions concerning the causation of the claimant’s T7-8 small central disc herniation.

Both Dr. Blankenship and Dr. Holder are of the opinion that it is improbable or unlikely that the employment related incident, as described by the claimant, would cause the subsequently observed defect at T7-8. On the other hand, Dr. Johnson has opined that the described employment related incident could have reasonably caused or produced the subsequently observed thoracic disc herniation at T7-8. The claimant’s other treating physician (Dr. Cheyne) has expressed no opinion one way or another on this issue.

A determination of the cause or causes of the herniated disc at T7-8, is made more difficult by the multitude of differing subjective symptoms which the claimant has attributed to the

employment related incident. Many of these are not particularly compatible with or indicative of the occurrence of a small central disc herniation at T7-8. However, the claimant's initial symptoms of pain in the mid portion of his thoracic spine together with the initial symptoms of rigidity or spasm in this area would clearly be indicative of the occurrence of a discal damage, such as a small herniation or protrusion of the T7-8 intervertebral disc. This particular area has continued to be the primary focus of the claimant's complaints through at least the time of his emergency room visit on August 9, 2005. There is no evidence that the claimant had sustained any injury to or complained of any difficulties with this portion of his body prior to the employment related incident of June 22, 2004.

After consideration of all the evidence presented, I find that the other evidence presented more strongly supports the opinion of Dr. Johnson. I find that the employment related incident of June 28, 2004 could have reasonably and logically produced the objectively documented small central herniation or protrusion of the T7-8 intervertebral disc. Further, the evidence shows that the onset of symptoms indicative of the occurrence of such an injury appeared within a reasonable period of time following the incident. The evidence presented fails to show any other equally reasonable or logical cause for this injury. Following the Rule announced in Hall v. Pittman Construction Company, 235 Ark. 134, 357 S.W. 2nd 263 (1962), I find that the claimant has proven the existence of a causal relationship between

the specific employment related incident on June 28, 2004 and the objectively documented small central disc protrusion herniation at T7-8.

As the claimant has proven that the employment related accident was a cause of the injury, in the form of a T7-8 disc herniation, it would be the "major cause" of any degree of permanent physical impairment that would be due solely to the existence of this disc herniation. Under the official rating guide adopted by this Commission, the mere existence of this disc herniation carries a permanent physical impairment of 3% to the body as a whole.

In summary, the claimant has proven that his compensable thoracic injury was the major cause of a permanent physical impairment of 3% to the body as a whole. He has further proven that this degree of permanent physical impairment is based upon or supported by the clearly objective findings. Finally, he has shown that this degree or impairment was calculated in a manner that conforms to the Commission's official rating Guide. Therefore, he has satisfied all of the statutory requirements for his entitlement to a permanent physical impairment of 3% to the body as a whole, due to this compensable thoracic disc injury. He is entitled to permanent partial disability benefits for this degree of permanent impairment, Ark. Code Ann. §11-9-522(a).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On June 28, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On June 28, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability.
4. On June 28, 2004, the claimant sustained compensable injuries to his thoracic and lumbar spine. The injury to his thoracic spine was in the form of a small central protrusion or herniation of the T7-8 intervertebral disc. The injury to his lumbar spine was in the form of a musculoligamentous sprain or strain.
5. There is no dispute over liability for medical expenses incurred for treatment of the claimant's thoracic or lumbar spine injuries.
6. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits.
7. The cervical MRI, which has been recommended by Dr. Johnson, would not represent "reasonably necessary medical services" for the claimant's injuries. Specifically, this test has not been shown to be necessitated by or connected with the claimant's compensable injuries, thus, the respondents would not be liable for the expenses of these services under Ark. Code Ann. §11-9-508.

8. The claimant has experienced a permanent physical impairment of 3% to the body as a whole from his compensable thoracic injury. The claimant's compensable thoracic injury is the "major cause" of this degree of permanent impairment. This degree of permanent physical impairment is based upon and supported by "objective and measurable physical findings." This degree of permanent physical impairment gives no consideration to complaints of pain, loss of range of motion, or straight leg raising tests. This degree of permanent physical impairment is calculated in a manner that conforms to the Commission's official rating guide, i.e. The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition.
9. The respondents have controverted the claimant's entitlement to the recommended cervical MRI and his entitlement to any benefits for permanent physical impairment.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded, i.e. 3% to the body as a whole.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a permanent physical impairment of 3% to the body as a whole.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded. One-half of this fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondents from the controverted permanent partial benefits herein awarded.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge