

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F205684

LORI VAZQUEZ, EMPLOYEE

CLAIMANT

S B POWER TOOL COMPANY, EMPLOYER

RESPONDENT

TRAVELERS INSURANCE COMPANY, CARRIER

RESPONDENT

OPINION FILED JULY 29, 2005

A hearing in this case was conducted on May 11, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on January 11, 2005; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to eight stipulations. The first four of these stipulations are set forth in the Prehearing Order and were confirmed, in whole or in part, by the parties at the hearing; the parties agreed to the remaining four stipulations at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on May 3, 2002 and at all other relevant times.
2. Claimant sustained a compensable injury on May 3, 2002.
3. Respondents have paid medical and temporary total disability benefits.

4. Respondents controvert Claimant's entitlement to additional benefits.
5. Claimant's total disability benefits rate is \$209.00; her permanent partial disability benefits rate is \$157.00.
6. Claimant reached maximum medical improvement on November 6, 2003.
7. The Respondent carrier began paying temporary total disability benefits in the amount of \$245.00 on May 22, 2002; by September 4, 2002, that payment was reduced to \$198.00, which was paid until May 26, 2004; the Respondent carrier then began paying Claimant permanent benefits at the rate of \$154.00.
8. Claimant's witness, Victoria Morland, was present at the hearing; if called to testify, she would verify the limitations and complaints of pain to which the Claimant testified.

At the May 11, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. They agreed to strike the first issue listed in the Prehearing Order, and substitute the issue listed first below. Thus, the parties agree that the issues to be litigated and resolved are limited to the following:

1. What is Claimant's correct permanent impairment rating?
2. Whether Claimant is entitled to benefits for permanent total disability.
3. In the alternative, whether Claimant is entitled to wage-loss disability benefits.
4. Whether Respondents should be penalized for underpayment of compensation.
5. Whether Claimant is entitled to an attorney's fee.

Claimant contends that she is entitled to an impairment rating and attendant benefits. She argues that she is permanently totally disabled, but in the alternative seeks wage-loss disability payments. Respondents agree that Claimant is entitled to some permanent impairment benefits, but seek an impairment rating based upon the correct edition of the

Guides. Respondents contend that Claimant is not permanently totally disabled.

DISCUSSION

At the time of the hearing Claimant was 42 years of age. She completed the ninth grade and can read and write, but has no vocational, technical, or any other type of specialized training. Her work history includes fast food jobs and one season in a candy factory, prior to working for the Respondent employer.

Claimant had worked for the Respondent employer “going on five years” at the time of her accident on May 3, 2002. Her job duties at the time of her accident were “called trucking, where you deliver parts to the line. You’ve got to pick up big boxes of screws and parts and deliver it to the line.” As to the weight of these boxes, “[t]he big boxes of cords probably weigh 40 pounds, I would guess. The little box of screws I lifted probably weighed about 60 pounds. It was heavy, but that’s just a guess.” A medical record dated May 9, 2002 reports the following history of Claimant’s accident:

The patient reports that last Friday while at work she was lifting some heavy equipment and injured her arm. She did not have any actual trauma to it, this was all induced by her lifting and now she has significant pain in her right shoulder. She has some pain that radiates up to her neck throughout her trapezius muscle and some in her back around her rhomboid area.

The parties stipulated that Claimant sustained a compensable injury on May 3, 2002.

Two studies were undertaken shortly after Claimant’s work incident. On June 15, 2002, Claimant underwent an “MRI cervical spine noncontrast.” It reported:

Right posterior herniation of disc C5-6 indents the right ventral aspect of the thecal sac slightly without any obvious lateral recess stenosis or central canal stenosis. Dorsal protrusion of disc is also seen at C6-7 with disc fragment appearing to cause some impingement on right lateral recess at this level.

This report’s impression is given as “[c]ervical spondylosis at C5-6 and C6-7, as described.”

A second "MRI cervical spine" was undertaken on June 27, 2002. It reported that "[n]o disc protrusion or herniation is noted although there is mild disc bulging at C5-6 and C6-7. No spinal or foraminal stenosis has resulted."

Initially, Claimant was provided with conservative treatment, including physical therapy, a trigger point injection, and medication. Dr. John Waller noted on June 12, 2002 that Claimant's "shoulder and neck are still giving her a significant amount of pain and discomfort in spite of conservative treatment including the therapy." Claimant was referred to Dr. Patrick Chan, who performed an anterior fusion at C6-7 on July 12, 2002; three days later, Dr. Chan operated on Claimant at the same level to correct a mistake in the initial procedure. The record indicates that she did not obtain relief from these operations.

Dr. Scott Schlesinger examined Claimant on December 9, 2002 in the course of performing an independent medical evaluation. He noted that Claimant's "complaint at this time is persistent neck pain, interscapular pain[,] and still has pain into her right upper extremity." Dr. Schlesinger did not believe Claimant to be a candidate for further surgery, and noted that "[i]t is not clear to me why anterior cervical plate and screws were necessary on her initial operation." He recommended pain management and assigned Claimant an 11% permanent impairment rating.

Dr. William Ackerman first examined Claimant on April 1, 2003. Upon examination, he offered the following assessment:

It is my medical opinion that a significant portion of the patient's pain is inflammatory in origin. She also has a significant amount of nociceptive pain. Some component of her pain is related to neuropathic pain, as well as muscle spasms.

He prescribed medications and a cervical epidural steroid injection. Claimant underwent

such an injection on May 30, 2003. On June 16, 2003, Dr. Ackerman opined “that she will require narcotic medications long-term. The epidural steroid injection did not provide her with any significant relief.”

Dr. Ackerman continued to treat Claimant. In a medical record dated July 14, 2003, he noted that “Dr. Chan wants to do another procedure” but that “Dr. Schlesinger does not feel that she is a surgical candidate at this time.” On September 9, 2003, Dr. Ackerman noted that Claimant “has a failed back syndrome, cervical. In my medical opinion [she] will require opioid medication long term.” On October 7, 2003, Dr. Ackerman recommended an EMG and nerve conduction test “to assess any changes related to discogenic pain or peripheral neuropathy.”

Dr. Reginald Rutherford administered electrodiagnostic testing to Claimant; his report is dated October 27, 2003. He concluded: “The nerve conduction study and needle examination are normal. There is no evidence via electrodiagnostic testing to suggest cervical radiculopathy, brachial plexopathy, ulnar neuropathy or median neuropathy right upper extremity.”

Claimant returned to Dr. Ackerman. On November 6, 2003, he assessed Claimant with “[f]ailed back syndrome, cervical.” He opined that Claimant was at maximum medical improvement, and recommended a functional capacity evaluation “to see what she is capable of doing. She should be able to do some form of gainful employment. She will need medications long-term.”

Claimant underwent a psychological evaluation on March 30, 2004; Dr. Judy Johnson performed the evaluation, upon referral from Dr. Ackerman. Among other observations, Dr. Johnson reported:

The overall pattern of her psychological responses suggests a lack of personal insight, extreme denial and significant discrepancy between her self-report and observed behavior.

...

The overall pattern of findings suggests that whatever physical findings are present will be difficult and complicated to treat due to significant depression.

Dr. Johnson recommended additional therapy and anti-depressant medication.

A radiology report dated April 6, 2004 noted “[a]nterior plate at the C6-7 level causing focal metallic artifact. There is evidence for a combination of diffuse bulge and spur at the C5-6 level.” Three days later Claimant presented to Dr. Schlesinger for a follow-up independent medical evaluation. Dr. Schlesinger noted that Claimant “continues to have problems despite [Dr. Ackerman’s] excellent conservative care.” Following examination, he recommended a plain x-ray of Claimant’s cervical spine “to make sure there is no evidence of bony or ligamentous instability.” If this evidence was not present, he believed Claimant to be at maximum medical improvement with an 11% permanent partial disability rating. He also recommended a functional capacity evaluation.

Dr. Ackerman continued to treat Claimant. He noted on April 20, 2004 that “[s]he is anxious as she wants to return back to work....” On May 18, 2004 he reported that “she would require analgesic medications probably for the rest of her life.”

Claimant underwent a functional capacity evaluation on June 8, 2004. The examiner noted that Claimant “put forth very inconsistent effort throughout the evaluation process.” The examiner concluded: “[Claimant] underwent functional evaluation this date with unreliable results for a valid FCE. [Claimant] did demonstrate the ability to work at least at the Light work category over the course of an 8 hour workday.”

Dr. Chan wrote the Respondent carrier on June 18, 2004.

[Claimant] had C6C7 anterior decompression stabilization and fusion. However, she is still symptomatic with persistent right upper extremity pain secondary to C5C6 foraminal stenosis. The patient had failed non-operative treatment for the pain related to C5C6 foraminal stenosis. Within reasonable degree of medical certainty, in my opinion the patient can benefit from anterior decompression and fusion with instrumentation at C5C6. However, Workers' Compensation is not willing to approve the surgery.

Short of the proposed C5C6 decompression and fusion/instrumentation, [Claimant] has reached maximal medical improvement on 5-24-04. Using the Guides to Evaluation for Permanent Impairment, 5th ed., the patient has 25% impairment of the Whole Person.

Dr. Ackerman wrote to Claimant's attorney on November 9, 2004.

[Claimant] will require medications for the rest of her life. She has a[n] injury to her cervical spine that required surgery and has a postlaminectomy syndrome, cervical at present. She will need opioid medications as well as muscle relaxants. Since patients build tolerance to certain drugs I cannot within reasonable medical certainty state which drug she will be on 6 to 12 months from now.

Claimant testified that she continues to receive treatment from Dr. Ackerman.

At the hearing, Claimant identified a list of medications that she is taking for pain, anxiety, and sleep. She stated that taking these medications "makes me tired and I just can't think straight. It just makes me not be able to live right." She described her current pain as follows:

My right side. My right arm feels like - you know that feeling when you hit your funny bone, I feel that all the time. I wake up now with my left side feeling numb and tingling. It's always on my right, but now it's going into my left. My neck hurts all the time, and I feel like I've got a knife in my shoulder blade all the time; and I get a lot of headaches.

Claimant has difficulty turning her head to the left or right; bending, lifting, or stooping; sitting or standing for greater than ten or fifteen minutes at a time; and lifting objects in her right hand without dropping them. She "can't walk very long before it starts hurting" and no longer engages in activities such as yard work, cooking, or shopping. Because of the limited range

of motion in her neck, Claimant seldom drives. She also has difficulty taking care of her personal needs such as putting on her shoes or socks or combing her hair.

Claimant testified that she has not worked since her injury and that her condition is “getting worse.” She confirmed that she cannot do anything for eight hours a day. On cross-examination, she admitted that she has not tried to work since May of 2002, and confirmed that she does not believe she can do any work. She began drawing social security disability benefits in November of 2004.

Q. But you really don't have any intention of trying to find employment; do you?

A. I can't.

Q. Have you made any inquiry in these last several years about any sort of employment?

A. No.

Q. Have you considered any kind of retraining?

A. I tried going to school.

Q. What was that for; was that like to complete a GED or something like that?

A. Yeah, but I can't sit there. I can't sit there and do those tests. I can't sit there and write for too long of a period of time. I just can't do it.

Q. Do you have any expectation of being able to work in the future at all?

A. If a miracle happens, I'd love to. I loved my job.... I planned on being there as long as I could. Back then, I thought I'd end up retiring from [the Respondent employer]. I loved that job.

When asked if she would be working if she did not have her pain, Claimant replied: “Oh, yeah.”

A. Permanent Impairment

At the hearing on May 11, 2005, counsel for Respondents noted that Dr. Chan used the wrong edition of the Guides in assessing Claimant's permanent impairment rating. He confirmed that Respondents are not challenging the existence of objective evidence or major cause; Respondents are simply requesting a calculation of Claimant's impairment using the correct edition of the Guides. At the conclusion of the hearing, the attorneys agreed that there is some degree of permanent impairment present.

There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, ___ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation to Permanent Impairment (4th ed. 1993) (hereinafter "Guides"). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34.

A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-704(c)(2). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I first find that Claimant's May 3, 2002 compensable injury is the major cause of the impairment at issue. Claimant confirmed an accident on that date; Claimant did not identify any other cause for her current condition, and the medical records do not reveal any other cause besides her May 3, 2002 compensable injury. Her June 15, 2002 and June 27, 2002 studies reveal findings at C5-6 and C6-7; there is no other cause identified for these findings apart from Claimant's compensable injury. See Polk County v. Jones, 74 Ark. App. 159, 165, 47 S.W.3d 904, ___ (2001).

I next find that there are objective and measurable physical findings in the record to support a determination of the existence or extent of Claimant's physical impairment. Again, the June 15, 2002 and June 27, 2002 studies reveal findings at C5-6 and C6-7. Claimant's April 6, 2004 "MR scan cervical spine" notes "evidence for a combination of diffuse bulge and spur at the C5-6 level."

Utilizing the Guides, I find that Claimant is entitled to a permanent impairment rating of 11% to the body as a whole, based upon her cervical spine condition. Dr. Chan's June 18, 2004 letter notes that Claimant "had C6C7 anterior decompression stabilization and fusion." Referring to Table 75 on page 113 of the Guides, a single-level spinal fusion with decompression translates to an 8% impairment. Claimant is entitled to an additional 2% for the second operation at this level. Dr. Chan's letter also notes "C5C6 foraminal stenosis," adding an additional 1% for Claimant's impairment at a second level. Thus, the 11% rating is appropriate based upon the record and the Guides.

B. Permanent Total Disability

Claimant seeks a determination that she is permanently and totally disabled. "Permanent total disability" means inability, because of compensable injury, to earn any

meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving her inability to earn any meaningful wage in the same or other employment; she must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2).

Claimant's injury is not scheduled under the Act; therefore, her entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant permanently and totally disabled based upon wage-loss factors. Whitlatch v. Southland Land and Dev., 84 Ark. App. 399, 405, 141 S.W.3d 916, ___ (2004).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity.

Lee v. Alcoa Extrusion, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (January 26, 2005) (citations omitted). In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) provides that permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(a).

As found above, Claimant has been assigned an impairment rating of 11%. Nonetheless, I find that Claimant failed to sustain her burden of proving by a preponderance of the evidence that she is not able, because of compensable injury, to earn any meaningful

wages in the same or other employment. See Ark. Code Ann. § 11-9-519(e). Claimant believes that she is physically unable to work, and has not tried to work since May of 2002. However, while he believes that Claimant will need medications the rest of her life, Dr. Ackerman wrote on November 6, 2003: “She should be able to do some form of gainful employment.” Despite putting forth “very inconsistent effort” over the course of her June 8, 2004 functional capacity evaluation, the examiner nonetheless believed that Claimant demonstrated “the ability to work at least at the Light work category over the course of an 8 hour workday.” On this record, Claimant did not sustain her burden of proving entitlement to benefits based upon permanent total disability.

C. Wage-loss Disability

In the alternative, Claimant seeks wage-loss disability benefits. Since she has been assessed with an 11% permanent impairment rating to the body as a whole, the Commission may consider her claim for wage-loss disability in excess of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1).

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. Logan County v. McDonald, ___ Ark. App. ___, ___ S.W.3d ___ (April 6, 2005).

In determining wage-loss disability, the Commission may take into consideration the worker’s age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker’s future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A claimant’s lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

McKinney v. Plastics Research & Dev., Full Workers’ Compensation Commission Opinion filed November 10, 2004 (E901881)(citations omitted); see Ark. Code Ann. § 11-9-522(b)(1);

Logan County, ___ Ark. App. at ___, ___ S.W.3d at ___. In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. “Major cause” is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A).

At the time of the hearing Claimant was 42 years of age, had a ninth grade education, and had no other specialized training or education. Her employment history involves fast food jobs and manufacturing. Claimant’s two surgeries at C6-7 failed to alleviate her complaints of pain; Dr. Chan believes that Claimant requires surgery at C5-6 because Claimant is “symptomatic with persistent right upper extremity pain secondary to C5C6 foraminal stenosis.” Dr. Ackerman believes that Claimant will need medication for the rest of her life; Claimant testified that the side effects of these medications make her tired and unable to “think straight.” Claimant’s witness, Victoria Morland, was present; the parties stipulated that, if called to testify, Morland would verify Claimant’s testimony regarding her limitations and complaints of pain.

Nonetheless, there is evidence that Claimant should be able to find gainful employment at a light work capacity. Claimant’s motivation to return to work is questionable; she does not believe that she will be able to work, and has not sought employment since May of 2002.

After considering all wage-loss factors, I find that the Claimant has established a decrease in her wage earning capacity equal to 40% to the body as a whole. She is entitled to benefits for this decrease in her wage earning capacity. Further, I find that Claimant did prove by a preponderance of the evidence that her compensable injury is the major cause of her decrease in earning capacity. The record demonstrates that Claimant’s compensable

injury is the sole, and thus the major, cause for this decrease.

D. Underpayment Penalty

Under Stipulation number 7, the parties agreed to the rate and timing of past disability benefit payments to Claimant. Counsel for the respective parties agreed that they could compute the amount of disability benefits that should have been paid; Respondents' counsel stated that "there may well be some underpayment, although it's not going to be that significant. If that's the case, it obviously would be controverted. So the fee would be due on it." Based upon the agreement of counsel at the hearing, Respondents are ordered to calculate the correct amount of disability benefits due to Claimant, utilizing Stipulations number 5 and 7. If there is an underpayment, Respondents are ordered to pay that amount to Claimant, less any attorney's fee due for controversion.

E. Attorney's Fee

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This opinion awards Claimant wage-loss disability benefits; the parties stipulated that Respondents controvert Claimant's entitlement to additional benefits. Thus, Claimant is entitled to an award of an attorney's fee pursuant to the statute to be paid by Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on May 3, 2002 and at all other relevant times.
3. Claimant sustained a compensable injury on May 3, 2002.

4. Respondents have paid medical and temporary total disability benefits.
5. Respondents controvert Claimant's entitlement to additional benefits.
6. Claimant's total disability benefits rate is \$209.00; her permanent partial disability benefits rate is \$157.00.
7. Claimant reached maximum medical improvement on November 6, 2003.
8. The Respondent carrier began paying temporary total disability benefits in the amount of \$245.00 on May 22, 2002; by September 4, 2002, that payment was reduced to \$198.00, which was paid until May 26, 2004; the Respondent carrier then began paying Claimant permanent benefits at the rate of \$154.00.
9. Claimant's witness, Victoria Morland, was present at the hearing; if called to testify, she would verify the limitations and complaints of pain to which the Claimant testified.
10. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to a permanent physical impairment rating in the amount of 11%. The record demonstrates that Claimant's May 3, 2002 compensable injury is the only, and therefore the major, cause of the impairment at issue. Her June 15, 2002; June 27, 2002; and April 6, 2004 studies all reveal findings at C5-6 and C6-7, providing objective and measurable physical findings. Utilizing Table 75 of page 113 of the Guides, Claimant is entitled to an 11% permanent impairment rating.
11. Claimant did not sustain her burden of proving by a preponderance of the evidence that she is permanently and totally disabled. Dr. Ackerman opined that Claimant "should be able to do some form of gainful employment." Her June 8, 2004 functional capacity evaluation confirms his opinion.
12. Upon consideration of all relevant wage-loss factors, I find that Claimant did

establish a decrease in her wage earning capacity equal to 40% to the body as a whole, and that she is therefore entitled to wage-loss disability benefits. Again, Claimant's May 3, 2002 compensable injury is the only, and therefore the major, cause of her decrease in earning capacity.

13. I find that Respondents should recalculate the correct amount of disability benefits due to Claimant, utilizing Stipulations number 5 and 7 (or Findings number 6 and 8). If there is an underpayment, Respondents are to pay that amount to Claimant, less any attorney's fee due to controversion.

14. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715, to be paid by Respondents.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

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

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml