

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305048

ERNEST O. WILLIAMS, EMPLOYEE	CLAIMANT
GATLING COOLING & HEATING, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 30, 2005

Hearing before Administrative Law Judge J. Mark White on May 19, 2005, in Camden, Ouachita County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Ms. Carol Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 19, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on April 11, 2005, and a Prehearing Order was entered that same day. A copy of the April 11, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including May 22, 2003; that on May 22, 2003, the claimant sustained compensable injuries to his neck and left shoulder; and that respondents accepted the May 22, 2003, injuries as compensable and paid some benefits.

The issues to be presented for determination were defined as follows: determination of the claimant's average weekly wage; whether the claimant is entitled to additional temporary total disability benefits; whether additional medical treatment is reasonably necessary in connection with a compensable injury; whether the claimant is entitled to permanent partial disability benefits; whether the claimant is permanently totally disabled; and whether the claimant has sustained wage loss in excess of any permanent anatomical impairment rating.

The claimant contends that he sustained his injury May 23, 2003, but that his first temporary total disability check was not paid until July, and that he is entitled to temporary total disability benefits from the date of his injury until the date of the first payment of benefits; that he remains entitled to temporary total disability benefits from the date those benefits were terminated through a date yet to be determined; that he is entitled to additional medical treatment as recommended by his physicians; in the alternative, that he is entitled to permanent partial disability benefits; in the alternative, that he is permanently totally disabled; and in the

alternative, that he has sustained wage loss in excess of any permanent anatomical impairment rating.

The respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this matter; that the claimant was released to return to work at his normal job duties back on March 2, 2004; that he was assigned a 5% permanent partial impairment, which the respondents have paid; that he continued to receive medical treatment by Dr. John Wilson for a period of time after his release; that additional medical treatment has not been requested nor is the same supported by the medical documentation; that there is no medical documentation known to respondents indicating the claimant remains in a healing period and entitled to indemnity benefits; and that the claimant earned an average weekly wage of \$389.88, and the respondents have paid benefits at the rate of \$260 for total disability benefits and \$195 for permanent partial disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance

with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that his average weekly wage was \$461.95.
4. The claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages as a result of his compensable injury prior to July 1, 2003.
5. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after March 2, 2004.
6. The claimant has therefore failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
7. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury.
8. The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional permanent partial disability benefits.

9. The claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled or that he has sustained wage loss in excess of his anatomical impairment rating.

DISCUSSION

I. History

The parties stipulate that the claimant sustained a compensable injury to his neck and left shoulder on May 22, 2003. He testified that he sustained his injuries in Camden while lifting two air conditioning units with two other workers. He said that as soon as the first unit was in place, he told his co-workers, "My back is burning," and asked that they wait before picking up the second unit. He did not seek medical treatment that day, but he testified that he went the following day to see a chiropractor, Dr. Chris Culpepper of Little Rock. Dr. Culpepper gave him a work excuse – the claimant testified the excuse was for three weeks, but the forms submitted by the claimant into evidence were for only one week. Also, the work excuse was not dated the day after the accident, May 23, but instead May 27. In any event, the work excuse listed the claimant's diagnosis as shoulder sprain/strain, cervical sprain/strain, cervical nerve root compression, and thoracic sprain/strain. The claimant returned to Dr. Culpepper on May 29 and 30, though the record does

not reveal what treatment was provided.

Paul Smith, an owner of the respondent-employer, testified that the claimant first reported the injury a week after it happened. The claimant testified that he provided the work excuse from Dr. Culpepper to the respondent-employer – presumably the injury report acknowledged by Smith – at which point he was directed to see the company doctor, Dr. Larry Braden. Dr. Braden’s June 5 note purports to “defer care” to Dr. Culpepper, but the claimant was apparently sent to Dr. Braden’s partner, Dr. Bill Dedman, the following day.

Dr. Dedman reported on June 6:

I am seeing Mr. Williams today for a repeat evaluation of his left shoulder pain. Mr. Williams was seen by Dr. Braden yesterday on 6/5/03. X-ray of the left shoulder was performed, which was normal. Dr. Braden then referred Mr. Williams back to Dr. Culpepper back in Little Rock who had initially started some evaluation on Mr. Williams after a motor vehicle accident back on 4/22/03. I am seeing him to re-evaluate whether or not he needs to see Dr. Culpepper.

My history from Mr. Williams is that he had a motor vehicle accident on 4/22/03 where he injured his left ankle, left knee, and left arm and shoulder. I do not have the records from Dr. Culpepper’s office to compare. He is presently in litigation for this accident. He was doing some lifting on 5/22/03 and started having pain over his left shoulder the following day. He did not report the accident to Gatling’s.

Dr. Dedman’s “impression” was “a mild shoulder injury with no evidence

of any neurological deficit.” He prescribed medication and physical therapy. The claimant returned to Dr. Dedman at least twice, and on June 23 Dr. Dedman released him from care and released him to return to regular work.

On July 1 the claimant saw Dr. Jay Lipke for continued neck and shoulder pain. An MRI performed later that summer revealed disc bulges at C5-6 and C6-7, and Dr. Lipke opined that the bulge at C5-6 was the cause of the claimant’s problems. Dr. Lipke treated the claimant conservatively, and in October he referred him to Dr. John Wilson for a surgical consultation. After a selective nerve block failed to alleviate the claimant’s symptoms, Dr. Wilson determined that he was not a surgical candidate. He released the claimant from care with a permanent impairment rating of 5% to the body as a whole. He also released the claimant to return to “normal activities at work,” though he indicated a functional capacity assessment might be needed to assess work limitations. The claimant returned to Dr. Wilson once more in July 2004 complaining of left shoulder pain.

At the hearing, respondents called as witnesses the two co-workers with whom the claimant was working at the time of his stipulated injury. Both of the co-workers, Jody Tillary and Derek Williams, denied that the claimant said anything about injuring his back, and they denied that he asked for a pause between lifting the two units. Both testified that they saw the claimant the week before the hearing

walking down the road, without a neck brace. At the hearing, the claimant was wearing a form of neck brace that was described as a TheraCane.

Respondents also called Chris Headrick and Richard Vick, who testified that in April 2004 they were digging a sewer line when the claimant jumped into the ditch with them and began to help them dig with a shovel. Headrick testified that the claimant mentioned the fact he was receiving disability benefits from the respondent-employer, but that the claimant asked Headrick for a job, on the condition he be paid in cash.

II. Adjudication

A. Average Weekly Wage

Compensation is payable at a rate computed from the claimant's average weekly wage under the contract of hire in force at the time of the accident. ARK. CODE ANN. § 11-9-518 (a)(1). The Commission is empowered in exceptional circumstances to determine the average weekly wage by a method that is just and fair to the parties. ARK. CODE ANN. § 11-9-518 (c).

The claimant worked for the respondent-employer no more than a few weeks. Payroll records submitted by the respondents indicate the claimant was paid \$1,286.60 for the time period from May 6 to May 29. The respondents divided this

amount by the time worked, 3.3 weeks, to arrive at an average weekly wage of \$389.88. I conclude that the respondents' calculation is incorrect.

Where a claimant works whenever work is available, as in seasonal work, his average weekly wage is to be based on a full-time workweek in the employment, even if the actual time worked was less than full-time. ARK. CODE ANN. § 11-9-518(a)(1); *Chapel Gardens Nursery v. Lovelady*, 47 Ark. App. 114, 885 S.W.2d 915 (1994); *Gill v. Ozark Forest Products*, 255 Ark. 951, 504 S.W.2d 357 (1974). An owner of the respondent-employer testified that his business was "seasonal" and that the claimant's work hours would vary from week to week and season to season. The parties appear to agree that the claimant was paid at the rate of \$9.50 per hour. Therefore, since the claimant's average weekly wage must be determined on no "less than a full-time workweek in the employment," Ark. Code Ann. § 11-9-518 (a)(1), I conclude that this claimant's average weekly wage must be calculated on the basis of a 40-hour workweek, with the addition of the average of his overtime earnings. *See* ARK. CODE ANN. § 11-9-518 (b).

The claimant earned \$9.50 per hour, which would result in a weekly pay of \$380 for a full-time workweek. He earned overtime pay of \$281.02 for the three weeks and three days worked, a weekly average of \$81.95. Adding these two figures together, I find that the claimant has proven by a preponderance of the evidence

that his average weekly wage was \$461.95.

B. Additional Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). 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).

As an initial matter, I note that I did not find the claimant to be a credible witness, in that his testimony was not consistent with the medical records submitted into evidence, nor was it consistent with the testimony of other witnesses. The claimant testified the air conditioning units he was moving when he was injured weighed 1,100 pounds each, while Tillary credibly testified they each weighed 576 pounds. The claimant testified he immediately complained of back pain to Tillary and Derek Williams, but both gentlemen denied the claimant reported or complained of any injury. The claimant denied that any of his doctors released him to return to work, but the documents submitted by the claimant show he was

released to regular duty by both Dr. Wilson and Dr. Dedman. The claimant testified that Dr. Culpepper released him from work for three weeks initially, but the documents submitted by the claimant reflect Dr. Culpepper took him off work for only one week. The claimant testified that Dr. Wilson referred him to Dr. Ron Williams for surgery, but nothing in the medical records corroborates this. Given these multiple, serious conflicts, I give the claimant's testimony no weight below.

It appears from the payment records submitted into evidence that the respondents paid the claimant temporary total disability benefits from July 1, 2003, until March 2, 2004 – the same period of time for which Dr. Lipke and Dr. Wilson kept the claimant off of work. The claimant seeks additional TTD benefits for the time before this period, beginning with the day of the accident, and from March 2, 2004, until a date yet to be determined. As to the prior time, the only evidence of the claimant's incapacity to earn wages is a work excuse slip signed by Dr. Culpepper. Without Dr. Culpepper's treatment records, I have no way of determining whether his taking the claimant off of work was reasonable, or whether it was due to the May 2003 compensable injury or the April 2003 motor vehicle accident. Given this scant evidence, I find that the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages as a result of his compensable injury prior to July 1, 2003.

As for the remaining period, I am persuaded from the medical record that the claimant's condition had become stable no later than March 2, 2004, when he was released by Dr. Wilson, his later visits with Dr. Wilson notwithstanding. I find that the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after March 2, 2004. Therefore, given the above findings, I conclude that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.

C. Additional Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The claimant testified that his doctors recommended surgery, but no such recommendation is contained within the medical evidence herein. I can find no recommendations of additional treatment, other than Dr. Wilson mentioning the possibility of a functional capacity assessment. I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment is

reasonably necessary in connection with the compensable injury.

D. Additional Permanent Partial Disability Benefits

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any determination of permanent physical impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Benefits for permanent impairment may be awarded only upon a showing that the compensable injury was the major cause of the impairment. ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a).

The respondents paid the claimant permanent partial disability benefits for a 5% permanent impairment rating assigned by Dr. Wilson. I can find no other permanent impairment rating in the record before me, nor any evidence to suggest that the claimant is entitled to an anatomical impairment rating higher than that assigned by Dr. Wilson. Therefore, I find that the claimant has failed to prove by a

preponderance of the evidence that he is entitled to additional permanent partial disability benefits.

E. Permanent Total Disability / Wage Loss Benefits

The claimant contends in the alternative that he is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519 (e). The claimant bears the burden of proving that he is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

Other than his own testimony, there is no evidence in the record to show that

the claimant's wage-earning capacity has been negatively affected by his compensable injury, or that he is unable to earn any meaningful wages in any employment. As noted above, I give the claimant's testimony no weight. He is relatively young, with a high school degree and specialized training in HVAC work. Prior to his injury he had begun, or was about to begin, college at UALR. I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled or that he has sustained wage loss in excess of his anatomical impairment rating.

AWARD

The claimant has proven by a preponderance of the evidence that his average weekly wage was \$461.95. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge