

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305411

KENNETH L. BOONE, JR.

CLAIMANT

ARKADELPHIA SHEET METAL

RESPONDENT EMPLOYER

STATE FARM FIRE & CASUALTY

RESPONDENT CARRIER

ORDER AND OPINION FILED FEBRUARY 16, 2006

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on January 6, 2006. A prehearing conference was held on November 16, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable May 15, 2003, injury.
2. The compensation rate is \$151.

The claimant contends he is in need of additional medical treatment. The claimant's primary treating physician, through an order of the Commission, Dr. Brent Sprinkle referred the claimant to Dr. Scott Schlesinger. The claimant is now requesting that his medical care and treatment be with Dr. Schlesinger. The claimant is further

requesting the 15% permanent impairment assessed by Dr. Jim Moore and is requesting wage loss benefits and attorney's fees.

Respondents contend that Dr. Schlesinger was not a valid referral and that his care and treatment is not the responsibility of respondents. Respondents further contend that Dr. Sprinkle and Dr. John Wilson have opined the claimant has no permanent impairment. Respondents contend the impairment rating assigned by Dr. Jim Moore is not supported by objective findings nor is it in compliance with the *AMA Guides, 4th Ed.* Respondents also contend that the new objective findings constitute an intervening cause and relieves respondents of liability. Alternatively, respondents contend if Dr. Schlesinger is found to be the authorized treating physician, his treatment is associated with the new findings and not the original injury. Respondents contend that because there is no anatomical impairment, the claimant is not entitled to wage loss disability benefits. Alternatively, if some impairment is found, respondents still contend the claimant has not sustained wage loss disability. Benefits were controverted on May 19, 2004.

ISSUES TO BE LITIGATED

1. Additional medical benefits.
2. Impairment rating.
3. Wage loss.
4. Attorney's fees.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann.

§11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable May 15, 2003, injury.
2. The compensation rate is \$151.
3. The claimant has proven by a preponderance of the evidence that the additional medical treatment he has pursued after May 19, 2004, was reasonable and necessary and remains the responsibility of respondents.
4. The claimant has proven by a preponderance of the evidence that he has sustained a 7% anatomical impairment rating.
5. The claimant has proven by a preponderance of the evidence that he has sustained a 25% diminished wage earning capacity in addition to the anatomical rating.
6. The claimant's attorney is entitled to maximum statutory attorney's fees on benefits awarded pursuant to Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 29 years old, completed the eighth grade and then got his GED. He also went to vocational school and received a refrigeration certificate. The claimant had worked hanging duct work for air conditioning and heat for the respondent employer about seven weeks before his May 15, 2003, accident. The job required

lifting and carrying up to 50 pounds for refrigerant bottles, ladders, heating and air conditioning units. The heaviest object the claimant could remember that he had to carry was 100 pounds. The claimant's previous job was a maintenance man at an apartment complex and he worked as a painter before that.

According to the claimant, he was not having any back problems before his May 15, 2003, work incident, although he had been to a chiropractor, Dr. Schuck, one time in 2001, after being referred by Dr. Hagood for back pain. The claimant testified that he had some back pain in 2001 with pain going down his leg; however, that resolved. According to the claimant, he had not been diagnosed with anything more than minor back strain before his May 2003 incident.

According to the claimant, on May 13, 2003, he and three other employees were carrying an old heating/air conditioning unit from a house and, as he stepped back while carrying the unit, his back popped and began hurting. The claimant experienced low back pain going down his right leg and through his right testicle. The claimant reported his injury immediately to the company owner, Michael Holloway. The claimant went to the van and sat the rest of the day. He testified that he asked to see a doctor but was not taken. According to the claimant, after he had been home a day or two, Mr. Holloway advised him he should have gone to the emergency room. The claimant went to a chiropractor, Terry Hudson, and saw him one time and then went to the emergency room on May 19, 2003.

The claimant was given medication and an x-ray at the emergency room. The claimant next began treating with Dr. James Blackmon and he ordered a MRI. The claimant next saw Dr. John Wilson and was treated with medication and physical

therapy with home exercises as well. The claimant underwent a series of three epidural steroid injections. The injections provided temporary relief but the pain in the leg and testicle did not go away. The claimant also underwent a myelogram and a CT scan. Dr. Wilson ultimately released the claimant to return to work full duty; however, the claimant continued to have pain and requested a change of physician. The Commission entered a change of physician order to Dr. Brent Sprinkle on January 7, 2004. Dr. Sprinkle ordered an EMG study and prescribed the medications, Bextra and Celebrex, and also ordered trigger-point injections in the back and a TENS unit. The claimant continues to use the TENS unit about six hours per day and get supplies paid by respondents. Dr. Sprinkle also sent the claimant for additional physical therapy and prescribed Neurontin. On the last visit to Dr. Sprinkle on May 19, 2004, he wrote in his record, "The patient has made accusations that I have no concern for his well-being.' And he goes on down farther and says, 'With these type accusations, I am really not comfortable continuing this therapeutic relationship and would not recommend continued follow-up.'" (T., p. 30, lines 2-7.)

The claimant was questioned about what precipitated the comments from Dr. Sprinkle and the claimant testified that he did not think Dr. Sprinkle was doing his best for him. The claimant asked about possibly having a discogram and Dr. Sprinkle would not order one. After that conversation, the claimant has been unable to see Dr. Sprinkle again. The claimant went to a family doctor, Dr. George Taylor, and then saw Dr. Scott Schlesinger on October 27, 2004. Dr. Schlesinger ordered a MRI and that was done November 2, 2004. The claimant explained that his wife's insurance was no longer available and he could not see Dr. Schlesinger again until May 2005. The

claimant tried to see Dr. Sprinkle again with his MRI but Dr. Sprinkle would not see him and ultimately wrote the claims adjuster on December 9, 2004; however, the insurance company did not allow the claimant to see Dr. Schlesinger. On May 16, 2005, the last visit with Dr. Schlesinger, he recommended a home traction unit and a functional capacity evaluation. The claimant has not received either. Dr. Schlesinger would not provide a permanent impairment rating and the claimant sought an evaluation by Dr. Jim Moore at the personal cost to him of \$500. In addition to assigning an impairment rating, Dr. Moore also recommended a discogram; however, the claimant has been unable to afford this.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2003). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

Treatment intended to reduce or enable a claimant to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. §11-9-508(a). See, *Chronister v.*

Lavaca Vault, Full Workers' Compensation Commission, June 20, 1991 (D704562). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the present case, the claimant was treated by Dr. John Wilson, who released the claimant to normal duties on November 1, 2003. Dr. Wilson stated that the claimant was to return to see him if he had an exacerbation of pain. The claimant decided to seek a change of physician and an order was filed on January 7, 2004, changing the claimant's authorized treating physician to Dr. Brent Sprinkle, D.O. The claimant began treating with Dr. Sprinkle and he ordered EMG studies, ordered a TENS unit, provided some trigger point injections and medication. By May 19, 2004, Dr. Sprinkle and the claimant had some personal difficulties and Dr. Sprinkle discontinued treatment of the claimant. Respondents controverted medical at the same time.

The claimant sought treatment with a family doctor and was referred to Dr. Scott Schlesinger and he ordered a new MRI. This MRI did reveal a paracentral extrusion at L5-S1 and an annular tear at L4-5. The claimant continues to have pain and has been unable to work following his injury.

After considering the testimony and reviewing the medical evidence, I find the claimant has proven by a preponderance of the evidence that additional medical is reasonable and necessary and that respondents remain responsible for reasonable and necessary treatment the claimant has pursued since May 17, 2004. Even Dr. Sprinkle's last visit with the claimant on May 19, 2004, revealed he had prescribed Neurontin. While Dr. Sprinkle seemed to believe the claimant had appropriate conservative care,

he did prescribe medication and had a personal conflict with the claimant. Dr. Sprinkle also opined on March 31, 2005, that with the new MRI findings it would certainly be reasonable for the claimant to see Dr. Schlesinger again. Respondents acknowledge that the medical was controverted on May 19, 2004 and Dr. Sprinkle had discontinued his care and treatment of the claimant. The treatment with Dr. Schlesinger through the claimant's family doctor occurred after respondents controverted the claim; therefore, the change of physician rules do not apply. However, I also find that Dr. Sprinkle did make a valid referral to Dr. Schlesinger after Dr. Sprinkle discontinued his relationship with the claimant. On May 16, 2005, Dr. Schlesinger recommended trying a home lumbar traction unit and also that the claimant undergo a Functional Capacity Evaluation. On December 6, 2005, Dr. Jim Moore recommended one further diagnostic study of a discogram. Taking these later medical reports into consideration lends support to the claimant's contention that he needs additional medical care.

Respondents contend the new findings in the later MRI represent an intervening cause and relieves the respondents of further liability. There was nothing presented in the way of testimony or medical evidence to substantiate an intervening cause for the new findings that would in any way relieve respondents of liability. When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). I find the preponderance of the evidence provides the claimant's current condition arose out of a compensable injury.

The claimant next contends he is entitled to the 15% body as a whole rating assigned by Dr. Jim Moore on December 6, 2005. “Permanent impairment” has been defined as any permanent functional or anatomical loss remaining after the healing period had ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Further, the *AMA Guides* define “permanent impairment” as an “impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment.” The *AMA Guides* further qualify the definition by noting that “[a] permanent impairment is considered to be unlikely to change substantially and by more than [three percent] in the next year with or without medical treatment.” *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Further, the Commission was required to adopt an impairment rating guide to be used in the assessment of anatomical impairment, and the Commission has adopted the *AMA Guides* to be used in this assessment. Ark. Code Ann. §11-9-522(g)(1)(A) (Repl. 2002); W.C.C. Rule 34. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the *AMA Guides*; the Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. *Avaya v. Bryant*, 83 Ark. App. 273, 105 S.W.3d 811 (2003).

In the present case, Dr. Moore utilized Table 72, Category III to IV of the *AMA Guides*, 4th Ed. After a review of the *Guides* and Table 72 utilized by Dr. Moore, I find that Table 75, Category II(c) is the appropriate section to consider in light of the medical evidence presented. Table 75, Category II(c) addresses unoperated on herniated

nucleus pulposus with or without radiculopathy as well as moderate to severe degenerative changes with a medically documented injury and assigns a 7% rating. If Table 72, Category IV is used, this mentions loss of motion segment and objective findings would be necessary to verify the rating and Category III refers to radiculopathy and the medical does not document this. I did not find Dr. Moore's assignment of a 15% rating documented sufficiently to address the objective findings necessary for Category III or IV to be utilized. The preponderance of the evidence provides that the appropriate permanent impairment rating is 7%. It is noted that both Dr. John Wilson and Dr. Brent Sprinkle did not assign a permanent impairment rating following their treatment. However, the latest MRI was not available to either doctor at the time each opined on permanency.

The claimant next contends he is entitled to wage loss benefits in excess of his impairment rating. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co., Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in

rehabilitation does not bar his claim, but the failure may impede a full assessment of his wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

In the present case, the claimant has not worked since his May 15, 2003, accident at work. He testified at the hearing that he continues to have back pain that goes down his leg and into his testicle. The claimant testified that he can sit for 10 to 15 minutes before he must change positions, has trouble walking and can lift only about 5 to 10 pounds without pain. He testified that he has trouble sleeping and now is unable to handle his yard work, car repair and home repairs that he previously handled. The medical evidence documents the claimant has a disk herniation and an annular tear with Dr. Moore's most recent medical report dated December 6, 2005, recommending a diskogram with a contrasted CT. Dr. Moore opined that the claimant's symptoms suggest nerve and these tests should investigate such. On May 16, 2005, Dr. Schlesinger had suggested the claimant have a Functional Capacity Evaluation and he also recommended a trial of a home traction unit. Neither of these have been pursued because of cost parameters by the claimant. Taking into consideration the medical information in evidence and the claimant's testimony and other wage loss factors, I find the claimant has sustained a diminished wage earning capacity in the amount of 25%.

ORDER

The claimant has proven by a preponderance of the evidence that the additional medical treatment he has pursued after May 19, 2004, was reasonable and necessary

and remains the responsibility of respondents. The claimant has proven by a preponderance of the evidence that he has sustained a 7% anatomical impairment rating. The claimant has proven by a preponderance of the evidence that he has sustained a 25% diminished wage earning capacity in addition to the anatomical rating.

The 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 Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**