

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401712

DEBBIE K. MCVAY, EMPLOYEE	CLAIMANT
ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JULY 11, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on April 12, 2006 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM L. WHARTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional temporary total disability benefits, additional permanent partial disability benefits (for both anatomical impairment and wage loss) and attorney's fees.

At issue is the determination of the healing period pursuant to Ark. Code Ann. §11-9-102(12); the correct impairment rating pursuant to Rule 34, 102(4)F)(ii)(a) 519; the extent of wage loss disability pursuant to Ark. Code Ann. §11-9-522 and the Fund's liability pursuant to Ark. Code Ann. §11-9-502.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704 I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on December 17, 2003 at which time the claimant sustained a compensable injury at a compensation rate of \$437.00/\$328.00. Medical expenses and temporary total disability benefits were paid until November 29, 2004. The respondents also accepted a 15% impairment rating to the body as a whole. The claimant continued to work for the respondent-employer until December 29, 2004 when she left their employ.

The claimant contends the correct impairment rating is 25% to the body as a whole, and not the 15% accepted by the respondents. The claimant seeks the difference (10%) in permanent partial disability benefits. The claimant also contends the healing period did not end on November 29, 2004. She seeks additional temporary total disability benefits from November 30, 2004 to March 17, 2005. Furthermore, the claimant contends that efforts at rehabilitation were unsuccessful and she is permanently and totally disabled.

Respondent No. 1, Public Employee Claims Division, contends all appropriate benefits have been paid. The claimant is not entitled to wage loss benefits because the respondents provided her with a job within her work restrictions pursuant to Ark. Code Ann. §11-9-522(b)(2).

Respondent No. 2, the Fund, contends respondent No. 1 must first pay out the impairment rating prior to the payment of permanent and total disability benefits. The Fund also contends that Respondent No. 1 is not entitled to a credit for payment of the rating toward the \$75,000.00 cap pursuant to Ark. Code Ann. §11-9-502(b)(1), (but see Thomas v. Legacy Lumberman and the Death & PTD Trust Fund, ___ Ark.

App. ____, ____, S.W.3d ____ (2005).

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant and her daughter, Michelle, who were emotionally distraught throughout the hearing, friend and co-worker, Ms. Kennie Burch, who was a strong and effective witness and rehabilitation specialist, Tom Strickland. The lay witnesses corroborated the claimant's testimony regarding her physical limitations.

The claimant, age 50 (D.O.B. July 28, 1951) has an eleventh grade education and G.E.D. She is right hand dominant and held her right shoulder close to her body with her left arm as she testified. Her work history includes delivering and stocking merchandise and office work, including data entry. Her health history includes right hip pain and an annular tear at T-11-12 with disc protrusion, left ankle pain, and degenerative disc disease of the cervical spine.

The claimant worked for the respondent-employer collecting data about traffic flow. Her job duties include pulling a 200 foot hose from a truck, driving nails into asphalt or concrete, setting up data collecting machines and downloading information into a computer. Her job requires travel and extensive use of her upper extremities.

On December 17, 2003, the claimant was trying to swing a hose into a truck when her arm popped. Initially she was treated by her family physician with physical therapy. Orthopedic surgeon, Dr. Pollard performed surgery in February, 2004, which was unsuccessful. Dr. Collins performed the second surgery in September,

2004 which did not improve her symptoms. The claimant experiences swelling, burning, numbness, tingling in her arm and sweating in her right palm. The discomfort causes sleep disturbance, elevated blood pressure and difficulty concentrating.

Dr. Collins released the claimant but she found it too painful to continue working. The claimant has also found it necessary to hire help with the domestic chores of housekeeping and yard work.

Rehabilitation specialist, Tom Strickland testified the claimant was motivated to return to work and the employer was cooperative in vocational rehabilitation efforts. However, the claimant's pain, anxiety and stress surrounding her injury were barriers to a successful outcome.

MEDICAL EVIDENCE

The claimant was treated by her family physician with injections, medication physical therapy and light duty for right rotator cuff tendonitis.

Diagnostic testing (MRI scan, arthrogram) confirmed a complete tear of the rotator cuff and a degenerative cyst in the right shoulder. Dr. Clark performed surgery on February 23, 2004. The claimant remained symptomatic and a second MRI scan on June 17, 2004 revealed a recurrent full thickness rotator cuff tear.

The claimant saw Dr. David Collins and a second surgery was performed on September 3, 2004. Dr. Collins' operative notes detail extensive changes in the shoulder. He advised that the claimant should not return to her job as a data collector. On November 1, 2004 Dr. Collins recommended a change in the claimant's job assignment or exploration of vocational rehabilitation.

Dr. Collins assessed a permanent impairment rating of 15% to the body as a whole in his report of November 29, 2004:

Certain aspects of the preoperative pain have not been relieved. These are predominantly related to palpable tenderness in the infra-acromial region.

Motion is minimally restricted... She has weakness consistent with the findings of rotator cuff tearing.

She has reached maximum medical improvement as it relates to her work-related injury and its treatment. She has sustained permanent partial impairment on the basis of anatomic changes of the skin, subcutaneous tissue, acromion process, deltoid muscle, coracoclavicular ligament, the contents of the subacromial space, and the rotator cuff. Impairment is equal to 25% to the upper extremity equal to 15% to the body as a whole.

She is best served with vocational rehabilitation or some change in her existing occupational task assignment. Features of pain that persist are best managed with topical medication, local ice and heat and, if needed, pain management consultation. I cannot think of any additional diagnostic tests or treatment at this time.

She may return to work with no use of the arm above shoulder level and no lifting or application of force to the right upper extremity greater than 10 pounds.

Dr. Collins did not reference which addition of the AMA Guidelines he used in calculating the rating.

The claimant saw Dr. Barry Baskin on December 6, 2004 and December 9, 2004 for chronic shoulder pain. He recommended medication and steroid injections and instructed her how to use her arm and support her elbow while she was performing light duty (clerical and computer work).

An EMG/NCV study was performed on December 23, 2004, with abnormal results indicating "polyneuropathy due to her injury." Her general practitioner

excused her from work.

Dr. David Silas, a neurologist, saw the claimant on January 12, 2005 and he noted weakness (grip, biceps, deltoids) and loss of range of motion in the right upper extremity. He diagnosed an ulnar and median nerve injury, recommended splinting and medication and continued her off-work status. In March, 2005 Dr. Silas changed his diagnosis to reflex sympathetic dystrophy (RSD), prescribed medication, and continued her off-work status. In his report of April 21, 2005, Dr. Silas opined that the claimant's condition would not improve.

She should start seeking long term disability, and at this time I feel like the patient is totally disabled and will never return to work.

In May, 2005, the claimant was examined by Dr. Vivendar Verma, a specialist in rehabilitation and pain management. He opined that the claimant needed an MRI to rule out cervical radiculopathy. Scans of the shoulder and neck were performed on May 24, 2005. A subchondral cyst in the femoral head was identified in the shoulder along with multilevel degenerative disc disease of the cervical spine with bulging and spurring causing stenosis particularly at C4-5 and 5-6.

The claimant returned to Dr. Silas and her general practitioner for pain management in June and July, 2006. In reports dated August 4, August 29, and October 18, 2005 Dr. Silas rated the claimant at 25% to the body as a whole based on cervical spine changes from the injury, restricted range of motion, pain, and abnormal diagnostic studies. Dr. Silas used the 5th Edition of the AMA Guidelines to make his assessment. He assessed the end of the healing period as March 17, 2005 and opined the claimant was unable to work.

In August, 2005 the claimant saw Dr. Butchaiah Garlapati, a pain management specialist. He recommended medication, diagnostic testing, a stellate ganglion block and therapy for RSD of the right shoulder. A bone scan conducted September 1, 2005 showed abnormalities in both shoulders as well as the left ankle.

Dr. Garlapati's report of 10-6-05:

I sincerely believe that in the last 2 years' time Ms. McVay has not seen any improvement in the function of her right upper extremity. I sincerely believe that Ms. McVay has reached maximum medical improvement and at times certain interventional procedures such as stellate ganglion blocks or sometimes even brachial plexus blocks are able to decrease the severity of the pain but may not completely eliminate the present problem. I also discussed with her about spinal cord stimulator or Medtronic pump device that supplies narcotic medication continuously.

MEDICAL EVIDENCE

A rehabilitation report dated October 20, 2004 indicates the claimant had not worked since December 17, 2003. The rehabilitation specialist noted the claimant was cooperative but appeared to be in pain. The claimant's discomfort interfered not only with her job but also with her hobbies, domestic chores and sleep.

FINDINGS AND CONCLUSIONS

The evidence of record shows the claimant sustained a compensable right shoulder injury and failed rotator cuff repair. Dr. Collins assessed a 25% rating to the upper extremity or 15% to the body as a whole. Dr. Silas assessed a 40% rating based on the shoulder and cervical disc disease.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. For an injury to the body as a whole, a claimant is entitled to temporary total disability

compensation during the period of time that the employee is within the healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code. Ann. §11-9-102(12). The healing period continues until the employee is as far restored as the permanent character of his injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

After Dr. Collins released the claimant in November 2004, she saw Dr. Baskin, Dr. Silas, Dr. Verma and Dr. Garlapati. All of their treatment focused on pain management. There was nothing further they could do to improve her condition. Accordingly, I find the claimant is not entitled to additional temporary total disability benefits.

Permanent impairment, is any permanent functional or anatomical loss remaining after the healing period has been reached. Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Also, in Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968), the Arkansas Supreme Court held that physical functional loss may best be measured through physical examination by competent medical specialists. The Commission must first evaluate the medical evidence and

determine if the permanent impairment is supported by objective and measurable findings. Reader v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). Ark. Code Ann. §11-9-704(c)(1)(B)(Repl. 1996) states that “any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” In addition, permanent benefits may only be awarded upon a determination that the compensable injury was the major cause of the impairment, Ark. Code Ann. §11-9-102(5)(F)(ii)(Repl. 1996).

The Fourth Edition of the AMA Guidelines outlines shoulder injuries in Chapter 3, “The Musculoskeletal System,” §3.1j at pgs. 41-74. Instructions for calculating the shoulder rating appear at page 66. Upper extremity ratings are then converted to the body as a whole using Table 3 at page 20. Based on the claimant’s medical records, she suffers from decreased range of motion, neuropathy and RSD of the shoulder as a direct result of the accident.

Dr. Silas’ rating includes the claimant’s cervical degenerative disc disease diagnosed in May, 2005 a year and a half after the injury on December 17, 2003. Dr. Silas opined the claimant’s neck condition resulted from the compensable injury but he offers no basis for that opinion. Degenerative disc disease can also be a part of the aging process and diagnostic testing indicates it is unlikely that her pain emanates from her neck, (see Dr. Silas’ report of December 23, 2004). Without some further explanation, I find there is no causal connection. Accordingly, I find Dr. Collins’ rating to be correct.

Wage loss is the degree to which the compensable injury has affected the claimant’s earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923

S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bone fide job offers, credibility, or voluntary termination. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

There seems to be no dispute that both the claimant and respondents have been cooperative in rehabilitation efforts but the claimant suffers from permanent nerve damage in her dominant arm and her neurologist has opined she is unable to return to the workforce. Therefore, I find the claimant is permanently and totally disabled.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on December 17, 2003 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$437.00/\$328.00. Medical expenses, temporary total disability benefits, (until November 29, 2004) and a 15% impairment rating have been accepted.
2. The claimant has failed to prove by a preponderance of the evidence of record that she is entitled to any additional temporary total disability benefits. The claimant's treatment after November 2004 was directed at chronic pain management.
3. The claimant has failed to prove that her cervical condition is causally related to the compensable shoulder injury. Therefore, the claimant is not entitled to any additional

permanent partial disability benefits for anatomical impairment.

4. The claimant has proven by a preponderance of the evidence of record that she was permanently and totally disabled as of December 30, 2004 based on her age, education, work experience, injury and work restrictions, chronic pain, and failed rehabilitation efforts. The shoulder injury is the major cause of her disability.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge