

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403161

RICKY D. STEWART, EMPLOYEE	CLAIMANT
GAITHER'S APPLIANCE, EMPLOYER	RESPONDENT NO. 1
WESTPORT INSURANCE, INC., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MARCH 17, 2006

Hearing held on December 20, 2005 at Texarkana, Miller County, Arkansas, before the HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HON. NELSON V. SHAW, Attorney at Law, of Texarkana, Texas.

Respondent No. 1 represented by HON. WILLIAM C. FRYE, Attorney at Law, of Little Rock, Arkansas.

Respondent No. 2 represented by HON. DAVID L. PAKE, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 20, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was conducted on August 17, 2005, and a prehearing order was entered on August 22, 2005. Originally, the prehearing order set a full hearing date of November 22, 2005; however, the parties subsequently agreed to continue the hearing to December 20, 2005. A copy of the August 22, 2005 prehearing order was marked as Commission Exhibit "1" and made a part of the record herein, subject to any modification made on the record at the full hearing.

The parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including March 19, 2004; that the claimant's applicable weekly compensation

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rates are \$442.00 and \$332.00 for TTD and PPD, respectively; and that the claimant sustained a compensable back injury on March 19, 2004, for which some benefits were paid.

At the full hearing the parties agreed the following issues would be presented for determination:

- 1) To what extent, if any, the claimant is entitled to PPD benefits due to his March 19, 2004 compensable injury.
- 2) Whether the claimant is entitled to wage loss disability benefits.
- 3) Attorney's fees.
- 4) Whether the claimant is entitled to additional medical treatment related to his March 19, 2004 compensable injury.

It must be noted that at the prehearing conference the parties originally listed vocational rehabilitation as an issue; however, at the full hearing the claimant withdrew that issue. (T. pg. 6, lns 1-4) Also, TTD was originally scheduled to be at issue, but at the conclusion of the full hearing the claimant withdrew that request as well. (T. pg. 97, lns 2-13)

At the full hearing, the claimant contended his entitlement to permanent partial disability benefits, wage loss disability benefits, additional medial treatment and attorney fees due to his March 19, 2004 compensable injury.

Respondents No. 1 contended at the full hearing that the claimant was injured on March 19, 2004, and at that time he gave the doctor a history of long standing cervical problems and upper extremity pain. That Dr. Long noted the claimant's injury date was actually August, 2000 and not 2004, and that the claimant was evaluated at the Texas Back Institute prior to his injury and was found to have spondylosis and disc herniations at various

levels in the spine. It is Respondents No. 1's position that most of the claimant's 15% rating is pre-existing and that the claimant was symptomatic prior to his injury.

Respondents No. 1 further contend the claimant is not entitled to any wage loss benefits and if the claimant does have wage loss, it is due to a combination of present problems and his pre-existing disability. Respondents No. 1 also contend that Dr. Cavanaugh expressed opinion that he could not state that more than 50% of any impairment was due to the injury. Respondents No. 1 also contend Dr. Cavanaugh opined that any pain management needed by the claimant would be due to the claimant's long standing problems and not related to his injury. Respondents No. 1 contend the testing for an arteriogram recommended by Dr. Long is not related to the claimant's injury.

Respondent No. 2 contended at the full hearing that the claimant cannot prove entitlement to either PPD benefits or wage loss disability.

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 the opportunity to hear the testimony of the witnesses and to observe their demeanor, and without giving the benefit of the doubt to either party, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §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 sustained a compensable injury on March 19, 2004.
- 4) The claimant has proven by a preponderance of the evidence that Respondent No. 1 should pay the claimant for a 10% permanent whole body impairment based on the PPD rate stipulated to herein, and that the claimant is entitled to the maximum statutory attorney's fee allowed by Arkansas Law consistent with the findings herein.
- 5) The claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits.
- 6) The claimant reached MMI on 4/21/05 and is not entitled to any medical treatment or pain management after 4/21/05.

DISCUSSION

A) HISTORY

The claimant, age 51, became employed as a service technician for in-home appliances by Gaither's Appliance sometime in 1991 or 1992. (T. pg. 19, lns 2-5) The claimant testified his last day of work with the respondent-employer was on March 19, 2004. On that date, the parties stipulated the claimant suffered a compensable back injury. The claimant testified as follows regarding what happened on March 19, 2004:

A. After we were made the repair and we did our checks but before we installed it we put the racks back in and everything back in and everything back together. At that time is when we went to reinstall the oven back into the hole that it had come out

of. Upon lifting the appliance, Harold Brown being - he's a little shorter than me. He's probably 4 inches shorter than I am. When we picked the oven up, as we were going back in with it, when we got to the point where we were just a couple of inches or so back from the opening, to having it to the height to put it in, he basically had run out of any arm - he was at his maximum that he could do and when he was, I gave it the last jerk to get it up into the hole. When I did that, it was like - it was almost like we had cut the power back on to the oven and 240 volts of electricity shot straight through me, all the way through my shoulder blades and down my back.

Q. What happened after you felt this?

A. At the time I probably made some sort of a sound, I don't recall, but I told Harold, get the oven, get the oven, I can't hold it. We already had it in the hole so he at that time slid the oven back in and I was on my way out the door from nausea. I was physically ill from the pain.

Q. What did you do when you went out the door?

A. When I went outside I became physically ill. I got sick to my stomach and I threw up. I was kind of just basically disoriented, I was really in a state of shock. I was in a whole lot of pain. (T. pgs. 27 & 28, lns. 18-26 & 1-22)

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The claimant testified that after the incident of March 19, 2004, his co-worker had to drive him home. After getting home, the claimant testified he sought treatment at St. Michael's Hospital that same day. The claimant then treated with Dr. Warren Long on May 5, 2004, at which time Dr. Long found the claimant to have "...C6 nerve root impingement involving C6-7 interspace, and probably the C5-6 interspace on the left, and to a certain extent, the right." (RX-1, pg. 31) Dr. Long also noted at that time the claimant had pain in his neck and left arm before the March 19, 2004 injury. Dr. Long stated in the May 5, 2004 report:

"Patient has a very interesting history. His date of injury differs from the date that was given to me from Concentra. He states his date of injury was in August, 2000. Concentra's paperwork shows his date of injury was March 19, 2004. (RX-1, pg. 30)

Dr. Long recommended an MRI of the cervical spine on May 25, 2004 and Dr, Scott Campanini read the cervical MRI as follows:

"Mild posterior disk bulging at C3-4, C4-5 an C5-6, broad-based and smoothly effacing the anterior CSF to a mild to moderate degree perhaps producing mild AP canal stenosis although some posterior CSF space is still maintained and the central portion of the canal measures greater than a centimeter in AP dimension." (RX-1, pg. 36)

Dr. Lipu Kong followed the MRI with a cervical spine myelogram and noted the following impressions:

"C spine myelogram shows posterior disc bulging/osteophytes from C2 to C6 levels with central canal stenosis most prominent at C3-4 level. (RX-1, pg. 37)

Dr. Kong also noted degenerative change involving multiple levels from C2-3 to C5-6.

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(RX-1, pg. 38)

Dr. Long referred the claimant to a neurosurgeon, Dr. David Cavanaugh. Dr. Cavanaugh assessed the claimant with cervical spondylosis without myelopathy. (RX-1, pg. 41) Dr. Cavanaugh reviewed the claimant's CT/myelogram from Christus-Schumpert Highland, and recommended "an anterior cervical discectomy, fusion and anterior instrumentation C3-4, C4-5 and C5-6." On July 21, 2004, Dr. Cavanaugh performed the recommended surgery. (RX-1, pg. 47)

After the claimant's fusion surgery, the claimant continued to complain of neck pain, and ultimately Dr. Cavanaugh referred claimant to Dr. Reginald Rutherford for a nerve conduction study. The study was conducted on January 13, 2005, and Dr. Rutherford reported "the nerve conduction study and needles examination are normal." (RX-1, p 59) Dr. Cavanaugh then referred the claimant for a functional capacity evaluation which stated the claimant "demonstrated the ability to perform material handling activities at the medium level with an occasional lift/carry of 40 lbs." (RX-1, pg. 62) In his April 21, 2005 report, Dr. Cavanaugh found the claimant at MMI. (RX-1, pg. 75). On May 5, 2005, Dr. Bruce Safman assessed the claimant with a 12% whole body impairment rating.

With continual complaints of cervical pain after Dr. Cavanaugh found the claimant at MMI, the claimant continued to treat with Drs. Stussy (CX-3, [pg. 1), and Long, (CX-3, pg. 2)

B) PERMANENT BENEFITS.

Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. (A.C.A. §11-9-102(4)(F)(ii)(a).

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Undoubtedly, the claimant has significant pre-existing cervical problems that contribute to his current disability. The record is replete with pre-March 19, 2004 medical reports from Drs. Peebles, Blumenthal, Dunn, and the Texas Back Institute evidencing cervical disc herniation and severe spinal stenosis at various cervical levels. (RX-1, pg. 1-26) Even though the claimant testified to an August, 2000 neck injury, the records reflect neck problems even before then.

I have reviewed the pre-March 19, 2004 medical records and find no recommendation for a 3 level cervical fusion. Clearly the claimant's admittedly stipulated compensable injury on March 19, 2004 aggravated his pre-existing neck condition, and again the respondents stipulated to a 3/19/04 compensable injury. After the compensable injury, Dr. Cavanaugh recommended and conducted fusion surgery at three levels.

After the surgery Dr. Safman assessed the claimant with a 12% whole body impairment. (RX-1, pg. 76) Dr. Safman's rating was not based on the claimant's spinal stenosis as argued by the respondents and outlined in their abstract; rather, the rating was based solely on Table 75, Section IV of the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition, Pg. 113. Table 75 section IV(d) clearly shows Dr. Safman based his rating on the fact that a 3 level cervical fusion was conducted not on section III for non-operated on Spondylosis.

I find that the major cause of the claimant's impairment rating was not his pre-existing degenerative problems, but rather the fact that he sustained an admitted compensable aggravation and after such, needed surgery. The surgery was the sole basis for the impairment rating. I am however reducing the rating to 10% because I find the claimant's residual signs

or symptoms to be the same as before the surgery and reduce Dr. Safman's rating by 2%. Table 75 IV (c) states a single level fusion with or without decompression without residual signs or symptoms to be an 8% whole body impairment plus an additional 1% per level. The records lead this examiner to find the surgery benefitted the claimant from an objective standpoint and residual signs or symptoms would be related to the claimant's pre-existing condition having no relation whatsoever to the surgery. The claimant was on prescription medication for his neck prior to 3/19/04, and previously had similar symptoms to which he now complains. Therefore, I find the claimant is entitled to a 10% whole body permanent impairment to be paid by the respondents forthwith; and a full statutory attorney's fee associated therewith.

In reaching this conclusion I do not totally disregard Dr. Cavanaugh's deposition testimony; however, Dr. Cavahaugh was not quick to throw out his August 23, 2005 or February 24, 2005 reports which seem to be in direct conflict with his deposition testimony. (RX-1, pg. 82-85). Even on cross-examination in his deposition, Dr. Cavanaugh still substantially stood by those reports.

The claimant has requested wage loss disability benefits in excess of his permanent impairment. 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 on a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, work experience, medical evidence, and any other matter which may reasonably be expected to affect the workers' future earning power. **Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W. 3d 848 (2001)**. Such other

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matters are motivation, post-injury, income, credibility, demeanor, and a multitude of other factors. **Glass v. Edens**, 233 Ark. 786, 346 S.W. 2d 685(1961),

I find the claimant has failed to prove entitlement to wage loss disability for a number of reasons. First, the claimant has waived vocational rehabilitation despite a functional capacity evaluation stating he can do medium duty work. (RX-1, pg. 67-74), Also, the claimant has education, and work experience that shows he can do a multitude of jobs. The claimant testified he completed an 18 month technical school at Tarrant County Junior College. The claimant went to a school to learn to make dentures. The claimant has experience building houses. The claimant also testified he worked at General Dynamics doing "paperwork". (T. pg. 17, lns 4-7) The claimant also worked at Mid-South Appliance Parts doing paperwork. After a year and one half, the claimant left Mid-South Appliances Parts because he stated "I am a manual labor fellow and I didn't like that job." (T. pg. 80, lns 16-19)

Additionally, as mentioned earlier, this examiner finds that although his fusion surgery resulted in an impairment rating, the medical records indicate the claimant is about the same or better than before the March 19, 2004 injury from an objective view.

Dr. Cavanaugh stated in his deposition that he told the claimant "... you don't have an attitude of wanting to get well." (Rx-2, pg. 36, lns 10-11) Dr. Cavanaugh's statement, together with the claimant's reluctance of doing non-manual labor, his unwillingness to request vocational rehabilitation, and his demeanor in general, leads this examiner to find the claimant is unmotivated to return to work or attempt to do the activities his functional capacity evaluation indicate he can do. Additionally, the claimant admitted to doing light duty maintenance since his surgery. Based on the reasons described herein, and applying the

factors for wage loss outlined herein, I find the claimant has failed to prove entitlement to wage loss 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.

A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact.

The claimant requested pain management in his request for additional medical. (T. pg. 98 lns 5-11) I agreed with Dr. Cavanaugh's 4/21/05 report finding that the claimant reached MMI on that date. As stated earlier herein, the medical records indicate the claimant's pre-existing cervical problems would be the reason for any needed future medical treatment; not his March 19, 2004 compensable injury or his fusion surgery.

Dr. Cavanaugh addressed the claimant's pain and stated "so it was for the pain that I had been treating him for, but obviously it was a long standing pain problem." (RX-2, pg. 41, lns 6-8) The claimant's own testimony indicated he was taking medication for his cervical pain prior to March 19, 2004. Nothing in the medical records or other evidence leads this examiner to find additional pain management could be related to his March 19, 2004 injury. I find the claimant's healing period for his March 19, 2004 compensable injury ended on 4/21/05 and that the claimant is not entitled to additional medical treatment after 4/21/05.

AWARD

Respondents are herein directed to pay the claimant permanent partial disability benefits equal to a 10% whole body impairment consistent with the findings of fact and

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conclusions of law outlined herein. Said sum accrued should be paid in lump sum without discount.

Maximum statutory attorney's fees are herein awarded to the claimant's attorney, the Honorable Nelson V. Shaw, pursuant to A.C.A. §11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. §11-9-809, until paid.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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