

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E802168

**RONALD TADLOCK,
EMPLOYEE**

CLAIMANT

**ST. JOSEPH'S REGIONAL
HEALTH CENTER,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

**SISTERS OF MERCY
HEALTH SYSTEM,
BENEFITS ADMINISTRATOR**

RESPONDENT NO. 2

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 3

OPINION FILED NOVEMBER 21, 2006,

Pursuant to a hearing conducted August 24, 2006, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Donald C. Pullen, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant,

Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1 and 2, and

Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas representing Respondent No. 3, attendance excused..

STATEMENT OF THE CASE

This was a hearing to consider the claimant's request for additional medical care by Dr. Jacob E. Abraham and the extent of his permanent disability.

The claimant contended that the employer should be responsible for the expenses of his care by Dr. Abraham in January and February, 2005, as well as additional reasonably necessary medical care, and, further, that he has sustained anatomical impairment of 10% to the body as a whole and

has been rendered permanently and totally disabled or has suffered substantial wage loss disability. An attorney's fee for controversion was requested. Other possible issues were reserved.

The employer contended that Dr. Abraham's treatment was not reasonably necessary in connection with the claimant's compensable injury and, further, that the claimant has sustained anatomical impairment of 10% to the body as a whole but is without wage loss disability exceeding that amount. The employer also contended that it was entitled to credit against payment of benefits for payment of benefits by the short term and long term disability carrier.

The Trust Fund took no position concerning the request for additional benefits and deferred to the outcome of litigation.

The ample record, which included documentary evidence, such as medical records, depositions, and prior hearing transcripts, and the testimony of the claimant, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant suffered compensable injuries as the result of a motor vehicle accident February 5, 1998, specifically including injuries to his cervical spine; his average weekly wage was \$911.00; the end of his healing period was July 10, 2000; benefits have been paid by Respondents No. 1 and 2 and by the long term disability and group health insurance carriers; after

a June 10, 1999, hearing, Respondents No. 1 and 2 were ordered to pay benefits and, in its opinion of December 9, 1999, the Commission applying Ark. Code Ann. §11-9-411, ordered the respondents to hold in reserve for a period of five years a sum equal to the potential subrogation claims for any benefit described in Ark. Code Ann. §11-9-411(a) for which respondents were entitled to a dollar for dollar offset; Ark. Code Ann. §11-9-411 also provides that, after the expiration of five years, the sums held in reserve only are to be paid to the Death & Permanent Total Disability Trust Fund if no release or final court order is presented otherwise directing payment of said sums; after a January 26, 2001, hearing, the Commission entered its Opinion September 11, 2002, ordering payment of benefits on behalf of the claimant, including the expenses of treatment by Dr. Abraham and by Dr. Hardy, although at this time, it appears that Dr. Abraham has not been paid by Respondents No. 1 and 2.

3. The preponderance of the evidence shows that the claimant's previous treatment by Dr. Abraham was reasonably necessary in connection with his compensable injuries and is the responsibility of the respondents. Pursuant to Ark. Code Ann. §11-9-508, the employer is responsible for providing such additional medical care, including care by Dr. Abraham, as may be reasonably necessary in connection with the compensable injury.

4. The preponderance of the evidence fails to show that the claimant has been rendered permanently totally disabled as the result of his compensable injuries but instead shows that he has sustained permanent disability in a total amount equal to 50% to the body as a whole and consisting of his anatomical impairment of 10% to the body as a whole, together with wage loss disability in the additional amount of 40% to the body as a whole.

5. Respondents No. 1 and 2 have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant sustained various injuries, primarily to his cervical spine, as a result of a work-related motor vehicle accident February 5, 1998, and required surgery, an anterior cervical discectomy and fusion, performed by Dr. James Arthur August 4, 1998. Following the surgery, Dr. Arthur indicated that there had been a good result from the surgery and that the claimant should have been able to return to work after about four months.

However, the claimant felt that the surgery had been no help at all in reducing his severe pain and muscle spasms, which have required additional care and have been disabling. He stated that his level of pain is about 9 on a scale of 10 until he receives periodic radio frequency denervation of the facet joints under the direction of pain specialist Dr. Jacob E. Abraham every year or year and a half. He further stated that following these procedures his level of pain is eventually reduced to about a 6, so that he is not required to take as much medication, although the last such procedure was performed with improved instruments and the result also improved.

The claimant's care has also included medication, physical therapy, and epidural steroid injection therapy. He estimated at the time of the hearing that he had received about six sets of radio frequency denervation therapy and about six steroid injections since 1999. He also takes medication, such as Neurotin, Robaxin, and Lortab. He stated that traction received during physical therapy to relieve compression of the cervical vertebrae has been beneficial.

At the time of the hearing, the claimant was receiving social security disability benefits and stated that he had significant physical limitations. For example, he testified that he had a hard time turning his head to the left or right and it was a real problem trying to drive a vehicle. He stated that the muscle spasms that he had before the surgery continued after the surgery and have always pretty much been there. He also testified that the last radio frequency denervation procedure in August, 2005, produced a quicker and better reduction in his pain, due to the change in needles that were used. He said that more radio frequency denervation therapy was scheduled to begin in September, 2006.

The claimant also has other physical problems, such as high blood pressure, diabetes, and sleep apnea, which is associated with his morbid obesity. He stated that his prior health problems also included three knee surgeries and problems with his shoulder that required a chiropractor, following lifting a patient at work, but that none of these problems had kept him from working up until the time of his motor vehicle accident.

The claimant stated that during a recent functional capacity examination, the examiner ignored his advice and exceeded the claimant's weight limit numerous times, so that his neck went into spasms, causing him to throw up three or four times during the examination. He testified that he has not tried to return to work since the date of injury, even though he was able to complete a degree in computer science following his surgery. He explained that this degree only qualified him to perform networking and hardware related work, which required running wires along the floor and through ceilings, which he could no longer do. He also stated that he was a slow typist because he was missing an index finger and could type no more than 20 words per minute. He further stated that in the past he had done paramedic work and had owned and operated a karate school and,

further, had once poured concrete in his own driveway, but was now unable to return to any of these activities.

The claimant stated that he now requires a lot of rest and must frequently lie down due to pain. He said that pain also interferes with his ability to sleep, so that he wakes up every one or one and a half hours. He also testified that he has a ten-pound lifting limitation and has relied on others to do things like yard work and house painting. He said that he has good days and bad days and if he lifts something or moves wrong or turns his head wrong he is going to pay for it. He believes that he is unable to sit at a computer terminal for extended periods without suffering from muscle spasms and that his attendance at work would be a problem. He admitted that he can drive a car and has been on trips with his wife, including trips to gamble at Tunica and Los Vegas and also a trip to visit relatives in San Diego. The prior record also shows a history of trips to Canada and New York.

His education at Garland County Community College included a heating and air conditioning course, a paramedic refresher course to maintain his certification. The claimant also studied woodworking at National Park Community College.

Much of the claimant's testimony is corroborated by other matters of record. However, some contradictions to the claimant's testimony also exist in the record. For example, as respondent's counsel has pointed out, when the claimant saw Dr. Abraham in April, 1999, it was Dr. Abraham's opinion that the claimant's cervical range of motion was normal. Similarly, electrodiagnostic studies conducted by Dr. Ross Harding in May, 2000, were also considered to be normal. Moreover, after the functional capacity evaluation in February, 2005, the examiner found the claimant's effort to be unreliable and that he exhibited self-limiting behavior. The examiner also found that the claimant's self-perceived abilities were handling and fingering are much lower than his actual ability.

He further noted that the claimant moved his head and neck freely and a normal pace of motion. He concluded that the claimant demonstrated the ability to perform sedentary work activities over the course of a work day without further stressing his cardio-respiratory systems. He also noted that the claimant demonstrated no difficulty with prolonged sitting. He further opined that the claimant's post-test pain rating for his neck indicated no significant problem with performing the sedentary type work he had performed during the test.

In short, the claimant was 50 years of age at the time of the hearing, drawing social security disability benefits and suffering from health problems, including the effects of his compensable injury. Although intelligent and well educated, he has not attempted to return to the work force. Dr. Reginald J. Rutherford, after examining the claimant on behalf of the respondents, later testified in a deposition that there was nothing to preclude the claimant from returning to work if motivated to do so. Thus, when the claimant's anatomical impairment, age, education, work experience, and other matters reasonably expected to affect his earning capacity are considered, it appears that he has not been rendered permanently totally disabled but has suffered disability to the extent stated above.

In a September 11, 2002, Commission Opinion, the claimant was awarded ongoing reasonably necessary and related medical treatment, including that of Dr. Abraham and Dr. Harding, which adopted the award of the administrative law judge. The concurring opinion of the chairman noted that the respondents and the dissenting commissioner emphasized the testimony of Dr. Rutherford and Dr. Arthur that the treatment in question did not provide him appropriate relief. However, the chairman pointed out that the record did, in fact, show that the claimant was receiving improvement from this treatment, although his discomfort never completely abated, and that the

treatment was compensable. This is similar to the current record, although now the claimant is, in fact, receiving better relief than he had in the past, due to the use of improved needles.

As previously noted, the employer and the benefits administrator, pursuant to Ark. Code Ann. §11-9-411, have claimed a credit and have reduced, on a dollar for dollar basis, the amount of benefits paid on behalf of the claimant, due to payment of long-term and short-term disability benefits.

In a December 9, 1999, Commission Opinion, the chairman wrote that the respondents were to hold in reserve for a period of five years a sum equal to the potential subrogation claims for any benefit described in Ark. Code Ann. §11-9-411(a), for which the respondent was entitled to a dollar for dollar offset. The chairman also noted that this provision was clearly enacted in part to protect the interests of the third-party payer, who was normally not a party to the hearing. The provision also seeks to avoid a double payment windfall for the recipient, not to mention a windfall to the respondent, whose obligations have been paid by a third party and who must ultimately turn over the unclaimed proceeds of the five-year fund to the Death & Permanent Total Disability Trust Fund. The respondents are ordered to comply with the terms of this provision concerning maintenance and disposal of the five-year fund.

AWARD

Pursuant to the foregoing opinion and the law, Respondents No. 1 and 2 are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted

attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge