

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502430

JAMES GRANT BENNETT, EMPLOYEE	CLAIMANT
YELLOW TRANSPORTATION, INC., EMPLOYER	RESPONDENT
SAFETY NATIONAL CASUALTY INSURANCE CO./ GALLAGHER BASSETT SERVICES (TPA), INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 29, 2007

This matter comes before Administrative Law Judge Barbara W. Webb on the record.

Claimant represented by Mr. Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 26, 2006, an Opinion was entered by this Administrative Law Judge in which the claimant was found to have sustained a compensable injury to his left shoulder on February 11, 2005, and was awarded medical benefits and temporary total disability benefits from the date of his injury until May 9, 2005, the date he was released to return to full duty work by his doctor. At that time, all other issues were resolved. On June 5, 2007, a pre-hearing conference was conducted in this case. At the pre-hearing conference, the parties agreed to submit the issue of permanent partial disability on a stipulated record. The stipulated record was set out in the Pre-hearing Order dated June 5, 2007, and contains the following:

1. The transcript of the hearing held March 28, 2006, and all exhibits, including medical records and the deposition of Dr. Hefley.

2. Pre-hearing Questionnaire responses from the claimant and attached exhibits.

3. Pre-hearing Questionnaire responses from the respondents and attached exhibits.

Based on the stipulated record, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including February 11, 2005, the date that claimant sustained a compensable injury to his left shoulder.
3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability benefits.
4. Respondents have accepted and paid a 2% whole person impairment rating and respondents are entitled to a credit for all benefits paid to date.

Copies of the Pre-hearing Questionnaire responses with Exhibits and the June 5, 2007 Pre-hearing Order are blue-backed and made part of the record in this proceeding.

ISSUES

By agreement of the parties, the issues to be decided are as follows:

1. Claimant's entitlement to permanent partial disability benefits, based upon a rating from Dr. William Hefley, beyond the 2% impairment rating accepted and paid by the respondents.
2. Controversion and attorney's fees.

CONTENTIONS

The claimant contends that he is entitled to permanent partial disability benefits based upon a 12% whole person impairment assessed by Dr. Hefley. Previously, the parties' lawyers discussed the issue of PPD and agreed that the claimant would receive a 2% impairment rating based upon Dr. Hefley's deposition taken March 16, 2006. The claimant subsequently questioned the informally resolved PPD issue and went back to Dr. Hefley on January 3, 2007. Dr. Hefley has now issued an opinion that claimant did not reach MMI until January 3, 2007, and he assessed claimant with a 12% whole person impairment. The claimant contends he is entitled to payment of PPD benefits based on 12% to the whole person, that the major cause of the impairment was his compensable shoulder injury and resulting surgery, and that respondents shall be entitled to a credit for any PPD benefits voluntarily paid to date. The claimant contends that the e-mails between counsel speak for themselves and do not constitute a stipulation. All other issues are reserved.

The respondents contend that all permanent anatomical impairment benefits owed to the claimant have been paid by the respondents. Specifically, Dr. Hefley opined in his deposition that the claimant's impairment rating traceable to the work injury would be 1% to 2%. After discussions with claimant's counsel via e-mail and over the telephone, the parties agreed to have a 2% anatomical impairment rating accepted and paid for the owed anatomical impairment benefits. The respondents contend that the agreement constituted a stipulation which cannot now be broken, and the claimant is now barred from pursuing benefits beyond the stipulated amount of 2% anatomical impairment.

At the hearing, the claimant testified on his own behalf. The testimony of William F. Hefley, Jr., M.D., was received by deposition dated March 16, 2006. Further the testimony of Larry Digiovanna, a witness for the claimant, was submitted by stipulation. 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 witness and observe his 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

- I. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The employer/employee/carrier relationship existed between the parties on or about February 11, 2005.
4. The employer/employee/carrier relationship existed at all relevant times, including February 11, 2005, the date that claimant sustained a compensable injury to his left shoulder.
5. The claimant's earnings were sufficient to entitle him to a compensation rate of \$466.00 for temporary total disability and \$350.00 for permanent partial disability benefits.
6. Respondents have accepted and paid a 2% whole person impairment rating and respondents are entitled to a credit for all benefits paid to date.
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any impairment rating for his compensable injury to his left shoulder which exceeds the 2% whole person impairment rating accepted and paid by respondents.

DISCUSSION

The claimant is 52 years old and completed two and a half years of college. The claimant is currently employed by the respondent, Yellow Transportation, Inc., more commonly known as "Yellow Freight." The claimant has been employed by respondent for 24 years. He originally drove a truck, but has spent the last 18 or 19 years as a dock worker. His work responsibilities include handling freight both

manually and by forklift. The claimant described the February 11, 2005, incident as follows:

The propane tanks, which weigh, aluminum tanks, roughly 50 pounds, I'm guessing. The steel tanks are a little heavier, probably 65 pounds. They lay horizontal on the back of the forklift, which is about four foot high. The tank runs out, you take the empty off, you get a full one, pick it up and put it on the rack on the back of the forklift. And that's when the injury occurred, when I went to pick the tank up. It was a steel tank, which is a little heavier than the other tank. It was a steel tank. When I picked it up, I got almost as high as I needed to be, and that's when the shoulder popped and severe pain in the left shoulder.

He testified that he had problems with the left shoulder prior to the date of the injury.

The claimant explained that he had seen his treating physician, Dr. Hefley, on January 26, 2005. An MRI was performed on his left shoulder on February 4, 2005. Dr. Hefley scheduled the claimant for left shoulder arthroscopy on February 25, 2005.

The claimant described the difference in his left shoulder immediately before the pop and after the pop on February 11th, as follows:

There was just an ache, not continual, but close to continual pain in the left shoulder prior to the picking up of the tank. But after the tank, popping of the shoulder, then there was a lot more pain, sharper pain. Like I said, considerably more pain after that than there was prior to that.

Prior to the February 11th incident the claimant was diagnosed with a left shoulder impingement with a partial rotator tear and bone spurs. Subsequent to the incident,

the doctor found a bicep tendon tear and a full thickness rotator cuff tear. Surgery was performed on the 25th of February. He returned to work on May 9, 2005.

Respondents offered the testimony of Dr. William F. Hefley by deposition. Dr. Hefley testified that he first began treating the claimant in January of 2000, including treatment for an arthritic right hip and right shoulder problems. On January 26, 2005, the claimant sought treatment from Dr. Hefley regarding his left shoulder. Doctor's notes on that date reflect that the claimant's chief complaint was of left shoulder pain and the claimant did not recall any specific injury to the left shoulder. From those symptoms, Dr. Hefley diagnosed the claimant with a possible rotator cuff tear. At that time, he ordered an MRI report. The MRI report showed arthritis of his AC joint and a suspected partial tear of the rotator cuff "with no evidence of a full-thickness rotator cuff tear." Dr. Hefley testified that the claimant was scheduled to undergo a procedure at that time but that it was his determination that they were not going to have to repair the rotator cuff because it was a partial thickness tear. During the surgery, Dr. Hefley found a two and a half centimeter tear in the claimant's left shoulder. He testified that he had no basis to believe that the claimant had a biceps tendon rupture prior to February 7, 2005. He testified that the claimant had reported to him that he had an incident picking up a heavy butane tank at work approximately ten days prior to the date of surgery. Based on the history and data, Dr. Hefley attributed the rupture of claimant's biceps tendon and extension of his shoulder problem from a partial thickness tear to a full thickness tear to the February 7, 2005, incident. He explained there were four different

treatment protocols. In a partial thickness tear, he simply removes the spurs and debrides the partial thickness tear. For those, he allows people to move their shoulder right away and immediately after surgery, they are able to begin to reach overhead and move their arm. For a small cuff repair of one centimeter or less, the patients are protected and move gradually in physical therapy but in three or four weeks are beginning to reach overhead. For the medium, which is what the claimant had, the type two cuff repair protocol, the patient is not allowed to lift his arm overhead until six weeks post-op followed by therapy. At six weeks, the patient would lift his own arm rather than the therapist lifting his arm. He explained that between six weeks and three months, the patient would have resistive training where he would begin to exercise the muscles. He testified that he released the claimant back to work at full duty on May 9th, approximately 11 weeks out from the surgery. He explained that with just a partial thickness tear, he might have put him back to work three to four weeks out, an increase of recovery time of seven or eight weeks. He estimated the increased surgical cost to range between \$1,000.00 and \$3,000.00.

He further testified, in regard to any permanent impairment, as follows:

Q. Let's talk permanent anatomical ratings based upon the Fourth Edition of the AMA Guidelines. I've seen a number of you(r) records on a lot of cases, so I know you're familiar with that. How much do you typically see as far as permanent anatomical impairment ratings for a partial tear procedure, which is what this gentlemen had going in? How much would you have expected the gentlemen to have sustained under the anatomically under the Fourth Edition of the AMA Guidelines.

A. You know, I'd have to look that up. I don't know. But I would think, again, it would be perhaps a small increase for the cuff repair and the biceps tendon. The biceps tendon was not repaired, so he has a chronic biceps tendon rupture. But maybe a small increase but not a dramatic change in his MMI and his permanent physical impairment.

Q. From the partial to the full you mean?

A. Right. Not a dramatic change because we – you know, he's got a permanent – his biceps tendon is retracted and it was retracted and we did not chase that down his arm to retrieve it. We simply debrided the piece that was left in his shoulder. And so, he has a little bit of a permanent deformity there in his biceps and, you know, some mild weakness there, so it might have increased it a percent or two, but not a dramatic change because we repaired the cuff.

Q. Right. And the partial tear to the full tear rating would be how many percentage points approximately?

A. Yes. Including the biceps tendon and everything.

Q. Okay. So basically, the major cause of any anatomical rating would be the partial tear in the procedure that you already had scheduled; is that accurate?

A. Yeah, I would think so.

Q. Okay. And then, with the additional finding of a biceps tendon rupture and then the full tear, that would increase any rating that was already in existence by 1 or 2 percent anatomically?

A. Right.

Q. And so, the major cause of any rating in connection with the work incident would be one or 2 percent, is that accurate?

A. Yes.

The evidence demonstrates that subsequent to the decision determining compensability and awarding the benefits, the parties entered into negotiations concerning the appropriate permanent impairment rating. The parties ultimately

reached an agreement and an agreed rating of 2% plus attorney's fees was paid to claimant and claimant's counsel. The agreement was not the subject of a hearing or formally approved by this Commission.

On January 3, 2007, the claimant returned to Dr. Hefley for further evaluation. In a one page summary dated January 12, 2007, Dr. Hefley noted that the claimant had a 20% upper extremity, 12% whole person permanent impairment rating based on the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition. He noted that claimant reached MMI on January 3, 2007, and that claimant's work-related injury is the major cause of the impairment. He noted that his opinion was "stated within a reasonable degree of medical certainty" and released from care on 1/3/07.

ADJUDICATION

Claimant contends that he is entitled to permanent partial disability benefits based upon a 12% whole person impairment assessed by Dr. Hefley. Claimant acknowledges that the parties' lawyers discussed the issue of PPD and agreed that the claimant would receive a 2% impairment rating based upon Dr. Hefley's deposition taken March 16, 2006. The claimant subsequently questioned the informally resolved PPD issue and went back to Dr. Hefley on January 3, 2007. Dr. Hefley issued an opinion that claimant did not reach MMI until January 3, 2007, and he assessed claimant with a 12% whole person impairment. The claimant contends he is entitled to payment of PPD benefits based on 12% to the whole person; that the major cause of the impairment was his compensable shoulder injury and

resulting surgery; and that respondents shall be entitled to a credit for any PPD benefits voluntarily paid to date. The claimant contends that the e-mails between counsel speak for themselves and do not constitute a stipulation.

The respondents contend that all permanent anatomical impairment benefits owed to the claimant have been paid by the respondents. Specifically, respondents contend that Dr. Hefley opined in his deposition that the claimant's impairment rating traceable to the work injury would be 1% to 2%. Respondents contend that after negotiations, the parties agreed to have a 2% anatomical impairment rating accepted and paid for the owed anatomical impairment benefits. The respondents contend that the agreement constituted a stipulation which cannot now be broken, and the claimant is now barred from pursuing benefits beyond the stipulated amount of 2% anatomical impairment.

The preponderance of the evidence clearly demonstrates the claimant's shoulder condition was worsened by the work-related injury resulting in the need for more extensive surgery. Dr. Hefley clearly stated that his original plan and protocol for the partial thickness tear was to remove the spurs and debride the partial thickness tear resulting in an immediate recovery. He further testified that both the history and the data indicated to a reasonable degree of medical certainty that the claimant extended his shoulder problem from a partial thickness tear to a full thickness tear when he attempted to lift the heavy butane tank at work resulting in a full repair surgery and additional seven to eight weeks of recovery time.

I. AGREEMENT

In this case, the respondents assert that their payment of permanent impairment benefits was based on an agreement reached between the parties and therefore the claimant is bound by the agreement and should be precluded from seeking additional impairment benefits. Claimant, on the other hand, relies on a medical report evaluation and report issued by the doctor after the agreement was reached and payments were made. In Air Compressor Equipment v. Sword, 69 Ark. App 162, 11 S.W.3d 1 (Ark. App. 2000), the Court of Appeals held that an agreement between the parties limiting certain benefits was not enforceable when such agreement was not specifically authorized or approved by the Commission. The Court of Appeals relied on Ark. Code Ann. § 11-9-108 (Repl. 2002), which states:

No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation, or device whatsoever shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this chapter, except as specifically provided elsewhere in this chapter.

Therefore, based on the clear and unambiguous language of the statute, I find that the respondents' argument that the informal agreement between the parties precludes consideration of the claim for additional permanent impairment by the claimant must fail.

II. PERMANENT ANATOMICAL IMPAIRMENT

Ark. Code Ann. § 11-9-704(c)(B) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported

by objective and measurable physical or mental findings.” Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 2002). The Commission had adopted the American Medical Association’s Guides to the Evaluation of Permanent Impairment, (4th Ed. 1993), for use in assessing the extent of permanent anatomical impairment. The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. § 11-9-704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the Guides. The claimant must also show that the compensable injury or injuries was the “major cause” of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The term “major cause” is defined as more than 50% of the cause, Ark. Code Ann. § 11-9- 102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act. In order for expert medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. § 11-9-102(16)(B). In determining the existence or extent of permanent

physical impairment neither any medical expert nor this Commission may consider complaints of pain.

In the instant case, both the claimant and respondents rely on the reports and testimony of Dr. Hefley. In his deposition, Dr. Hefley opined that due to the claimant's pre-existing problems, the major cause of any rating in connection with the work incident would be one or two percent. In his summary report dated January 12, 2007, Dr. Hefley opined that the appropriate rating for the shoulder was 12% to the body as a whole and that the major cause of the impairment was claimant's work-related injury.

The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's

opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this case, I find that the deposition testimony of Dr. Hefley should be afforded more weight than the one-page summary report of Dr. Hefley. In his deposition, Dr. Hefley clearly acknowledges the existence of the pre-existing condition of claimant's shoulder and properly attributes the amount of additional impairment caused by the work-related injury. In his summary report, there is no mention of the pre-existing condition or the need for prior surgery. Based on Dr. Hefley's exacting testimony, I find that the preponderance of the evidence demonstrates that the compensable injury was the major cause of the claimant's 2% impairment. Wal-mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002); Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998). On a final note, I find that the 2% impairment rating assigned by Dr. Hefley is supported by the medical evidence in this case. Respondents have not controverted the additional 2% rating as assigned by Dr. Hefley and in fact have paid the rating to claimant.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge