

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBERS F410267 & F012404

ALFRED HILL, EMPLOYEE	CLAIMANT
COOPER STANDARD AUTOMOTIVE, INC., SELF-INSURED EMPLOYER	RESPONDENT
CONSTITUTIONAL STATE SERVICES, TPA	RESPONDENT

**OPINION FILED MARCH 14, 2007**

Hearing before Administrative Law Judge Mark Churchwell on December 21, 2006 in El Dorado, Union County, Arkansas.

Claimant represented by Honorable Aaron L. Martin, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Honorable Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on December 21, 2006 in El Dorado, Arkansas. A Prehearing Order was entered in this case on November 1, 2006. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. In addition, I conducted a post-hearing telephone conference on February 28, 2007 to clarify typographical errors in the Prehearing Order.

The following stipulations were submitted by the parties in the Prehearing Order as clarified on February 28, 2007 and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed between the above-captioned parties at all times relevant to this claim, including October 1, 2000 and September 21, 2004.
3. The claimant did suffer a compensable low back and lumbar spine injury on September 21, 2004.
4. The respondent has previously made payments on both claims including medical and temporary total disability benefits.
5. The claimant received a 7% anatomical impairment rating to the body as a whole on June 22, 2001, which has been paid as well, paid in full May 16, 2002.
6. The claimant's average weekly wage is \$822.62, with a compensation rate of \$453.00 for TTD on September 21, 2004.
7. The claimant's compensation rate for permanent partial disability for his October 1, 2000 injury is \$289 per week.

By agreement of the parties, the issues to be litigated and resolved at the present time are limited to the following:

Claimant:

1. Whether the claimant is entitled to additional temporary and total disability benefits from September 1, 2005 to a date yet to be determined.

2. Whether the claimant is entitled to additional permanent partial disability benefits in the form of wage loss.
3. Whether the claimant is entitled to a controverted attorney's fee for the indemnity benefits sought.

Respondent:

1. Entitlement to additional temporary total disability benefits and additional permanent partial disability benefits (wage loss).
2. Statute of limitations for additional benefits for the October 1, 2000 injury.

The record consists of the December 21, 2006 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record my March 2, 2007 letter to the attorneys and Mr. Dennis' February 28, 2007 fax addressed to the Administration Law Judge.

#### **DISCUSSION**

The claimant sustained a compensable injury on October 1, 2000. The respondents provided benefits and paid in full a seven percent impairment rating on May 16, 2002. The claimant testified regarding a subsequent injury at work when his back popped, and he experienced tremendous pain down his left leg. The parties stipulated that the claimant's second compensable injury, to the lower back and lumbar spine, occurred on September 21, 2004.

The claimant testified that he could not recall when he last saw a doctor for his October 2000 injury before seeing a doctor for the September 2004 injury. The claimant testified that he did not think he went to a doctor in 2003 because he was working.

The claimant testified that he last worked for the respondents on September 21, 2004, and workers' compensation paid his medical bills and his time off from work. The claimant testified that he was released on April 28, 2005. During that period, Dr. Bryant's October 7, 2004 report indicates that the claimant had an MRI which revealed the presence of disc disease. Dr. Bryant's impression was "Lumbar strain with degenerative disc disease and disc herniation as per the MRI." After a period of conservative treatment, including medication, injections, and physical therapy, Dr. Bryant scheduled the claimant for follow up "as needed" on February 7, 2005 and on April 28, 2005.

The claimant has filed the present claim, in part, seeking an award of additional temporary total disability benefits beginning on September 1, 2005. In this regard, the claimant testified that he returned to Dr. Bryant on September 1, 2005, after he bent over to brush his teeth one morning and his back "just went out."

Dr. Bryant's September 1, 2005 office note makes no mention of the recent bending incident but states: "The patient has not yet reached MMI." Dr. Bryant concluded from a new MRI performed on September 21, 2005 that: "In comparison with his former MRI, his herniated disc disease has worsened." Dr. Bryant's November 3, 2005 report indicates that an EMG/NCS study was normal, and the claimant was scheduled to receive epidural injections on the recommendation of Dr. Steven Cathey.

By December 29, 2005, the claimant had received three epidural steroid injections from Dr. Anca. On February 27, 2006, Dr. Bryant indicated that the claimant was not a surgical candidate and that the claimant would follow up as needed. Dr. Bryant provided the claimant medications on April 4, 2006, and again indicated that the claimant would follow up as needed. Several of Dr. Bryant's reports in the hearing record, including the last report on June 8, 2006, document muscle spasms in the claimant's lower back.

The claimant testified at the December 21, 2006 hearing that he had been a pastor at that time for approximately two years delivering on average two or three sermons per month. The claimant also obtained a CDL and began working as a substitute bus driver in November of 2006. After having his recollection refreshed by the respondents' attorney, the

claimant also testified that he began working as a pre-K teacher's aide in August of 2006.

In the present claim, the claimant seeks additional temporary disability compensation for an unspecified period after September 21, 2005, and an award of permanent disability benefits related to his October 1, 2000 injury and/or his September 24, 2004 injury. At the close of the December 21, 2004 hearing, the claimant's attorney requested to reserve the issue of wage loss for the September 24, 2004 injury.

**1. Is the present claim, to the extent that it requests additional benefits for the October 1, 2000 injury, untimely and barred by the applicable statute of limitations?**

Arkansas Code Annotated § 11-9-702(b)(1) provides:

(1) In cases in which any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

In the present case, the preponderance of the evidence establishes that the respondents last paid indemnity benefits for the October 2000 injury on May 16, 2002, and that the claimant did not receive medical treatment for his 2000 injury at any time in 2003. Because an entire year elapsed in 2003 in which the claimant did not receive any compensation for his 2000 injury, I find that any claim for

additional benefits for that injury would be time barred when filed no later than January 1, 2004. Since the only claim for additional benefits in the record was not filed until August 18, 2006, I find that the present claim, to the extent that it requests additional benefits for the October 1, 2000 injury, is barred by the provisions of Arkansas Code Annotated § 11-9-702(b)(1).

**2. Is the claimant entitled to a period of temporary disability compensation beginning on or after September 1, 2005?**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. An injured employee is entitled to temporary partial disability compensation during the period that he is within his healing period and suffers a partial decrease in his capacity to earn the wages that he was receiving at the time of the injury. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

In the present case, the claimant has failed to establish by a preponderance of the evidence that he

experienced partial or total disability for any period on or after September 1, 2005. In this regard, I note that none of the doctors' reports after September 1, 2005 contain any statement or opinion that the claimant is either incapable of working, is capable of working only at a lighter duty work, or is capable of working but only at less than full work week.

In addition, during the period in question after September of 2005, the claimant has worked as a pastor, and also later as a teacher's aide and a substitute bus driver. Although the claimant testified that he did not feel that he could hold down a job during the period at issue, I respectfully note that the claimant was engaged in three different types of work at the time of the hearing. While there is apparently no dispute that the claimant was not able to return to his job at Cooper after September 21, 2004, and has separated from the company with income from a disability plan, the claimant has failed to establish on this record that he was incapacitated from earning in other types of work between September of 2005 and December of 2006.

Even if the claimant had established an incapacity to work between September of 2005 and December of 2006, which I do not find, I also conclude that the claimant has failed to

establish by a preponderance of the evidence that the symptoms which he experienced after his back went out when he bent over to brush his teeth, and which sent him back to Dr. Bryant, are causally related to the injury at work sustained in September of 2004.

In reaching this conclusion, I recognize that Dr. Bryant indicated on September 1, 2005, that the claimant had not reached MMI. However, I also note that Dr. Bryant made no reference to the incident where the claimant's back went out when he brushed his teeth. In addition, I note that a September 21, 2005 MRI indicated worsening disk abnormalities as compared to an earlier 2000 MRI. However, I note that the September 21, 2005 MRI was performed after the occurrence of both the September 21, 2004 work incident and the incident where the claimant's back gave out while brushing his teeth around September 1, 2005. No medical opinion was offered into the record indicating that the abnormalities indicated in the September 21, 2005 MRI were related to the injury sustained a year earlier. In addition, I note that the claimant went approximately five months from April of 2005 until September of 2005, without seeking treatment for his low back, until after the incident bending over to brush his teeth. The claimant has failed under these circumstances to establish by a preponderance of

the evidence that any abnormalities identified in the September 21, 2005 MRI, or that his increased symptoms in September of 2005 after bending over, are related to the injury that he sustained on September 21, 2004.

**3. Has the claimant established that he is entitled to permanent disability benefits for his September 21, 2004 compensable injury?**

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Arkansas Code Annotated § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which the worker was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair the worker's earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. 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).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

However, to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained a permanent physical impairment as a result of the

compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

Benefits for permanent impairment must be based on an impairment rating using the AMA Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993). The Commission may review the Guides even if the Guides are not in the record, and the Commission may determine its own impairment rating under the Guides, rather than simply assessing the validity of impairment ratings assigned by doctors. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

In addition, benefits for permanent anatomical impairment shall be awarded only if the claimant's compensable injury is the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The provisions of Ark. Code Ann § 11-9-102(4)(F)(ii)(b) do not apply in determining a claim for permanent anatomical impairment. Michael v. Keep & Teach, Inc., 87 Ark. App. 48, 185 S.W.3d 158 (2004). Major cause means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

A determination of the existence and extent of physical impairment must also be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16)(A)(i). When

determining the permanent physical impairment, neither a doctor or the Commission may consider complaints of pain. For purposes of assigning impairment ratings to the spine, straight-leg-raising tests and range-of-motion tests do not qualify as objective findings. Ark. Code Ann. § 11-9-102(16) (A) (ii).

In the present case, the claimant's medical records contain objective medical findings which establish the existence of permanent anatomical impairment in the claimant's spine. These objective findings include Dr. Bryant's documentation of chronic muscle spasm, last noted in the record in his June 8, 2006 report, and lumbar disk abnormalities identified in the September 21, 2005 lumbar MRI.

However, as discussed above, I find that the claimant has failed to establish that the disc abnormalities identified in his September 21, 2005 MRI are causally related to his September 21, 2004 back injury at work under circumstances where (1) the September 21, 2005 MRI was performed after an incident away from work where the claimant's back gave out while bending over to brush his teeth; (2) the claimant went five months without seeing a doctor for his back from April of 2005 until September of 2005 after the tooth brushing incident; and (3) no physician has rendered an opinion offered into the record indicating

that any of the abnormalities identified in the September 2005 MRI are causally related to the September 21, 2004 incident at work. I find that it would require speculation and conjecture on my part to conclude that any abnormalities identified in the September 21, 2005 MRI are causally related to the September 21, 2004 injury at work. I therefore find that the claimant has failed to establish by a preponderance of the evidence that his September 21, 2004 injury is the major cause of any degree of permanent anatomical impairment that he has in his lower back.

**4. Should the issue of wage loss disability for the claimant's September 21, 2004 injury be reserved?**

At the close of the hearing, the claimant's attorney proposed reserving the issue of wage loss benefits for the 2004 injury on the grounds that a different standard would apply for wage loss for the 2004 injury than the standard for the 2000 injury. As I discussed with the attorneys in a post-hearing conference, I understand that the courts have interpreted that a somewhat different "major cause" analysis applies in deciding wage loss disability in Second Injury Fund cases as opposed to deciding wage loss against an employer. See Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998). In addition, I pointed out to the attorneys in that post-hearing conference that, since both the claimant's compensable 2000 injury and his

compensable 2004 injury were both in his low back, this appears to be a case of potential liability for the Second Injury Fund.

I pointed out in that post-hearing conference that the employer and the insurance carrier are the parties who benefit from Second Injury Fund involvement in appropriate cases, and it should be their responsibility to join the Fund where their defense is based on the theory that an initial injury is contributing to the amount of disability following a second injury. Second Injury Fund v. Mid-State Construction Company, 16 Ark. App. 169, 698 S.W.2d 804 (1985). However, I pointed out that the Commission has amended Rule 099.24, effective April 1, 1989, to provide specifically for waiver of Second Injury Fund liability if the Fund is not provided notice. In addition, in the event of waiver of Second Injury Fund liability, Rule 099.24 provides that the rights of the claimant will not be affected.

In the present case, I received from the respondents' attorney on February 28, 2007, a fax indicating that the respondents continue to object to the claimant's request to withdraw wage loss from consideration. Consequently, consistent with Commission Rule 099.24, I find that the respondents have waived Second Injury Fund liability in this case, and the rights of the claimant shall not be affected.

However, I also note that even in a second injury case, the claimant must still establish *some* degree of compensable permanent anatomical impairment caused by the second injury as a prerequisite to an award of wage loss disability benefits. Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

As discussed previously, however, the claimant in the present case has failed to establish that he sustained *any* degree of compensable permanent anatomical impairment for his compensable 2004 injury. Since the claimant has failed to establish a compensable anatomical impairment for the 2004 injury, the claimant cannot be entitled to an award of wage loss for that injury either under Ark. Code Ann. § 11-9-522, under Ark. Code Ann. § 11-9-525, or under the waiver provisions of Commission Rule 099.24.

Since the claimant has failed to establish a compensable anatomical impairment for the 2004 injury, and since a compensable anatomical impairment is a prerequisite to an award of wage loss under any legal theory against any potential respondent, I find that the claimant's request to reserve the issue of wage loss for the 2004 injury is without merit and is therefore respectfully denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed between the above-captioned parties at all times relevant to this claim, including October 1, 2000 and September 21, 2004.
3. The claimant did suffer a compensable low back and lumbar spine injury on September 21, 2004.
4. The respondent has previously made payments on both claims including medical and temporary total disability benefits.
5. The claimant received a 7% anatomical impairment rating to the body as a whole on June 22, 2001, which has been paid as well, paid in full May 16, 2002.
6. The claimant's average weekly wage is \$822.62, with a compensation rate of \$453.00 for TTD on September 21, 2004.
7. The claimant's compensation rate for permanent partial disability for his October 1, 2000 injury is \$289 per week.
8. I find that the present claim, to the extent that it requests additional benefits for the claimant's October 1, 2000 injury, is barred by the applicable statute of limitations in Arkansas Code Annotated § 11-9-702(b)(1).
9. The claimant has failed to establish by a preponderance of the evidence that he experienced partial or total disability for any period on or after September 1, 2005. In addition, the claimant has failed to establish by a preponderance of the evidence that the symptoms that he experienced after his back went out when he bent over to brush his teeth on or about September 1, 2005, and which sent him back to Dr. Bryant for treatment, are causally related to the injury that he sustained at work on September 21, 2004. The claimant has therefore failed to establish by a preponderance of the evidence that he is entitled to an award of temporary total disability benefits or an award of temporary partial disability benefits for any period after September 1, 2005 through the date of the hearing, December 21, 2006.

10. The claimant has failed to establish by a preponderance of the evidence that he sustained any degree of compensable permanent anatomical impairment as a result of his September 21, 2004 injury. Because a compensable anatomical impairment is a prerequisite to an award of wage loss, I am without authority to award the claimant wage-loss disability for his 2004 injury under either under Ark. Code Ann. § 11-9-522, under Ark. Code Ann. § 11-9-525, or under the waiver provisions of Commission Rule 099.24.
  
11. Since a compensable anatomical impairment is a prerequisite to an award of wage-loss disability under any legal theory against any potential respondent, I find that the claimant's request to reserve the issue of wage loss for the 2004 injury is without merit, and is therefore respectfully denied.

**ORDER**

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied for all benefits presently at issue.

**IT IS SO ORDERED.**

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HONORABLE MARK CHURCHWELL  
Administrative Law Judge