

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F107050**

ARTHUR LEWIS, EMPLOYEE	CLAIMANT
TRANSCO LINES, INC., EMPLOYER	RESPONDENT NO. 1
FIREMAN'S FUND INSURANCE CO., CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

**OPINION FILED JANUARY 8, 2007**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Russellville, Pope County, Arkansas.

The claimant was represented by HONORABLE JEFF MOBLEY, Attorney at Law, Russellville, Arkansas.

Respondents No. 1 were represented by HONORABLE WENDY WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 waived appearance.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on October 11, 2006 in Russellville, Arkansas. A prehearing order was entered in this case on March 23, 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.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The existence of the employee/employer/carrier relationship on the date of the accident.

2. The claimant sustained a compensable injury on June 8, 2001.
3. Claimant is entitled to maximum compensation rates of \$410/\$308.
4. The ALJ entered an Opinion on or about October 14, 2003, finding the claimant was in the course and scope of his employment at the time of the accident and therefore the claimant's injury was compensable.
5. On or about November 23, 2004, the Full Commission affirmed the ALJ's Opinion.

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

1. The question of whether claimant's healing period ended on May 15, 2002, and if he suffered a total incapacity to earn wages (additional TTD from May 15, 2002 until February 17, 2006).
2. Payment of past medical bills [reserved].
3. Future medical [reserved].
4. Impairment rating and/or percentage of permanent disability.
5. Wage loss disability benefits.

The record consists of the October 11, 2006 hearing transcript and the exhibits contained therein.

#### **DISCUSSION**

The claimant sustained a compensable low back injury on June 8, 2001, when the truck he was driving was involved in a five-vehicle accident. The claimant was treated by Dr.

Kelly Meyer. Dr. Meyer ultimately prepared a letter on May 15, 2002, indicating that the claimant had reached maximum medical improvement. There appears to be no dispute that the respondents ultimately paid the claimant temporary total disability benefits through that date. In addition to his other subsequent care, claimant later presented to Dr. Russell Allison, an orthopedic specialist, for evaluations on February 17, 2006 and on May 2, 2006. On a form dated February 24, 2006, Dr. Allison indicated that the claimant reached maximum medical improvement on February 17, 2006, and that the claimant has a ten percent (10%) whole person impairment rating. In a report dated May 2, 2006, Dr. Allison indicated that the claimant's impairment rating on that date was eleven percent (11%).

In the present claim, the claimant seeks additional temporary total disability benefits from May 15, 2002 until February 17, 2006. In addition, the claimant seeks appropriate benefits for permanent anatomical impairment and for permanent wage loss.

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. 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, Dr. Meyer's May 15, 2002 letter notes that by that date, the claimant had undergone diagnostic testing, physical therapy, epidural injections, and had been referred to a pain specialist for consideration for implementation of a permanent epidural. Dr. Valley's October 29, 2001 report from that referral indicates that the claimant's behavior during that office visit was not consistent with his objective findings, and that the claimant did not meet the criteria for intrathecal pump.

In addition, Dr. Meyer's May 27, 2005 letter indicates that he last saw the claimant on April 21, 2003, and that the claimant's condition will not improve and will continue to get worse with time. In his September 26, 2005 deposition, Dr. Meyer again opined that the claimant was as good as he was going to get on May 15, 2002. (See Exh. 6 pgs 36 and 48).

Dr. Allison's February 24, 2006 form fails to state on what basis, if any, that Dr. Allison may have concluded the claimant did not reach maximum medical improvement until February 17, 2006. On this record, the preponderance of the

evidence indicates that nothing further in the way of treatment would improve the claimant's low back condition after May 15, 2002. I therefore find that a preponderance of the evidence establishes that the claimant's healing period for his low back injury ended on May 15, 2002, and the claimant has therefore failed to establish that he is entitled to any period of temporary disability compensation after that date.

\_\_\_\_\_With regard to the claimant's request for benefits for a permanent anatomical impairment, I note that Act 796 of 1993 directed the Commission to adopt an impairment rating guide to be used in the assessment of anatomical impairment. See Ark. Code Ann. § 11-9-519(g), 11-9-521(h) and 11-9-522(g) (Repl. 2002). The Commission through Rule 099.34 adopted as an impairment rating guide portions of 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, \_\_\_ S.W.3d \_\_\_ (2004). Major cause means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

Finally, a determination of the existence and extent of physical impairment must 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 presented to Dr. Allison on February 17, 2006 and again on May 2, 2006. Based on the results of range of motion testing of the lumbar spine, Dr. Allison calculated a whole body impairment rating on these dates of 10% and 11% respectively, using

Tables 81 and 82 of the 4<sup>th</sup> Edition of the Guides. However, Commission Rule 099.34 specifically provides in part:

*Purpose:* The purpose of Rule 099.34 is to establish an impairment rating guide to be used in the assessment of anatomical impairment. To accomplish this purpose, the Arkansas Workers' Compensation Commission hereby adopts Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) published by the American Medical Association exclusive of any sections which refer to pain and **exclusive of** straight leg raising tests or **range of motion tests when making physcial or anatomical impairment ratings to the spine**. [Bold-emphasis added]

I find that Tables 81 and 82 of the 4<sup>th</sup> edition of the Guides, and the range of motion tests on which Dr. Allison ratings are based, are specifically precluded from any consideration under Commission Rule 099.34. I therefore must accord no weight to Dr. Allison's impairment ratings assigned for loss of motion in the lumbar spine.

Furthermore, in comparing the claimant's medical reports in the record (exclusive of range of motion testing to the lumbar spine) with the criteria for lumbar impairment under Section 3.3g and Section 3.3j of the 4<sup>th</sup> edition of the Guides, I do not find in the medical record any of the structural inclusions appropriate for a rating to the lumbar spine under the diagnosis-related estimates model of Section 3.3g, nor do I find any of the lumbar spine disorders on which impairments are based in Table 75 of Section 3.3j.

In this regard, Dr. Allison's February 17, 2006 report

assesses the claimant with back pain and lumber DJD. Dr. Allison also references facet disease. Dr. Douglas Kerin read a July 6, 2001 lumbar myelogram as indicating borderline spinal canal stenosis at L4-5 without a focal disk protrusion and degenerative change at L5-S1 without protrusion, and Dr. Kerin read the post-myelogram CT as indicating degenerated disk at L5-S1 and mild bulging annulus of L4-5 without indication of disc protrusion. Dr. Valley's October 29, 2001 lumbar spine assessment included degenerative disk disease and possible lumbar facet syndrome.

Dr. Meyer on May 12, 2002 described x-rays of the lumbar spine as indicating degenerative arthritis, particularly at L5-S1, where the patient had lost some disk space. In a July 7, 2005 letter, Dr. Meyer explained that the claimant has degenerative osteoarthritis which was aggravated by his injury. In an August 18, 2005 letter, Dr. Meyer also interpreted the presence of facet synovitis at the L4-5 and L5-S1 regions on the myelogram and post-myelogram CT. Dr. Meyer testified that the claimant's main problems are facet joint pain and borderline stenosis. (C. Exh. 6 p. 15) Dr. Meyer testified that the injury aggravated the stenosis. (C. Exh. 6 p. 16) Dr. Meyer explained that a facet joint consists of interlocked bony projections that

keep the lumbar vertebrae in alignment. (C. Exh. 6 p. 35). In addition to these abnormalities, physical therapy notes refer to the presence of muscle spasm, and Dr. Meyer testified that the claimant had muscle spasm in the lumbar spine when Dr. Meyer last saw the claimant on September 19, 2005. (C. Exh. 6 p. 14) Dr. Meyer's earlier August 14, 2005 letter contained a history of the claimant having had lumbar muscle spasms on the right from L4 to L2 radiating down to the right hip. (R. Exh. 1 p. 8)

In short, even if the claimant's work injury aggravated his lumbar stenosis and/or his lumbar facet disease, and even if the presence of muscle spasms is an objective and measurable finding sufficient to support the existence of permanent physical impairment, I can find no basis under the 4<sup>th</sup> edition of the AMA Guides for assigning an impairment rating for facet disease or un-operated stenosis without consideration of the range of motion test results which Dr. Allison considered, but which Rule 099.34 demands be excluded from consideration in determining a spinal impairment rating.

I also find that the claimant has failed to establish by a preponderance of the evidence that his compensable injury would be the major cause of any such impairment related to his spinal stenosis or related to his facet joint

abnormalities. In this regard, I note that no physician has rendered an opinion in this case indicating that the claimant's compensable injury is the major cause of any degree of permanent anatomical impairment which he may have sustained. In addition, I note that both Dr. Allison and Dr. Meyer anticipate the claimant's problems getting worse over time. (C. Exh. 1 p. 52 and 58).

In reaching my conclusion regarding major cause, I recognize that the Arkansas Court of Appeals found that an injured worker with an aggravation of pre-existing stenosis met the major cause requirement and was entitled to an award of some degree of permanent anatomical impairment in Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004). However, in Pollard the claimant's stenosis required surgery, and the Court noted that a need for surgery for the stenosis and an impairment from the surgery would not have occurred but for the work-related injury. In the present case, by comparison, the claimant has not undergone any impairment-producing surgery rateable under the 4<sup>th</sup> edition of the Guides for either his stenosis or for his facet joints. I conclude that the circumstances in the present case are therefore distinguishable from Pollard.

Because I find that the claimant has failed to establish the requirements necessary to establish a

compensable anatomical impairment, I find that I am also without authority to award permanent disability benefits for wage loss. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee/employer/carrier relationship existed on the date of the accident.

2. The claimant sustained a compensable injury on June 8, 2001.

3. The claimant is entitled to maximum compensation rates of \$410/\$308.

4. The ALJ entered an Opinion on or about October 14, 2003, finding the claimant was in the course and scope of his employment at the time of the accident and therefore the claimant's injury was compensable.

5. On or about November 23, 2004, the Full Commission affirmed the ALJ's Opinion.

6. The preponderance of the evidence establishes that the healing period for the claimant's compensable injury ended on May 15, 2002. The claimant has therefore failed to establish that he is entitled to any period of temporary disability compensation after that date.

7. The claimant has failed to establish by a preponderance of the evidence that he has a permanent physical impairment in the lumbar spine rateable under the provisions of Commission Rule 099.34. Even if the claimant had a rateable impairment related to his lumbar stenosis an/or his lumbar facet disease, the claimant has failed to establish by a preponderance of the evidence that his compensable injury is the major cause of any impairment to his lumbar spine caused by these conditions.

8. Because I find that the claimant has failed to establish the existence of a compensable physical impairment, I find that the claimant also cannot receive an award of permanent disability for wage loss in excess of permanent impairment.

**ORDER**

For the reasons discussed herein, I find that this claim for additional benefits must be, and hereby is, denied.

**IT IS SO ORDERED.**

---

MARK CHURCHWELL  
Administrative Law Judge