

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400875

EARNEST REYNOLDS, EMPLOYEE	CLAIMANT
ROBERTSON CONTRACTORS, INC., EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 6, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on January 12, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney-at-Law, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

A hearing was conducted January 12, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on December 20, 2006, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to some additional clarification concerning respondents' contentions. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the parties at all relevant times, including January 15, 2004; that the claimant sustained

compensable injuries as the result of a specific incident identifiable in time and place of occurrence on said date; that he earned sufficient wages to entitle him to the maximum compensation rates of \$453.00 per week for temporary total disability and \$340.00 per week for permanent partial disability; that respondents accepted, and continue to pay, reasonably necessary medical treatment, including a change of physicians to Dr. Thomas Ward on August 22, 2006; that respondents controverted claimant's entitlement to additional, temporary total disability beyond the amounts previously paid, and have controverted permanent impairment benefits beyond the proposed forty-six (46) weeks it maintained it had previously paid.

By agreement of the parties, the following issues were presented for determination:

1. The date claimant's healing period ended.
2. Claimant's entitlement to additional temporary total disability.
3. A determination on the extent of claimant's permanent impairment.

Claimant contended, in summary, that his healing period did not end until September 27, 2005; that respondents should be responsible for temporary total disability benefits through that date at the rate of \$453.00 per week; that, thereafter, the claimant was entitled to ninety (90) weeks of permanent impairment benefits based upon an impairment rating of twenty percent (20%) to the body as a whole while further contending that respondents had only paid twenty-two (22) weeks of permanent impairment benefits. The claimant specifically reserved the issue of

vocational rehabilitation benefits and/or wage-loss disability. The claimant requested a controverted attorney's fee on any additional benefits awarded.

The respondents contended that it had paid all related medical and indemnity benefits to which the claimant was entitled. Respondents contended that the claimant's healing period ended on August 23, 2004, rather than the September 27, 2005, date maintained by the claimant; that it initially accepted and paid a seven percent (7%) impairment assessed by Dr. John Wilson on August 23, 2004, but actually paid a total of forty-six (46) weeks of permanent partial disability benefits; pointing out that respondents had accepted and paid a full ten percent (10%) impairment rating pursuant to Table 75, Sub-part IV of the Fourth Edition of the AMA Guidelines. Respondents maintained that the twenty percent (20%) permanent impairment assessed by Dr. Jim J. Moore included range of motion and complaints of pain which cannot be considered, and that it had accepted and paid the proper impairment rating. Respondents claim a credit for any temporary total disability benefits that it may have overpaid beyond the actual healing period.

The claimant was the only witness to testify. The record is composed solely of the transcript of the January 12, 2007, hearing containing numerous exhibits and medical reports addressing the issues in dispute.

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 claimant and to 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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. A preponderance of the credible evidence of record reflects that the claimant's healing period ended on December 30, 2004. The claimant is entitled to temporary total disability benefits through said date.
4. The claimant has sustained a ten percent (10%) whole body impairment as the result of his January 15, 2004, compensable injury and surgery.
5. The issue of claimant's entitlement to vocational rehabilitation benefits, as well as claimant's entitlement to wage-loss disability has been specifically reserved.

DISCUSSION

_____The relevant facts in this case are basically undisputed. The issues presented for determination turn primarily upon the medical evidence. It is apparent from the claimant's own testimony, as well as the medical evidence, that the claimant's healing period has long since ended. Respondents have exercised good faith in meeting their obligations under our workers' compensation laws by providing the claimant with reasonably necessary medical treatment, including, but not limited

to allowing the claimant to exercise his right to change treating physicians. The claimant's continued medical treatment is solely for the purpose of treating the claimant's permanent symptoms rather than improving the claimant's condition. The claimant's condition is permanent. Although it is the claimant's opinion that he is unable to return to gainful employment, this conclusion concerns claimant's entitlement to wage-loss disability which has been specifically reserved.

Two (2) primary issues have been presented for determination. The first concerns the date claimant's healing period ended. In the event claimant's healing period extended beyond August 23, 2004, the date one of his primary care physicians first assessed permanent impairment, claimant's entitlement to additional temporary total disability must be addressed. The only remaining issue concerns addressing the conflicting medical opinions addressing the issue of the extent of claimant's permanent impairment.

The claimant sustained an admitted, compensable injury on January 15, 2004. The claimant was working out of a "man basket" which was operated by a truck boom while constructing a bridge. The operator apparently hit the lever too hard, causing the man basket to bounce, pinning the claimant between the basket and a steel beam. The claimant was immediately taken to the emergency room where x-rays revealed a fractured rib. However, the claimant's primary complaint involved his neck and shoulders. The claimant was initially treated by Dr. Jerry Frankum in Newport, Arkansas. The claimant continued working for several weeks.

Because the claimant's condition grew progressively worse, he was sent back to Dr. Frankum who referred him to Dr. Jim J. Moore, a neurosurgeon in Little Rock, Arkansas. Dr. Moore ran various diagnostic studies which revealed a large herniated disc at C6-7, which ultimately required surgery. (Tr.15-18)

The record reflects that Dr. Moore consulted Dr. John L. Wilson, an orthopedic surgeon in Little Rock, Arkansas. Dr. Wilson first examined and evaluated the claimant on April 15, 2004. In a report to Dr. Moore on said date, Dr. Wilson opined that the claimant had a large disc at C6-7. He recommended doing an anterior discectomy and fusion. (Jt. Ex. A, pp.6-7)

The claimant underwent surgery on May 27, 2004. The surgery was performed by Dr. Wilson with the assistance of Dr. Moore. The operative report reflects that the procedure performed was an anterior discectomy and anterior cervical fusion, C6-7. (Jt. Ex. A, pp.8-9)

The claimant continued to see Dr. Wilson for follow-up examinations. Respondents contended that the claimant's healing period ended on August 23, 2004, based upon a report from Dr. Wilson to Dr. Moore on said date, releasing the claimant from his active care to return to work and to return to see him if he continued to have problems while, at the same time, estimating the claimant's permanent impairment at seven percent (7%) to the body as a whole. It is apparent from Dr. Wilson's report that the claimant had not reached maximum medical improvement on August 23, 2004, because x-rays taken on that date revealed early

consolidation of the fusion. (Jt. Ex. A, p.14)

The claimant returned to Dr. Wilson on October 20, 2004. At that time, the claimant was placed in a cervical collar and prescribed additional medications. Dr. Wilson also prescribed physical therapy, as well as a functional capacity assessment. Indeed, the claimant underwent physical therapy, as well as a functional capacity assessment. On December 30, 2004, the claimant was released to return to work with a forty (40) pound weight restriction based upon the functional capacity assessment. Dr. Wilson determined that the claimant had reached maximum medical improvement on December 30, 2004. (Jt. Ex. A, pp.21-27)

I feel compelled to point out that, in his December 30, 2004, report, Dr. Wilson noted that upon examination, the claimant walked with his neck stiff and shoulders upward; however, while observing the claimant walking out of the building, he noted that the claimant's shoulders relaxed to a normal position. When questioned concerning Dr. Wilson's observations, the claimant stated that Dr. Wilson lied. (Jt. Ex. A, p.26)(Tr.31)

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Construction Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages, and remains in his healing period, he is entitled to temporary total disability. *Id.* The healing period is statutorily defined as that period for healing of an injury resulting from an accident. *Dallas County Hospital v.*

Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Crabtree, Supra*. The question of when the healing period has ended is a factual determination for the Commission. The persistence of pain may not, in and of itself, prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher, Inc., v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). In order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

After the claimant was released by Dr. Wilson as having reached the end of his healing period, he has been examined and evaluated by other medical providers. However, it is apparent from a review of the medical evidence, that the claimant's treatment has been solely for the purpose of treating the claimant's permanent injury rather than improving his overall condition. The claimant did not seek any additional medical treatment between December 30, 2004, and May 3, 2005, at which time he was examined and evaluated by Dr. William F. Blankenship in the same clinic with Dr. Wilson. Dr. Blankenship did not have any further

recommendations other than that the claimant return to Dr. Moore since Dr. Moore was one of the surgeons during the claimant's surgical procedure. (Jt. Ex. A, pp.28-29).

The claimant was next seen by Dr. Jim J. Moore on May 10, 2005. Dr. Moore recommended some Lidoderm patches to treat the claimant's permanent condition, recommended additional diagnostic studies with a final diagnosis of post-laminectomy syndrome. (Jt. Ex. A, pp.30-31)

The claimant was last seen by Dr. Moore on September 27, 2005, at which time the claimant was released with an assessment of a twenty percent (20%) permanent partial impairment to the body as a whole. However, it is apparent from Dr. Moore's September 27, 2005, report that his impairment rating was based, in part, on the claimant's complaints of pain, as well as a restricted range of motion of the cervical spine. The claimant was treated with medications. (Jt. Ex. A, pp.34-35)

A preponderance of the credible evidence reflects that the claimant's healing period ended on or before December 30, 2004. In fact, the claimant candidly conceded that his condition has not improved following the surgery and has basically remained the same at all times prior to the date he maintained his healing period ended which was the date Dr. Moore assigned an impairment rating, on September 27, 2005. Further, the record reflects that the claimant, at least as early as possibly February, 2005, was clearing brush and performing various activities which are inconsistent with a claim for total disability. (Tr.20, 29-30)

I did not find the claimant to be a particularly credible witness. The claimant's testimony that he is unable to work is a mere conclusion, not supported by the record as a whole. Although admittedly, the claimant has restrictions, they are permanent in nature and go to the issue of wage-loss disability which has been reserved.

The remaining issue concerns the extent of the claimant's impairment.

Ark. Code Ann. §11-9-704(c)(1)(Repl. 2002) provides that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable, physical or mental findings." Objective findings are defined as: "Those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102(16)(Repl. 2002). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. *Id.* Furthermore, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests cannot be considered objective findings." With regard to medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. *Dept. of Parks and Tourism v. Helms*, 60 Ark. 110, 959 S.W.2d 749 (1998).

I have reviewed the conflicting assessments of permanent impairment by Dr. John Wilson and Dr. Jim J. Moore. Clearly, Dr. Wilson's initial assessment of

permanent impairment was merely an estimate and was based upon a single-level decompression without spinal fusion and without residual signs or symptoms which was in error. The record reflects that the claimant underwent a single-level decompression with fusion. Further, the claimant has continued to exhibit muscle spasms following surgery, clearly reflecting that he has residual signs or symptoms which merit a ten percent (10%) whole body impairment based upon Table 75, Subpart IV(D). of the AMA, Guides to the Evaluation of Permanent Impairment (Fourth Edition).

I specifically find that the impairment rating assessed by Dr. Jim J. Moore includes range of motion and complaints of pain which cannot be considered and that Table 75 of the Guides, rather than Table 73 relied upon by Dr. Moore, are the appropriate guides in the instant claim.

Claimant's entitlement to both vocational rehabilitation, as well as claimant's entitlement to wage-loss disability has been specifically reserved. In view of the foregoing, I hereby make the following:

AWARD

Respondent, Zurich American Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$453.00 per week through December 30, 2004.

Thereafter, respondents are directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$340.00 per week beginning

December 31, 2004, and continuing for forty-five (45) weeks, representing a ten percent (10%) whole body impairment.

All accrued benefits shall be paid in lump sum and without discount. Respondents may claim credit for any indemnity benefits previously paid.

Additionally, claimant's attorney, Mr. Steven R. McNeely, is hereby awarded the maximum statutory attorney's fee on any additional benefits controverted and awarded herein pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge