

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405776

JAMES WATTS, EMPLOYEE	CLAIMANT
NELSON UTILITY CONSTRUCTION, INC., EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

**OPINION FILED FEBRUARY 2, 2007**

Hearing conducted before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 13, 2006 in Little Rock, Arkansas before administrative law judge Frank Arey. After the hearing, the case was randomly re-assigned without objection to administrative law judge Mark Churchwell for a decision on the record developed at the November 13, 2006 hearing.

A prehearing order was entered in this case on October 10, 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 employee-employer-carrier relationship existed on May 7, 2004 and at all relevant times.
2. The claimant sustained a compensable back injury on May 7, 2004.
3. The claimant's average weekly wage is \$750.00.
4. The respondents controvert permanent benefits.
5. The February 18, 2005 Administrative Law Judge's Opinion and the June 30, 2005 Full Commission Opinion are law of the case and res judicata.
6. The claimant's temporary total disability benefits and attorney's fees had been paid for the period from May 28, 2004 to July 17, 2004.

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

1. Whether claimant is entitled to additional medical benefits.

2. Whether claimant is entitled to temporary total disability benefits from July 28, 2004 until the claimant returned to work on February 7, 2005.
3. Whether claimant is entitled to temporary partial benefits from the date claimant returned to work, February 7, 2005, to April 14, 2006.
4. Whether claimant is entitled to a permanent impairment rating.
5. Whether claimant is entitled to an attorney's fee.

The record consists of the November 13, 2006 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record the Administrative Law Judge's Opinion filed on February 18, 2005 and the Full Commission Opinion filed on June 30, 2005 in this case.

#### DISCUSSION

- 1. Additional Temporary Disability Compensation From July 28, 2004 Until April 14, 2006.**

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. Arkansas State Highway and Transportation Department 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 sustained a compensable low back injury on May 7, 2004. The claimant was previously awarded a period of temporary total disability compensation for the period from May 28, 2004, when Dr. Sullivan took him off work, until July 17, 2004, when Dr. Sullivan released the claimant to light duty work. At the prior hearing held on December 2, 2004, the parties reserved the issue of the claimant's entitlement to temporary disability after July 17, 2004.

From the questions and answers at the November 13, 2006 hearing, I gather that the claimant returned to work for Nelson Utility Construction on or about July 17, 2004, but only worked until approximately July 28, 2004. The claimant testified that he was laid off for "[l]ack of work that I

could do." The claimant then drew six months of unemployment benefits, and very shortly thereafter, began work for the Arkansas Highway and Transportation Department, where he still works today.

In the present case, the claimant has failed to persuade me by a preponderance of the evidence in the record that he experienced any incapacity to earn wages after his release to light duty on July 17, 2004. In this regard, I note that no physician ever again placed the claimant in off work status after his release to light duty on July 17, 2004. No physician rendered a medical opinion offered at the November 13, 2006 hearing indicating that the claimant was incapable of working for any period after July 17, 2004. The claimant also failed to present any explanation from a physician or a vocational expert as to whether or not his release to light duty would prohibit his return to his prior work as a groundsman, or operating dozers, boring rigs, and a trackhoe. I note that the claimant held himself out as capable of working in order to draw the maximum 26 weeks of unemployment benefits, and the claimant coincidentally went to work at the Highway Department very shortly after those unemployment benefits ran out. The evidence presented in this case does not persuade me that the claimant experienced

any degree of incapacitation (partial or total) from returning to work for any period after July 17, 2004.

## **2. Permanent Impairment Rating**

The Arkansas Court of Appeals thoroughly discussed the requirements necessary to establish an entitlement to benefits for a permanent anatomical impairment in Excelsior Hotel v. Squires, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

First, 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).

Second, 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).

Third, 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 underwent two MRI's to assess the status of his condition. Following the second MRI on February 14, 2006, his treating physician, Dr. Brent Sprinkle assigned the claimant a zero percent (0%) impairment rating on April 14, 2006. While I am not bound by Dr. Sprinkle's conclusions, neither may I ignore them. As I compare Dr. Sprinkle's April 14, 2006 MRI interpretation to that of the radiologist on February 14, 2006, I interpret that Dr. Sprinkle read the MRI himself and

reached his own conclusions as to the significance, or lack of significance, of any abnormalities present in the second MRI. I find no credible evidentiary basis for concluding that Dr. Sprinkle's interpretation of the February 14, 2006 MRI is based on any material mistake of fact, or for otherwise discounting Dr. Sprinkle's April 14, 2006 conclusions. I find that the preponderance of the credible evidence therefore establishes that the claimant has a zero percent (0%) impairment rating in his lumbar spine.

**3. Payment Of Medical Bills From Boston Rural Medical Health Center, Inc.**

After reviewing the bills and reports, I find that the unpaid treatment from May 28, 2004 through December 30, 2005 identified in claimant's exhibit 1 was reasonably necessary for treatment of the claimant's compensable back injury and complications from non-steroidal medicine. The parties did not submit any documentation or evidence as to whether the claimant underwent a sleep study mentioned by Dr. Coward on April 8, 2005, and I make no finding as to whether such a study was/would be reasonably necessary.

**4. Request For Pain Management.**

The claimant's attorney indicated at the hearing that "if Respondents have a doctor for pain management, we would

be happy to go to them. We're having a little trouble getting a [change of physician] through and somebody to see him." The respondents' attorney acknowledged at the hearing that Dr. Sprinkle is the claimant's authorized treating physician for purposes of future treatment and referrals. I note that neither Dr. Sprinkle or Dr. Sullivan have referred the claimant for pain management.

Absent any indication in the record from the claimant's authorized treating physician as to whether the claimant is or is not an appropriate candidate for pain management, I find that the claimant has failed to establish that he is a candidate for pain management at this time.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed on May 7, 2004 and at all relevant times.
2. The claimant sustained a compensable back injury on May 7, 2004.
3. The claimant's average weekly wage is \$750.00.
4. The respondents controvert permanent benefits.
5. The February 18, 2005 Administrative Law Judge's Opinion and the June 30, 2005 Full Commission Opinion are law of the case and res judicata.

6. The claimant's temporary total disability benefits and attorney's fees have been paid for the period from May 28, 2004 to July 17, 2004.

7. The claimant has failed to establish by a preponderance of the evidence that he is entitled to any period of temporary partial disability or temporary total disability for any period after his release to return to light duty work on July 17, 2004.

8. The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable permanent anatomical impairment as a result of his admittedly compensable low back injury.

9. The claimant has established by a preponderance of the evidence that the medical treatment he received at Boston Rural Medical Health Center Inc. from May 28, 2004 through December 30, 2005 was reasonably necessary for treatment of the claimant's compensable back injury and complications from non-steroidal medicine.

10. The claimant has failed to establish by a preponderance of the evidence in the present record that pain management is reasonably necessary for his compensable low back injury at this time.

**AWARD**

The respondents are directed to pay additional medical benefits in accordance with the findings of fact set forth herein. Because the claimant's injury occurred after July 1, 2001, I am without statutory authority to award the claimant's attorney a fee on the medical benefits awarded herein. See Ark. Code Annotated § 11-9-715 (Repl. 2002); Teasley v. Hermann Companies, Inc., 92 Ark. App. 40, \_\_\_ S.W.3d \_\_\_ (2005).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge