

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F606796

CHRISTOPHER CROOK,
EMPLOYEE

CLAIMANT

O'REILLY AUTOMOTIVE, INC.,
EMPLOYER

RESPONDENT NO. 1

INDEMNITY INSURANCE COMPANY OF NORTH
AMERICA c/o GALLAGHER BASSETT SERVICES,
CARRIER/TPA

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 11, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK
CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 were represented by HONORABLE CURTIS L.
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 was represented by HONORABLE BRANDON CLARK,
Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 8,
2008, in Little Rock, Arkansas. A Prehearing Order was
entered in this case on April 8, 2008. The following
stipulations were submitted by the parties and are hereby
accepted:

1. The employer/employee relationship existed on or
about March 17, 2006.

2. On that date the claimant sustained a compensable injury to his low back.
3. Respondent No. 1 has accepted a 12% permanent anatomical impairment rating to the body as a whole which will be paid out in August of 2008.
4. All authorized, reasonable and necessary medical expenses have been paid through treatment provided as of February 12, 2008.

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

1. Recommended medical treatment (including a third surgery performed by Dr. McHugh on April 14, 2008).
2. TTD from April 14, 2008, to a date yet to be determined.
3. Reimbursement to Blue Cross Blue Shield for payment of the April 14, 2008, surgery.
4. If the additional surgery is not reasonably necessary, then wage loss disability in excess of the claimant's 12% permanent anatomical impairment rating.
5. Controversion.

Respondents No. 1:

1. The claimant's entitlement to wage loss disability.
2. Additional medical treatment.
3. Additional TTD.

Respondent No. 2:

1. The Second Injury Fund has accepted liability for wage loss disability in an amount to be determined.
2. A wage loss disability determination is premature until the claimant has reached the end of his final healing period for his March 17, 2006, injury.

The record consists of three volumes: (1) the one-volume July 8, 2008, hearing transcript, (2) the one-volume exhibit binder from the hearing on July 8, 2008, and (3) the one-volume transcript of the August 8, 2008, deposition of Victoria Powell.

DISCUSSION

The claimant sustained an admittedly compensable low back injury on March 17, 2006. When a period of conservative treatment failed to resolve the claimant's low back complaints, Dr. Wayne Bruffett, an orthopedic surgeon,

performed a microscopic partial diskectomy on the right at the L4-5 level of the claimant's spine on August 3, 2006. When the claimant's low back complaints did not resolve after additional conservative care, Dr. Bruffett performed a second surgery on the right at the L4-5 level on March 7, 2007. On May 23, 2007, Dr. Bruffett concluded that the claimant was at maximum medical improvement following the second surgery and assigned a 12% impairment to the whole body which Respondents No. 1 accepted and were paying at the time of the hearing. The claimant also underwent a functional capacity evaluation in May of 2006 which indicated the claimant could return to work in the medium work category.

The claimant returned to work as the store manager at O'Reilly Auto Parts in Magnolia shortly after his release to work by Dr. Bruffett on May 23, 2006. Thereafter, the claimant sought and received from the Commission a change of physician to Dr. Bernie McHugh, a Monroe, Louisiana, neurosurgeon, who had previously performed a "redo" surgery on the claimant's neck in 2002. Dr. McHugh placed the claimant in off-work status on September 9, 2007, and ultimately performed a third surgery on the claimant's low back on April 14, 2007, at both the L4-5 and L5-S1 levels.

The respondents refused to pay for Dr. McHugh's surgery which was ultimately paid for by Blue Cross Blue Shield.

The claimant contends that the respondents are liable for Dr. McHugh's surgery and for a period of post-surgical temporary disability from April 14, 2008, to a date yet to be determined. If Dr. McHugh's surgery is found not to be reasonably necessary for the claimant's compensable injury, the claimant seeks an award of wage loss disability in excess of the 12% permanent anatomical impairment rating assigned by Dr. Bruffett and accepted by Respondents No. 1. The Second Injury Fund acknowledges their liability for any wage loss disability to which the claimant may be entitled but also contends that the claimant sustained minimal disability.

1. Evidentiary Objections.

On page 27 of the hearing transcript, Mr. Davis objected, on hearsay grounds, to Mr. Clark questioning the claimant's wife regarding whether Dr. McHugh in September of 2007 provided the claimant and his wife any medical explanation for the claimant's ongoing chronic right leg tingling. On page 34 of the hearing transcript, Mr. Nebben likewise objected to Mr. Davis asking the same witness whether Dr. Bruffett at first desired to conduct a micro-

diskectomy as a minimally invasive procedure. While I agree that the questions sought a hearsay response, the witness' answers are not inconsistent with my review of the medical reports and involve facts which are not in dispute i.e., that Dr. McHugh ordered a myelogram/post-myelogram CT before rendering a diagnosis and that microdiscectomy is a minimally invasive surgery. The witness' answers are accepted into evidence.

2. Respondents No. 1's Liability For Dr. McHugh's Treatment.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a). Injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Ark. Code Ann. § 11-9-705(a)(3); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Air Compressor Equipment v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Medical treatment intended to reduce or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). An employer may also remain liable for medical treatment reasonably necessary to maintain a claimant's condition after the healing period ends. Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In the present case, I find that the claimant has failed to establish that Dr. McHugh's surgery at issue was reasonably necessary for treatment of his March 17, 2006, back injury for the following reasons.

To the extent that Dr. McHugh performed surgery at L4-5 and L5-S1 on the *left* and to the extent that the claimant reported to Dr. McHugh that he was experiencing symptoms down his left leg in September of 2007, I find that the claimant has failed to establish that symptoms down his left leg in September of 2007 are causally related to the incident on March 17, 2006.

In reaching this conclusion, I recognize that the March 17, 2006, March 31, 2006, April 13, 2006, April 19, 2006, and May 5, 2006, reports from SAMA HealthCare in El Dorado

contain identical notations of left lower extremity paresthesias and complaints of intermittent radiation down the claimant's left lower extremity. (C. Exh. 1 p. 15, 18, 20, 22, 26) After May 5, 2006, however, not a single medical report ever again makes reference to any symptoms in the claimant's left leg until the claimant presented to Dr. McHugh for the first time on September 27, 2007. Between May 5, 2006, and September 27, 2007, the claimant was evaluated, treated or provided diagnostic testing by no less than eight different individuals (Dr. Ezell, Dr. Bruffett, Dr. Laakman, Dr. Dodd, Dr. Rutherford, Dr. Akin, Mr. Davidson, and Dr. Kusenberger) on no less than 19 occasions. Essentially every one of these nineteen reports consistently contains complaints of low back and *right* lower extremity complaints, but not one of these nineteen reports mentions the left lower extremity. (C. Exh. 1 pgs. 27 - 74) Under these circumstances, I find that the left leg symptoms which the claimant reported to Dr. McHugh on and after September 27, 2007, are not causally related to the low back injury that he sustained on March 17, 2006.

Even if the claimant's left lower extremity symptoms in September of 2007 were causally related to his injury in March of 2006, a finding I do not make, I would still find

that Dr. McHugh's surgery was not reasonably necessary for the claimant's compensable back injury and symptoms reported down both legs based on the following evidence.

First, I find persuasive Dr. Bruffett's May 23, 2007, conclusion that the claimant's reported inability at that time to flex his right hip did not make much sense anatomically because the hip flexors are enervated by higher lumbar regions. (C. Exh. 1 p. 70) I also find persuasive Dr. Scott Schlesinger's May 7, 2008, statement that he reviewed records including a January 15, 2008, myelogram and postmyelogram CT ordered by Dr. McHugh, that there was nothing on the right to correlate with the claimant's right sided symptomology and that Dr. Schlesinger could not have recommended any surgery based on the studies reviewed. (R. 1 Exh. 2 p. 4)

Second, I note that the claimant and his wife both indicated at the July 8, 2008, hearing that the claimant continues to experience the numbness and tingling down his right leg after the third surgery. (T. 26, 63) As I understand the claimant's testimony, he feels that his third surgery helped him by causing a 40 to 50 percent reduction in his back pain. (T. 63) While the claimant may very well be experiencing a gradual decrease in his low back pain over

time, nothing in the record indicates to me that the nature of the surgery performed by McHugh was intended to improve the claimant's back pain or would have the side-effect of improving the claimant's back pain. Instead, Dr. Bruffett indicated before the claimant's second surgery that these surgeries are not for back pain but are intended to resolve painful numbness in a patient's hip and leg. (C. Exh. 1 p. 43) Clearly, Dr. McHugh's surgery was not successful in resolving the claimant's complaints of numbness and tingling in the right leg prior to the hearing.

For all of the foregoing reasons, I find that the claimant has failed to establish by a preponderance of the evidence that the treatment at issue provided by Dr. McHugh after September 27, 2007, was reasonably necessary for treatment of the claimant's compensable low back injury. I therefore find that Blue Cross Blue Shield has no potential subrogation interest in this claim rendering moot the claimant's request that Respondents No. 1 reimburse Blue Cross Blue Shield pursuant to Arkansas Code Annotated Section 11-9-411. Because the claimant failed to establish that Dr. McHugh's surgery was reasonably necessary, the claimant has also failed to establish that he re-entered a

new post-surgical healing period on April 14, 2008, as he contends.

3. Wage Loss Disability And Controversion.

Because the claimant did not enter a new healing period on April 14, 2008, I find that the issue of wage loss disability in excess of the 12% impairment rating accepted and paid by Respondents No. 1 is ripe for determination. For an unscheduled injury, such as the claimant's compensable back injury, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 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).

In the present case, the claimant's healing period for his work related injury ended on May 23, 2007. He underwent a functional capacity evaluation on May 21, 2007. The results of the evaluation indicate that the claimant gave a reliable effort with 53 of 54 consistency measures within expected limits. The claimant demonstrated the ability to work in the medium work classification with limitations of occasional lifting or carrying up to 50 pounds. He demonstrated no functional deficits with the use of his arms. He demonstrated mild functional deficits with regard to prolonged standing and was determined to be capable of standing at the frequent level over the course of a workday. He demonstrated decreased tolerance to stooping and bending and mild range of motion deficits in his lumbar spine. (C. Exh. 1 p. 57)

The claimant returned to work in his previous job as the store manager for O'Reilly Auto Parts in Magnolia after his release to work in May of 2007 and continued to work until September 24, 2007. The claimant testified that he was not able to pull his weight after returning to work, that he went home early with back pain and right leg

tingling and numbness on September 24, 2007, and the district manger advised him the next day not to return to work until he was 100 percent. (T. 55-57) The claimant has not worked anywhere since September 24, 2007, and has filed an EEOC claim against O'Reilly's for disability discrimination. (T. 23, 58)

Bob White, a vocational specialist, performed a vocational evaluation on the claimant on June 30, 2008, i.e., while the claimant was in his healing period for Dr. McHugh's surgery. Among other things, Mr. White noted the claimant's history of back surgeries, his neck surgeries in 1998 and 2002, and his right knee surgeries in 1996 and 2004. Mr. White concluded that the combination of back, neck and knee injuries has affected the claimant's ability to sit, stand, walk, lift, and carry to the point that he can no longer work in sedentary or light work.

(C. Exh. 6 p. 6)

At the time of the hearing, the claimant was 46 years old. He has a high school education. He attended college for two years studying business administration before dropping out. (T. 75-76) He worked five years at O'Reilly Auto Parts and was earning \$36,000 per year as manager in September of 2007. He previously worked three years as a

parts service manager for Auto Zone, four years as a firefighter for the City of El Dorado, and fourteen years at Lowe's in the warehouse, on the sales floor and finally as an assistant retail sales manager. He worked approximately one year for American Home Patient, a company that delivers medical supplies to in-home patients, and two years for Del-Tin Fiber, a company that makes fiber board. (T. 67-69, C. Exh. 6 p. 2-3)

After reviewing the entire record, I accord Bob White's vocational evaluation little weight for two reasons. First, there are no medical reports and no witness testimony in the record to corroborate Mr. White's conclusion that the claimant's neck and knee injuries have contributed to his current physical limitations. Furthermore, the lifting and carrying restrictions he relied upon in his evaluation were provided during a period that the claimant remained within a post-surgical healing period for Dr. McHugh's surgery which I do not find reasonably necessary for the claimant's work-related back injury.

I do find credible the results of the functional capacity evaluation performed on May 23, 2007, when the claimant reached maximum medical improvement after his second surgery. Based on the results of this evaluation, I

find that the claimant experienced a 50 pound maximum lifting restriction as a result of his work-related back injury and two compensable surgeries and that he is restricted to the medium work category as a result of his work-related back injury and compensable surgeries.

After considering the claimant's relatively young age, his education, his work experience in both management and sales in automotive parts and building supplies, his limitation to medium duty work with a 50 pound lifting restriction, his ongoing back pain and right leg symptoms after reaching maximum medical improvement in May of 2007, and all other relevant factors, I find that the claimant is entitled to benefits for a 15 percent impairment to his wage earning capacity for his low back injury in excess of the 12 percent impairment rating accepted and paid by Respondents No. 1. Because I find that the additional surgery performed on April 14, 2008, was not reasonably necessary treatment, I find that the claimant is not entitled to receive benefits for additional impairment or disability associated with that third surgery, and I have therefore not considered the additional anatomical impairment and physical restrictions imposed on the claimant after that surgery in assigning a 15% wage loss disability.

Finally, I note that the claimant has a pre-existing history of low back problems before March 17, 2006. In fact, the claimant reported a four week history of back pain and intermittent pain radiating to the right hip to a physician on March 16, 2006, the day before his compensable low back injury in this claim. (C. Exh. 1 p. 14) While the presence of pre-existing low back problems can present difficult "major cause" issues in some circumstances, here there is no dispute that the claimant is entitled to benefits for a 12% impairment rating for his back injury and first two surgeries, and the Second Injury Fund has acknowledged their liability for any wage loss disability to which the claimant is entitled. I note that the Arkansas Court of Appeals interpreted that the major cause requirement for wage loss disability was satisfied under similar circumstances in Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W.2d 331 (1998) where the Second Injury Fund is liable for the wage loss associated with a work-related back injury that combines with a pre-existing back injury to cause the wage loss awarded by the Commission.

In light of the stipulated 12% impairment rating paid by Respondents No. 1, the Second Injury Fund's acknowledged liability for the wage loss disability at issue, and since I

have not considered the negative effects associated with the non-compensable third surgery in 2008 in determining wage loss disability, I find that the claimant's compensable low back injury is the major cause of the claimant's 15% permanent disability awarded herein.

Because the Second Injury Fund has contended that the claimant sustained only minimal wage loss disability and since the Second Injury Fund has never acknowledged liability for any specific degree of wage loss disability at any point in these proceedings, I find that the Second Injury Fund has controverted the entire 15% permanent partial disability awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee relationship existed on or about March 17, 2006.
2. On that date the claimant sustained a compensable injury to his low back.
3. Respondents No. 1 has accepted a 12% permanent anatomical impairment rating to the body as a whole which was paid out in August of 2008.
4. All authorized, reasonable and necessary medical expenses have been paid through treatment provided as of February 12, 2008.

5. The claimant failed to prove by a preponderance of the credible evidence that the surgery performed by Dr. McHugh was reasonably necessary for treatment of his work-related back injury.
6. The Second Injury Fund is liable to the claimant for a 15% permanent partial disability in excess of the 12% permanent anatomical impairment accepted and paid by Respondent No. 1.
7. The Second Injury Fund controverted the 15% permanent partial disability awarded herein.

AWARD

The Second Injury Fund is directed to pay benefits in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid

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by the Second Injury Fund in accordance with Ark. Code Ann.

§ 11-9-715 and Death & Permanent Total Disability Trust Fund

v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge