

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F102830

GRADY MARTIN, JR., EMPLOYEE **CLAIMANT**

**JENSEN CONSTRUCTION COMPANY,
EMPLOYER** **RESPONDENT NO. 1**

**ST. PAUL MERCURY INSURANCE CO.,
INSURANCE CARRIER/TPA** **RESPONDENT NO. 1**

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND** **RESPONDENT NO. 2**

OPINION FILED JULY 14, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Miller County, Arkansas.

Claimant was represented by Mr. Jason L. Horton and Mr. Mark B. Duch, Attorneys at Law, Texarkana, Texas.

Respondent No. 1 was represented by Mr. Joseph E. Kilpatrick, Jr., Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 17, 2008, the above captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing telephone conference was conducted on January 9, 2008, which was presided over by the Honorable Chief Administrative Law Judge David Greenbaum. At the conclusion of the January 9, 2008, prehearing conference, the parties requested the matter be sent to District 6 for adjudication in Texarkana, Arkansas. At which time, the claim was assigned to this administrative

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law judge to conduct a hearing on the issues outlined at the prehearing conference on January 9, 2008. As a result of the January 9, 2008, prehearing conference, a Prehearing Order was filed on that same date. The parties agreed the Prehearing Order filed January 9, 2008, would be admitted into the record as Commission Exhibit “1”, subject to any modifications made at the full hearing.

The parties stipulated to the following at the April 17, 2008, full hearing:

- 1) On August 7, 2003, a hearing was conducted in this matter and an administrative law judge Opinion was filed as a result on October 30, 2003, which was subsequently affirmed in part and reversed in part by the Full Commission. The Full Commission Opinion was filed March 15, 2005, and the parties agreed that the Full Commission Opinion is final and the law of the case and hereby admitted into this hearing record by reference.
- 2) The employment relationship existed at all relevant times.
- 3) The claimant sustained compensable injuries to his neck on September 10, 1999.
- 4) Claimant’s average weekly wage was \$533.48.
- 5) Pursuant to the Full Commission Opinion of March 15, 2005, claimant sustained a 15% whole body impairment plus wage loss disability in the amount of 25% for a total amount of 40% permanent disability.
- 6) All issues not addressed herein are reserved.
- 7) The hearing transcript and all attached exhibits from the August 7, 2003, hearing is hereby admitted into this record by reference.

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The parties agreed at the full hearing to litigate the following issues:

- 1) Additional medical treatment beyond what has previously been paid, including but not limited to respondents' responsibility for an additional cervical surgery.
- 2) Claimant's entitlement to additional permanent disability benefits.
- 3) Whether statutory penalties should be imposed on Respondent No. 1.
- 4) If claimant is found to be permanently and totally disabled, claimant's maximum medical improvement date must be determined.
- 5) If claimant is found to be permanently and totally disabled, whether Respondent No. 1 is entitled to a credit for permanent partial disability benefits paid prior to the claimant reaching maximum medical improvement.

At the full hearing, claimant contended that he had undergone a change of physical condition and was entitled to permanent total disability benefits. The claimant further contended that he was entitled to outstanding hospital, medical, and related treatment, including but not limited to the surgery performed by Dr. Lee Buono. The claimant contends he is entitled to continued reasonably necessary medical treatment. Claimant also contended that he was entitled to a 36% penalty for nonpayment or late payment of medical expenses. Claimant requests out of pocket expenses for pharmaceuticals, lodging expenses, and travel expenses related to his reasonably necessary medical treatment. Claimant contended he was entitled to all

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medical treatment received from Drs. Safman, Raker, Fletcher, and Michaels, and Buono.

Respondent No. 1 contended at the full hearing that it had fully complied with the Full Commission's Opinion filed March 15, 2005, and that the claimant was not entitled to any additional benefits of any nature or kind. Respondent No. 1 further contended that any additional surgery was both unauthorized as well as unrelated to the admitted injury; and that claimant had not undergone a change in physical condition. Respondent No. 1 further contends that they are entitled for a credit toward their \$75,000.00 cap for any permanent partial disability benefits paid.

Respondent No. 2 contended at the full hearing that if the claimant is found to be permanently totally disabled, Respondent No. 1 is not entitled to a credit for payment of permanent disability benefits against its maximum liability as defined in A.C.A. § 11-9-502, prior to the date upon which the claimant reached the end of his final healing period and became permanently and totally disabled pursuant to Death & Permanent Total Disability Trust Fund v. Legacy Insurance Service.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following

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findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.
- 3) The Full Commission Opinion from March 15, 2005, found that the cervical treatment from Drs. Raker and Safman were causally related to the claimant's compensable neck injuries and thus were authorized treating physicians.
- 4) All medical treatment contained in the record herein related to the claimant's cervical spine was reasonable, necessary, and related to the claimant's compensable neck injuries. Drs. Safman, Raker, Fletcher, Michaels, and Buono were all either previously found to be authorized treating physicians or were all valid referrals from either Drs. Safman or Raker and thus authorized. All treatments for the claimant's cervical spine from Drs. Safman, Raker, Fletcher, Michaels, and Buono were valid referrals and the treatment contained in the record herein from said doctors regarding the claimant's cervical spine was reasonable, necessary, and related to the claimant's compensable neck injuries from 1999. Therefore, Respondent No. 1 is responsible for all medical treatment contained in the record herein related to the claimant's cervical spine, including mileage expenses and prescriptions but, excluding any lodging expenses. Specially, but not limited to, I find the third cervical surgery from Dr. Buono at level C4-5 to be reasonable, necessary, and related to the claimant's compensable injuries and thus Respondent No. 1's responsibility.
- 5) The Full Commission Opinion in this matter from March 15, 2005, specifically found the claimant did not sustain a compensable lumbar injury. Said finding is now *res judicata* and

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the law of the case and will not be revisited herein. Respondent No. 1 is only responsible for the medical treatment contained in the record herein to the claimant's cervical spine.

- 6) Claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled.
- 7) Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional wage loss disability beyond that already awarded by the Full Commission in their March 15, 2005, Opinion.
- 8) Claimant has proven by a preponderance of the evidence that he is entitled to an additional 2% whole body anatomical impairment due to his February 2006 third cervical surgery performed by Dr. Buono. Said additional surgery at the C4-5 level was controverted by Respondent No. 1 and a full statutory attorney's fee attaches pursuant to A.C.A. § 11-9-715(B)(i).
- 9) Claimant has failed to prove by a preponderance of the evidence that statutory penalties should be imposed against Respondent No. 1 for nonpayment or late payment of medical bills previously awarded.
- 10) Issues related to the claimant's temporary total disability following the third compensable cervical surgery is also specifically reserved.

DISCUSSION

The claimant was 39 years of age when he sustained compensable neck injuries on September 10, 1999, while working for the respondent-employer. The claimant testified as follows at the April 17, 2008, full hearing regarding the incident which caused his cervical injuries:

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A Well, we was working in Arkadelphia, cutting wooden pallets, logs so to speak, off for the deck floors for a bridge. We extended a ladder up on one of the logs and I went to cut it off and that [sic] when I fell. I fell on my back and knocked myself unconscious.

Q What did you fall on, what type of surface?

A Oh, it was rocks, rip-rap rocks.

Q About how high were you up off the ground?

A Five foot or more.

(T. pg. 42, lines 4-13).

As a result of the claimant's compensable neck injuries, a full hearing was conducted before an administrative law judge in 2003. As a result of the administrative law judge Opinion filed October 30, 2003, both parties appealed and a Full Commission Opinion was rendered by the Arkansas Workers' Compensation Commission on March 15, 2005. The parties have stipulated that the Full Commission Opinion from March 15, 2005, would be admitted by reference. In the March 15, 2005, Opinion the Full Commission gave a detailed account of the claimant's educational history, work history, and medical treatments related to the claimant's compensable neck injury. Said history detailed by the Full Commission in their March 15, 2005, Opinion is contained at pages 2-12 and is hereby incorporated for the purpose of this Opinion/Order.

The Full Commission, in its March 15, 2005, Opinion, found that the claimant

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was entitled to the treatment for his cervical spine from Drs. Raker and Safman, found that the claimant was entitled to a 15% whole body anatomical rating plus an additional 25% for wage loss disability in excess of the claimant's 15% whole body anatomical rating. Since the Full Commission Opinion/Order, the claimant testified that his condition has gotten worse. (T. pg. 43, lines 21-23). The claimant testified that upon his condition continuing to worsen, he sought medical treatment from Drs. Raker, Safman, Fletcher, Michaels, and Buono. Ultimately, the records reflect that the claimant underwent a third surgery for his neck problems from Dr. Buono on February 21, 2006. (Claimant's Exhibit 1, page 129).

The claimant contends that since this matter was last adjudicated he has undergone a change of physical condition that would entitle him to additional permanent disability benefits up to and including a finding of permanent and total disability. Claimant contends he is entitled to additional medical treatment, a 36% penalty for nonpayment or late payment of medical expenses, and attorney's fees.

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). A claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 230 S.W.3d 153 (2003). What constitutes reasonably

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necessary medical treatment is a question of fact for the Commission. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2nd 857 (1987).

It is undisputed that the claimant sustained compensable cervical injuries to his neck as a result of his work for the respondent-employer on September 10, 1999. Subsequently, the Full Commission opined that the claimant's first two neck surgeries following his 1999 compensable injury at levels C3-4 and C5-6 were compensable. The second surgery was of much debate at the last hearing; however, the Full Commission found that it was reasonably necessary and related to the claimant's compensable injuries. The previous medical records in the Full Commission Opinion quotes Dr. Russell as stating "Anytime you do a fusion at one level, you're going to accelerate the deterioration at other levels, and he has already had the process in motion." The Full Commission found that the first surgery along with the causation opinion from Dr. Russell showed that the second surgery was also a compensable consequence and thus the respondents' responsibility. For the same reasons upon which the Full Commission relied regarding the claimant's second neck surgery, I too find that the claimant's third surgery from Dr. Buono in February of 2006 was reasonable, necessary, and related to the claimant's September 1999 compensable injury and thus the responsibility of Respondent No. 1.

The Full Commission also stated in its March 15, 2005, Opinion that the

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claimant was entitled to treatment from Drs. Raker and Safman. Both doctors were treating the claimant for his continued neck complaints which were causally related to the compensable injury. I have reviewed the claimant's cervical treatments contained in the record herein and also conclude that all cervical treatment contained in the record from Drs. Raker, Safman, Michaels, Fletcher, and Buono were necessary, reasonable, and related to the claimant's September 1999 compensable neck injury. As such, Respondent No. 1 is responsible for all cervical treatment contained in the record herein.

It is important to note that this record contains numerous medical reports and various treatments to the claimant for his lumbar spine and other parts of his body. Claimant's attorney specifically stated a request for reconsideration concerning compensability of the claimant's lumbar spine. Compensability of the claimant's lumbar spine was not outlined in the Prehearing Order and is not an issue herein; however, the Full Commission specifically found that the claimant did not sustain a compensable lumbar injury as a result of the September 10, 1999, incident and said finding is now *res judicata* and the law of the case. Respondents are not responsible for any treatment to the claimant's lumbar spine or any other treatments contained in this record except for the treatments to the claimant's cervical spine. Respondents are responsible for medical mileage and prescriptions related to the claimant's cervical

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spine, but not lodging expenses. The record is clear that the doctors providing cervical treatment to the claimant in this record were treating the claimant for his continued neck complaints which were causally related to the claimant's compensable injury.

Claimant has requested a 36% penalty for respondents' failure to pay previously ordered medical bills. Claimant presented virtually no proof of any such nonpayment. The record does reflect correspondence with Dr. Raker wherein Dr. Raker has billed for cervical and lumbar treatment to the claimant. It appears Respondent No. 1 has requested a proper billing information to reflect only the treatment the claimant received to his cervical region. Once again, Respondent No. 1 is not responsible for any treatment the claimant has received to his lumbar spine and only responsible for any treatment to the claimant's cervical spine. Based on the evidence now before the Commission, I find that there is no basis for a 36% penalty to be imposed upon Respondent No. 1. The Full Commission noted in its March 15, 2005, Opinion that the claimant was referred to Dr. Raker for pain management and there is nothing contained in the record herein that causes this administrative law judge to change the opinion that the claimant continues to require pain management for his admittedly compensable cervical injuries.

Claimant contends that he is now permanently and totally disabled.

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“Permanent total disability” is the “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” A.C.A. § 11-9-519(e). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. A.C.A. § 11-9-102(4)(F)(ii)(a). The determination of whether the claimant is permanently and totally disabled was the subject of a previous adjudication. On October 30, 2003, this matter came for a hearing on the issue of whether the claimant was permanently and totally disabled as a result of his September 1999 compensable injuries. At that time, the administrative law judge found that claimant was not permanently and totally disabled but was instead entitled to wage loss disability benefits of 25% over and above the claimant’s anatomical impairment. The determination that the claimant was not permanently and totally disabled was then affirmed by the Full Commission in its March 15, 2005, Opinion. Claimant comes forth today alleging that he is now permanently and totally disabled due to a change in physical condition. I find that the evidence shows that the claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled. In fact, the only change in physical condition related to the claimant’s compensable cervical injuries is the fact that the claimant’s cervical problems have dramatically improved following his third cervical surgery which I have found to be compensable.

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Dr. Buono's records after the claimant's third neck surgery consistently show that the claimant's neck condition is significantly better than it was at the time of the last adjudication. Dr. Buono in his March 1, 2006, report found at Claimant's Exhibit 1, page 136, states:

He is very happy with the results of the surgery, and finally he can walk without a cane. He is ecstatic, and so is his wife, and the numbness is gone in his hands. His myelopathy is improving, and his wound is clean, dry, and intact without signs of arrhythmia. He is extremely happy with the results of the surgery, and gave me a hug in the office today.

Dr. Buono's April 3, 2006, report states:

At this point in time he is still doing quite well and is very happy with the results of the surgery, as the numbness in his arms and legs is much better.

Dr. Buono's June 6, 2006, report states:

He tells me that he is walking a lot better since the surgery, and the strength in his hands has also improved a lot since the surgery.

The medical records and the claimant's own testimony are abundantly clear in that they show the claimant is much improved since the last adjudication in this matter:

Q You were on a cane at the time of the last hearing, right? When we had the hearing in 2003 you had a cane?

A Yes.

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Q And you don't have to have that anymore?

A I don't have it anymore.

(T. pg. 76, lines 2-7).

The records and the testimony show that the claimant required the use of a walking cane in 2003, but now does not require the use of the cane. The records do show that the claimant has other problems; however, those problems are in no way related to the claimant's compensable neck injury from September of 1999. I find that the claimant has failed to prove by a preponderance of the evidence a change in physical condition since the claimant's last adjudication regarding permanent and total disability that would justify a modification or a change in the previous ruling. In fact, I find just the opposite, that the claimant's compensable neck injury has significantly improved since the last adjudication. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled.

When addressing permanent and total disability, it is necessary to look into the possibility of wage loss disability benefits. Claimant's entitlement to permanent disability benefits is controlled by A.C.A. § 11-9-522, which states, in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the claimant's percentage of physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the

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employee's age, education, work experience, and other matters to which a compensable injury has affected a claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as claimant's age, education, and work experience. Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998).

The claimant has already been awarded 25% wage loss disability benefits by the Full Commission in its March 15, 2005, Opinion. The claimant contends he is now entitled to additional wage loss disability due to a change in physical condition and primarily relies on the fact that he had the third surgery to his cervical spine. The Full Commission in its Opinion which is incorporated herein conducted a detailed examination into the claimant's wage loss which is recited on pages 13-14 in its March 15, 2005, Opinion. When taking all considerations into account regarding wage loss as I have recited herein, I find that there is nothing to justify an additional increase in the claimant's previously awarded wage loss disability benefits. The records clearly show that the claimant's third cervical surgery did exactly what it should have, it helped. Now the claimant is able to walk without the need for a cane and the medical records clearly show the claimant is vastly improved since the Full Commission rendered its Opinion. If anything, the claimant should now be able to perform more duties than he could at the time of the last adjudication. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is

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entitled to any additional wage loss disability benefits beyond those previously awarded.

The claimant is however entitled to additional permanent partial disability benefits as a result of his third compensable neck surgery which was conducted in February of 2006. Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. I have found that the claimant's compensable neck injury was causally related to the claimant's third neck surgery conducted in February of 2006. As such, I have found that the claimant's neck surgery was reasonable, necessary, and related to the claimant's compensable injury and pursuant to the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, the claimant is entitled to an additional 2% whole body anatomical impairment rating. According to Table 75 of the 4th Edition, an additional 1% is added for the February 2006 third surgical procedure and an additional 1% is added for the additional level for a total of an additional 2% whole body anatomical rating which respondents are ordered to pay in a lump sum. Said additional 2% whole body anatomical impairment has been controverted and therefore a full statutory attorney's fee attaches.

In making the determination of the additional anatomical impairment, I do not disregard the ratings provided by Drs. Michaels and Raker. It is the duty of the

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Commission to examine the ratings and make a determination based upon its experience and expertise to determine the proper permanent anatomical impairment. Dr. Raker in his April 10, 2006, report states, “He must use a cane for balance and stabilization.” (Claimant’s Exhibit 1, page 146). Dr. Raker’s report shows that he has a lack of understanding from the claimant of his physical abilities or a lack of understanding of the claimant’s functionality which causes this examiner to doubt the veracity of Dr. Raker’s opinion regarding the extent of the claimant’s permanent impairment. Dr. Raker also relies on range of motion testing that appears to be active rather than passive. A.C.A. § 11-9-102(16)(ii)(b) states, “For purposes of making physical or anatomical impairment ratings to the spine, straight leg-raising tests or range of motion tests shall not be considered objective findings.” The full Commission did quote the Court of Appeals in Groom v. Nekoosa papers, 2007 AWCC 112 (Claim No. E711688) as stating “the Commission disregarded all non-objective evidence simply because it was subjective. We hold that this was an arbitrary rejection of medical evidence. There is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings.” I do not arbitrarily disregard Dr. Raker’s opinion of impairment, but do find passive range of motion test should be given more weight than active. I find Table 75 and an additional 2% impairment to be more

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appropriate. As stated above, I also find Dr. Raker did not have the full story from the claimant as far as his need for a cane which leads this examiner to question the subjective nature of Dr. Raker's rating.

With regard to Dr. Michaels' rating (Claimant's Exhibit 1, page 151), Dr. Michaels states, "Per T73 p.110 a 2 level C-fusion results in DRE IV impairment of 25%." I do not find Dr. Michael's rating appropriate. First, the claimant had a "2 level C-fusion" before the Commission awarded a 15% whole body impairment in its March 15, 2005, Opinion. The 15% finding for the two surgeries is *res judicata* and the law of the case. If the Commission wanted to find the claimant had "loss of motion segment integrity of multilevel neurologic compromise", as required for a 25% rating under Table 73 DRE Category IV, they could have and would have in its March 15, 2005, Opinion. Additionally, my review of the 4th Edition Guides to the Evaluation of Permanent Impairment does not define fusion as "loss of motion segment integrity." It does seem logical that a fusion would fall into such a category; however, the 4th Edition does so specifically state.

The Full Commission has previously found that claimant is entitled to a 15% whole body impairment rating related to the claimant's compensable cervical injuries. My duty is to determine whether the claimant has sustained additional anatomical impairment as a result of a change of physical condition since the last adjudication.

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Clearly, the claimant did undergo another cervical surgery that was directly related to his compensable injury; and, I find that he is entitled to an additional 2% whole body anatomical impairment as a result of his change in physical condition due to his third compensable neck surgery.

AWARD

Respondent No. 1 is directed and ordered to pay benefits in accordance with the findings of facts and conclusions of law set forth herein.

All sums herein awarded are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb