

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513654

KENNETH PARHAM,
EMPLOYEE

CLAIMANT

MIKE ROGERS DRILLING COMPANY, INC.,
EMPLOYER

RESPONDENT

BITUMINOUS CASUALTY CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 13, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in El Dorado, Union County, Arkansas.

The claimant was represented by HONORABLE RONALD L. GRIGGS, Attorney at Law, El Dorado, Arkansas.

The respondent was represented by HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 13, 2007, in El Dorado, Arkansas. A Prehearing Order was entered in this case on October 9, 2007. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at that time. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The claimant was an employee of Mike Rogers Drilling Co., Inc. in October of 2005, and on October 19, 2005, he sustained a compensable injury to his left shoulder.

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

1. The claimant's appropriate anatomical impairment rating.
2. Wage loss disability in excess of permanent anatomical impairment.
3. Attorney's fees on any permanent anatomical impairment in excess of the 6% rating assigned by Dr. Rosenzweig and paid by the respondents.
4. Appropriate attorney's fees on wage loss disability.

The record consists of the December 13, 2007, hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant sustained an admittedly compensable left shoulder injury while working for Mike Rogers Drilling Company on October 19, 2005. The claimant's shoulder popped

while pulling on heavy pipe hung in an elevator on a drilling operation.

After a period of failed conservative treatment, Dr. Clemens Soeller performed shoulder surgery on March 9, 2006. After a recovery period, Dr. Soeller ordered a functional capacity evaluation which was performed on July 26, 2006.

The functional capacity evaluation report indicates that the claimant gave a reliable effort, with 50 out of 50 consistency measures within expected limits. Low coefficients of variation with all repetitive trial testing indicated consistent effort, and the claimant did not demonstrate signs of symptom magnification or other inappropriate illness responses.

Utilizing range of motion data and strength testing data generated in the functional capacity evaluation on July 26, 2006, Dr. Soeller calculated a 47% impairment to the claimant's right upper extremity pursuant to tables and figures in Section 3.1j, Section 3.1m, and the Combined Value Chart of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition.

Utilizing only Table 27 in Section 3.1m of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Kenneth Rosenzweig assigned the claimant a 10%

rating to the upper extremity for surgery (i.e., distal clavicle resection). The respondents paid Dr. Rosenzweig's assigned rating (converted to a 6% rating to the whole body). The claimant contends that he is entitled to a higher rating based on Dr. Soeller's calculations and that he is entitled to benefits for permanent disability in excess of his anatomical impairment. The respondents contend that the Arkansas Workers' Compensation Law does not allow strength or range of motion to be considered in calculating an impairment rating. The respondents also contend that the claimant has not sustained any wage loss disability since the functional capacity evaluation indicated that the claimant is still capable of working in the heavy work category.

Issue 1: What is the claimant's appropriate permanent anatomical 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 (4th 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, 185 S.W.3d 158 (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 nor 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, there is no dispute that the rating Dr. Rosenzweig assigned for surgery pursuant to Table 27 meets all of the necessary criteria for payment, as the respondents have accepted and paid that rating.

Furthermore, I have reproduced on my own Dr. Soeller's calculations using the same functional capacity evaluation data that Dr. Soeller utilized. I find no mathematical error in Dr. Soeller's calculation of a 47% impairment to the upper extremity under the sections of the AMA Guides that he used. Because the range of motion testing performed was to the *shoulder*, and not the *spine*, and since the tables of figures utilized by Dr. Soeller rely on data and measurements, not pain, I also find that Dr. Soeller's calculations meet the requirement of use of the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) exclusive of any sections which refer to pain and exclusive of range of motion tests when rating the spine, as mandated by Commission Rule 099.34.

There is no evidence in the record indicating that the claimant ever experienced left arm lifting strength deficiency or abnormal range of motion before his work-related injury and surgery. In addition, the claimant's only documented left arm injury is his compensable impingement and since his only documented surgery is the subacromial decompression with distal clavicle resection. Under these circumstances, I find that the claimant has also established by a preponderance of the evidence in the record that his compensable shoulder injury is the major cause of his calculated permanent impairment for limited shoulder range of motion and limited lifting strength. I therefore find that the claimant has established the second requirement (major cause) necessary to establish that he is entitled to benefits for permanent impairment based on Dr. Soeller's calculations.

As to the third requirement, I note that the provisions of Act 796 of 1993 are to be strictly construed. Ark. Code Ann. §11-9-1001. I also note that Arkansas Code Annotated Section 11-9-102(16) (A) (i) excludes from the definition of "objective" all findings except those findings that "cannot come under the voluntary control of the patient." Duke v.

Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996).

In Duke, the Court indicated regarding Tinel's testing:

Despite the evidence tending to show the accuracy and reliability of the tests performed on the appellant, it is nevertheless clear that they depended on voluntary responses and that the findings obtained from them could be controlled by a knowledgeable patient. We are consequently obliged to hold that they did not constitute objective findings as defined in Ark. Code Ann. § 11-9-102(16).

In the present case, the evidence indicates that the claimant's functional capacity tests yielded accurate and reliable results based on every validity criteria administered during testing. Nevertheless, the Arkansas Courts have previously determined that active range of motion testing does not produce objective findings.

Department of Park & Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998). Passive range of motion testing does produce objective findings. Hayes v. Wal-Mart, 71 Ark. App. 207, 29 S.W.3d 751 (2000). However, the claimant has failed to present any evidence establishing that the functional capacity evaluation utilized passive range of motion testing.

With regard to strength testing, I note that the text of the Guides to the Evaluation of Permanent Impairment (4th Ed.) page 3/64 specifically states that "strength

measurements are functional tests influenced by subjective factors that are difficult to control..." Neither the applicable section of the Guides nor the functional capacity evaluation report in the record indicate that the strength test results in the record could not come within the claimant's voluntary control.

I must therefore conclude that neither the strength testing nor the range of motion testing performed in the functional evaluation produced objective findings within the meaning of Ark. Code Ann. § 11-9-102(16)(A)(i). I therefore find that Dr. Soeller's rating calculations based on those findings are not supported by objective findings.

In reaching my conclusions, I am aware of the Court's recent admonition that medical evidence of the impairment need only be *supported* by objective findings and that a rating cannot be rejected solely because the rating is based in part on non-objective evidence. Singleton v. City of Pine Bluff, 97 Ark. App. 59, ___ S.W.3d ___ (2006). In the present case, however, I must conclude that Dr. Soeller's methodology is based *solely on* non-objective test results.

For the reasons discussed herein, the claimant has failed to establish that he is entitled to benefits for any degree of permanent anatomical impairment in excess of the

10% rating to the upper extremity (6% rating to the body as a whole) assigned by Dr. Rosenzweig and accepted by the respondents.

Issue 2: Is the claimant entitled to benefits for permanent partial disability (wage loss)?

For unscheduled injuries, 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 determining the 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 was 41 years old at the time of the hearing. He quit high school in the 11th grade but got a GED in 1998. He worked for some period in

the logging woods when he quit school. He has worked for periods for Dow Chemical, Titan Tire in Mississippi, and Angola Prison in Louisiana before his injury. However, the vast majority of the claimant's work experience has been on drilling rigs for various drilling companies.

Immediately before his shoulder injury, the claimant earned \$17.25 per hour regular pay working 12 hour shifts, seven days on followed by seven days off for the respondents. After his shoulder injury and surgery, the claimant has earned \$12 per hour for a company installing sprinkler systems and more recently \$10 per hour for a company that performs general maintenance (weedeating, trash pick-up, etc.) at numerous oilfield drilling sites. The claimant works 40 to 60 hours per week at his current job.

Following arthroscopic surgery, Dr. Soeller did not place any permanent physical restrictions on the claimant's shoulder use. The claimant does not take narcotic medication and cannot say how often he takes over-the-counter pain relievers.

The claimant testified that he does not have enough strength left in his left arm to return to his old work on drilling rigs as an oilfield driller. Overall, the claimant's functional capacity test indicates that he can

return to work in the "heavy" work classification. However, the claimant's arm level lift on the left was 31 pounds versus 47 pounds on the left. The respondents did not present any evidence rebutting the claimant's credible testimony that his residual left arm strength is insufficient to return to his pre-injury work on drilling rigs.

After considering the claimant's age, education, work experience, the nature and extent of his shoulder injury and permanent impairment, and all other relevant factors, I find that the claimant has sustained a 6% permanent disability to his wage earning capacity in excess of his 6% permanent anatomical impairment rated to the whole body. Because there is no evidence that the claimant experienced a left arm strength limitation before his injury and surgery, I find that the claimant has established by a preponderance of the evidence that his compensable shoulder injury is the major cause of the 6% permanent partial disability awarded for wage loss herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The claimant was an employee of Mike Rogers Drilling Co., Inc. in October of 2005, and on October 19, 2005, he sustained a compensable injury to his left shoulder.
3. The claimant's appropriate anatomical impairment rating is the 6% rating assigned by Dr. Rosenzweig and paid by the respondents.
4. Any greater impairment rating would not be supported by objective and measurable findings.
5. The claimant has sustained a 6% impairment to his wage earning capacity in excess of the 6% anatomical impairment accepted and paid by the respondents.
6. The claimant's attorney is entitled to an attorney's fee on the 6% permanent disability for wage loss awarded herein.

AWARD

The respondents are 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 by the respondents 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