

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F707087**

BARON L. ROSBY, EMPLOYEE	CLAIMANT
NATIONAL OILWELL VARCO, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE COMPANY C/O SPECIALTY RISK SERVICES, LLC, CARRIER/TPA	RESPONDENT

**OPINION FILED AUGUST 13, 2008**

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

The claimant was represented by HONORABLE BENNIE O'NEIL, Attorney at Law, North Little Rock, Arkansas.

The respondents were represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on June 17, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on April 22, 2008.

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 the respondent at all relevant times.
3. The claimant was injured on March 27, 2007.

4. The claimant was assessed a permanent residual impairment (whole body) of 3% on October 9, 2007.
5. Some benefits were paid and the employer stopped.
6. The claimant's compensation rate is \$383.00 weekly for temporary total disability and \$287.00 weekly for permanent partial disability.

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

1. The claimant's entitlement to additional temporary total disability benefits between his injury date and the date he was assessed permanent disability on October 9, 2007.
2. The claimant's entitlement to permanent partial disability benefits based upon 3% permanent residual impairment.
3. The claimant's entitlement to a wage loss disability.
4. Future medical expenses.
5. The claimant's entitlement to 72 weeks of additional compensation for rehabilitation since he cannot return to his previous job under Arkansas Code Annotated § 11-9-505.

6. The claimant's entitlement to a program of rehabilitation as outlined in Arkansas Code Annotated § 11-9-505.

The record consists of the June 17, 2008, hearing transcript and the exhibits contained therein.

#### **DISCUSSION**

The claimant sustained admittedly compensable contact dermatitis due to his allergic reaction to epoxy exposure at work while employed at National Oilwell Varco as a wet winder operator on or about March 27, 2007. The respondents paid some period of benefits for this condition then stopped. The claimant has been followed by Dr. Jerri Hoskyn of River City Dermatology.

Dr. Hoskyn has treated the claimant with various medications including topical steroids, an oral antibiotic, and at least one steroid injection. Dr. Hoskyn concluded in a report dated October 9, 2007, that the claimant had achieved maximum medical improvement. Dr. Hoskyn rated the claimant with a 3% permanent anatomical impairment to the whole body applying Table 2 on page 280 of the Fourth Edition of the A.M.A. Guides To The Evaluation Of Permanent Impairment.

The claimant seeks additional temporary total disability compensation, benefits for permanent anatomical impairment, future medical treatment, and a program of rehabilitation or wage loss disability if a program of rehabilitation is not awarded.

**1. Temporary Total Disability.**

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. 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, I find that the healing period for the claimant's contact dermatitis ended on October 9, 2007. In this regard, I note that Dr. Hoskyn is the only physician who has rendered an opinion on this issue, and Dr. Hoskyn's report assigning maximum medical improvement is dated October 9, 2007.

I also find that the claimant has established by a preponderance of the credible evidence that he was unable to

return to work from March 27, 2007, until the end of his healing period on October 9, 2007. In this regard, I note that Dr. Hoskyn opined on August 21, 2007, that the claimant's condition continued to improve while off work. The claimant's work restrictions at that time was no exposure to epoxys or irritants.

The claimant credibly testified that he attempted to return to work for National Oilwell Varco after developing dermatitis but was told that the company had no work available which would not expose him to epoxy resin. The claimant's primary work history is in construction. The claimant credibly testified that when he stopped working at National Oilwell Varco he then tried to do construction work, but he had to quit because his flesh was open so badly that he experienced irritation from dust and other materials. (T. 18) I note that the claimant's description of his flesh being open during the period is consistent with Dr. Hoskyn's notation of ongoing excoriations in her August 21, 2007, report. I also note that the claimant's description of difficulties with his flesh also appears to be consistent with the notations in Dr. Hoskyn's April 17, 2008, report indicating that she has prescribed oral antibiotics on an intermittent basis.

The claimant has therefore established by a preponderance of the evidence that he attempted to but was disabled from working and entitled to temporary total disability compensation from April 27, 2007, until the end of his healing period for dermatitis on October 9, 2007. However, the respondents are entitled to a credit for the temporary total disability already paid, and the respondents are entitled to a credit for any wages that the claimant may have received from either the respondents or any other employer for his attempts to return to work between March 27, 2007, and October 9, 2007.

**2. Three Percent (3%) Impairment Rating.**

The claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 2003), provides that "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" is defined as more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). Further, any determination of the existence

or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1)(B). In addition, pursuant to Ark. Code Ann. § 11-9-522(g), the Commission has adopted the Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Ed., for assessing anatomical impairment, "exclusive of any sections which refer to pain and exclusive of straight leg raising tests or range of motion tests when making physical or anatomical impairment ratings to the spine." See Commission Rule 099.34.

The Commission is required to weigh the medical evidence and to translate this medical evidence into an appropriate finding regarding permanent impairment using the AMA Guides. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). Thus, the Commission may assess its own impairment rating using the Guides rather than relying solely on its determination of the validity of ratings assigned by physicians. Id.

Among the other criteria governing assignment of an anatomical impairment rating, it must be determined when the condition, particularly a soft tissue injury, becomes "permanent." The Guides define a "permanent impairment" as an "impairment that has become static or well stabilized

with or without medical treatment and is not likely to remit despite medical treatment." See Guides, 4<sup>th</sup> Ed., page 315. Accord Guides, 4<sup>th</sup> Ed., page 9: "An impairment should not be considered 'permanent' until the clinical findings, determined during a period of months, indicate that the medical condition at issue is static and well stabilized."

In the present case, I find that the claimant has established by a preponderance of the credible evidence that he is entitled to a permanent anatomical impairment rating of 3% to the whole body for his work-related contact dermatitis condition. In this regard, I note that Dr. Hoskyn is the only physician who has addressed this issue, and Dr. Hoskyn has assigned the claimant a 3% impairment rating pursuant to Table 2 on Page 280, of the Fourth Edition of the AMA Guides To The Evaluation Of Permanent Impairment. There is no evidence of record that the claimant had ever experienced any problems consistent with his current skin condition prior to his exposure and allergic reaction to epoxy at work. The claimant has therefore established that his compensable injury was the major cause of his 3% anatomical impairment rating.

Furthermore, I note that Dr. Hoskyn's determination of a permanent anatomical impairment is supported by objective

medical findings which are visually observable and therefore do not come within the voluntary control of the patient. The objective findings from Dr. Hoskyn's reports include her observation and notation of hyperpigmented plaques, focal lichenification, excoriations, and prurigo nodules.

I also find that the claimant's condition is permanent. In this regard I note that Dr. Hoskyn has estimated medical costs for the next five years, and Dr. Hoskyn opined on October 9, 2007, when she assigned an impairment rating, that the claimant's condition would not change significantly enough over the next year to change his impairment rating.

**3. Future Medical Expenses.**

At the hearing, there appeared to be no dispute regarding the respondents' continued liability for the claimant's medical treatment and medication. I therefore conclude that any finding regarding the claimant's need for disputed future medical treatment is premature at this time.

**4. Proposal For Vocational Rehabilitation And/Or Wage Loss Disability.**

Arkansas Code Annotated § 11-9-505(b) provides in relevant part:

(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been

offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the program is reasonable in relation to the disability sustained by the employee.

(2) The employer's responsibility for additional payments shall not exceed seventy-two (72) weeks, regardless of the length of the program requested.

...

(4) A request for the program, if elected by the claimant, must be filed with the commission prior to a determination of the amount of permanent disability benefits payable to the employee.

With regard to a determination of permanent disability 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 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, I find that the claimant has failed to establish that he has sustained any permanent decrease in his wage earning capacity as a result of his contact dermatitis, and on that basis, I also find the claimant has failed to establish that a program of vocational rehabilitation is reasonable in relation to disability sustained by the claimant.

In this regard, I note that the claimant was approximately forty-seven years old at the time of the hearing. He is a high school graduate. At the time of his injury in 2007, the claimant was earning \$14.30 per hour as a wet winder operator for National Oilwell Varco.

The claimant's primary work experience, however, has been in construction. The claimant worked approximately two years in Little Rock for Lasiter, a construction company, earning approximately \$13.00 per hour. In addition, the claimant worked 18 or 19 years for Abrams Construction in

Houston and Austin earning approximately \$15.00 per hour before moving to Arkansas.

While I find credible the claimant's testimony that dust irritated his open flesh when he attempted to return to work in construction immediately after being terminated by National Oilwell Varco and while within his healing period, I note that at the hearing on June 17, 2008, the claimant no longer had observable open flesh or excoriations. I note that the only permanent limitation that the claimant has experienced from his contact dermatitis due to epoxy allergy is a restriction that he no longer work with epoxy or no longer work near epoxy. Dr. Hoskyn indicated in her October 9, 2007, report that the claimant otherwise has no current limitation on his ability to work or perform activities of daily living.

In summary, the claimant's work experience is primarily in construction operating equipment. He earned more money in construction than he earned while working at National Oilwell Varco. Dr. Hoskyn indicated that the claimant has no current limitation on his ability to work other than avoiding jobs which have epoxy exposure. The claimant presented no evidence that he would be exposed to epoxy if he returned to operating machinery in construction. Under

these circumstances, I find that the claimant has failed to establish that he has experienced any permanent decrease to his wage earning capacity as a result of his contact dermatitis and epoxy allergy.

**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 the respondent at all relevant times.
3. The claimant was injured on March 27, 2007.
4. The claimant was assessed a permanent residual impairment (whole body) of 3% on October 9, 2007.
5. Some benefits were paid and the employer stopped.
6. The claimant's compensation rate is \$383.00 weekly for temporary total disability and \$287.00 weekly for permanent partial disability.
7. The claimant proved by a preponderance of the evidence that he is entitled to temporary total disability compensation from March 27, 2007, until October 9, 2007. The respondents are entitled to a credit against liability for any wages paid to the claimant by any employer during the period and

for the temporary disability benefits already paid to the claimant during this period.

8. The claimant proved by a preponderance of the credible evidence that he is entitled to benefits for a 3% permanent anatomical impairment.
9. The claimant failed to prove that he has experienced any permanent impairment to his wage earning capacity as a result of his work-related contact dermatitis due to epoxy allergy. I find that the claimant has therefore failed to establish that a program of vocational rehabilitation would be reasonable in relation to his disability, and I find that the claimant has failed to establish that he is entitled to any indemnity benefits for permanent disability from his injury in excess of the 3% permanent anatomical impairment established by the medical evidence.

**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.

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MARK CHURCHWELL  
Administrative Law Judge