

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705690

VIRGILIO OCHOA		CLAIMANT
TYSON FOODS, INC., SELF INSURED	NO. 1	RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY FUND, INSURANCE CARRIER	NO. 2	RESPONDENT

OPINION FILED NOVEMBER 4, 2011

Hearing before ADMINISTRATIVE LAW JUDGE AMY GRIMES in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent No. 1 represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

Respondent No. 2 represented by CHRISTY KING, Attorney, Little Rock, Arkansas-not participating at the hearing.

STATEMENT OF THE CASE

On August 8, 2011, the above captioned claim came before the Workers' Compensation Commission in Springdale, Arkansas, for a hearing. A pre-hearing conference was held on April 4, 2011, and a pre-hearing order filed on April 5, 2011. A copy of the pre-hearing order has been marked as Commission's Exhibit No. 1 and made part of the record without objection. At the pre-hearing conference the parties agreed to the following stipulations:

1. On May 3, 2007, the relationship of employee-self insured employer-TPA existed between parties.
2. The appropriate weekly compensation rates are \$504.00 for total disability and \$378.00 for permanent partial disability.

3. On May 3, 2007, the claimant sustained a compensable injury to his lumbar spine.

4. There is no dispute at present over medical services.

5. There is no dispute at present over temporary total disability benefits.

At the pre-hearing conference the parties also agreed to litigate the following issues:

1. The date of the end of the healing period.

2. The existence and extent of permanent physical impairment.

3. The existence and extent of permanent functional disability for loss of wage earning capacity including permanent total disability.

4. Controversion and appropriate attorney's fees.

There have been two prior opinions in this case. The first was the result of a hearing heard before Judge Michael Ellig in January 3, 2008. The issue in that case was whether or not the claimant was entitled to temporary total disability from May 4, 2007 through June 27, 2007. As a result of that hearing, there is a prior opinion in which the claimant was found to be entitled to temporary total disability from May 4, 2007 through June 27, 2007. There was no appeal from that opinion. It is res judicata and law of the case. There was a second and subsequent hearing before Judge Michael Ellig on November 17, 2008. The subject matter of that

hearing was the entitlement of the claimant to additional medical benefits. The result of that hearing was an opinion in which the Administrative Law Judge found that the claimant was not entitled to additional medical benefits. That opinion has been affirmed and adopted.

The claimant contends that he sustained a compensable injury while working for respondent on or about May 3, 2007. At that time the claimant incurred a lumbar spine injury while in the scope and course of his employment. The claimant contends he is permanently and totally disabled or in the alternative entitled to a permanent impairment rating and wage loss disability.

The respondent contends that he denies the claimant has permanent impairment and/or wage loss as a result of the May 3, 2007 injury. The respondent denies that the claimant is permanently and totally disabled as a result of the May 3, 2007 injury. The respondent also contends that the lumbar surgery which the claimant underwent on July 28, 2009, was not reasonably necessary medical treatment for the work-related injury and was not necessitated by or connected with his May 3, 2007 injury. Thus, any permanent impairment resulting from the surgery is not the liability of the respondent, nor is any wage loss associated with the surgery, nor is any complication which may have arisen after the surgery. The respondent also contends that the claimant also apparently reported a right hematoma hemiplegia after surgery. His family doctor diagnosed a cerebral vascular accident. However, the diagnostic tests were all normal. The respondent also denies that the

claimant's condition is causally related to the work-related injury and denies any liability.

The stipulations agreed to by the parties at the pre-hearing conference conducted on April 4, 2011, and contained in the pre-hearing order filed on April 5, 2011, are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and other matters before the Commission, and having had the opportunity to hear the testimony and observe the witness and his demeanor, the following decision is rendered.

FACTUAL BACKGROUND

The claimant is a 48 year old male who began working for the respondent in 2005 (Record 8/8/2011 at p. 10). Claimant testified that he was an immigrant from El Salvador. He completed high school in El Salvador and moved to California in approximately 1979. He testified that he underwent some GED training and some training to learn English. He also testified that he has some training as a refrigeration technician, that he has a license to be a refrigeration technician and a license to be a boiler technician (Record 8/8/2011 at p. 8, 9). The claimant did refrigeration work for the respondent. He also did boiler work for the respondent (Record 8/8/2011 at p. 10). The claimant testified that his job requirements, while working for the respondent, necessitated that he lift a minimum of 70 pounds. He also testified that he had to go up ladders, crawl, bend, stoop, climb through units and climb stairs. He also stated that he had to crawl underneath machinery in order to do repairs (Record 8/8/2011 at p. 11, 12). He was

injured on May 3, 2007, while working on top of a mechanic platform otherwise known as a scissor lift. A fork lift operator lost control and hit the platform. The impact caused the claimant to hit his back on the control panel (Record 8/8/2011 at p. 15). The claimant testified that between the date of the injury and the date of his surgery in July of 2009, that there has not been a significant period of time that he went without any low back pain or numbness in his legs (Record 8/8/2011 at p. 16). The claimant testified that he at times did not have the strength to lift his leg. He also stated he had feelings of an electric shock running down his leg (Record 8/8/2011 at p. 17, 18). Four days after his accident the claimant saw Dr. Cathleen Vandergriff, who assessed low back pain with radiculopathy and sent claimant back to work with restrictions of no lifting of greater than ten pounds and no above the ground work (Claimant's Exhibit No. 1 at p. 18). She also noted:

"On exam his back is straight and normal to inspection without bruises, masses, or swelling. He jumps with light touch. Straight leg raises are unable to accurately be assessed as he resists by lifting his leg, groans loudly when either leg is lifted off the exam table any more than three inches. He has pain in his lower back with axial loading. He moves very slowly when asked to stand from a sitting position and grabs onto the table and door for balance. He states he is unable to do the heel or toe walk. He has trouble balancing on either foot. He states he is only able to bend to where his hands reach the level of his mid thighs and then he groans loudly in pain. He is unable to twist at the shoulders or hips."

"Although he has greatly over exaggerated responses during the exam and has some

positive Waddell's signs, I will order an MRI due to his complaints of numbness. I am going to send him to physical therapy for evaluation and treatment. I have written for Lodine 400 mg. He is sent back to work today with no lifting greater than ten pounds and no above the ground work" (claimant's Exhibit No. 1, at p. 18).

The claimant continued to treat with Dr. Vandergriff until she released him from her care in June of 2007, with the same restrictions she had assigned in May of 2007. She did refer him to a neurosurgeon due to his continuing pain and related symptoms (Claimant's Exhibit No. 1 at p. 30). The claimant saw Dr. Knox on June 19, 2007, who noted there was nothing that could be done for the claimant from a neurosurgical standpoint (Claimant's Exhibit No. 1 at p. 34, 35). During the 2007 treatments and doctor's visits, the claimant continued to work for the respondent (Record 8/8/2011 at p. 21). He testified that he continued to have problems with pain and numbness (Record 8/8/2011 at p. 22). Claimant continued to work in his pre-injury position doing refrigeration and boiler repairs, until it was necessary for him to take medical leave. The physical requirements for the job were the same as they were pre-injury. He testified that he was allowed to take breaks and get assistance with lifting from co-workers while on the job (Record 8/8/2011 at p. 22). When the medical leave ran out, the claimant was terminated by the respondent (Record 8/8/2011 at p. 24).

Then, a year plus later, in March of 2009, claimant saw Dr. Carolyn Nutter (Claimant's Exhibit No. 2 at p. 42). In a radiology report of that date, she noted:

"Multilevel degenerative disc disease. These findings are most pronounced at the L3-4 level. At this level there is a moderate sized broad-based central and left paracentral disc herniation with evidence for impingement on the left L4 root. At this level there is also bilateral L3 foraminal narrowing and mild central canal narrowing" (Claimant's Exhibit No. 2 at p. 43).

On March 23, 2009, the claimant again saw Dr. Knox who listed as his impression:

"L3-4 herniated intravertebral disc with lumbar radiculitis and radiculopathy. He also noted left L3 spondylo defect and weakness and dysesthesias" (Claimant's Exhibit No. 2 at p. 46).

Dr. Knox also noted as his plan for treatment that he would schedule the claimant for a follow up in April of 2009. They discussed a steroid injection or Medrol Dosepak. Dr. Knox also referred the claimant for a TENS unit and back brace. At that point, Dr. Knox discussed an indication for light duty or to remain off work. However, the claimant stated that he must work and if he was not there, there is no one to cover his shift (Claimant's Exhibit No. 2 at p. 46). On March 31, 2009, the claimant saw Dr. Knox, again. This time Dr. Knox recommended surgery with the following notation:

"I have recommended that he go ahead and proceed with the L3-4 extensive decompression and fusion with an open reduction of the lateral slip. He was counseled in detail. I went over our spinal model as well as his x-rays. I drew it out on his x-rays and detailed him on the extensive risks and complications."

Dr. Knox also stated that he was keeping the claimant off work until he was able to complete the surgery (Claimant's Exhibit No.

2 at p. 47). Claimant had surgery on July 28, 2009. Subsequent to surgery, Dr. Knox ordered an MRI of the brain due to concerns about a hemiplegia. The results were unremarkable (Respondent's Exhibit No. 1 at p. 30). Claimant received several other x-rays, MRIs, and scans all with negative results (Respondent's Exhibit No. 1 at p. 32, 33). On September 16, 2009, the claimant saw Dr. Knox for a post surgical visit. Dr. Knox noted the claimant was doing well from the fusion standpoint (Respondent's Exhibit No. 1 at p. 40). Dr. Knox noted some concern about right hemiparesis and sent claimant to a neurologist for further evaluation (Respondent's Exhibit No. 1 at p. 40). An MRI of the brain was conducted and was within normal limits (Respondent's Exhibit No. 1 at p. 44, 45). In November of 2009, Dr. Knox notes the L3-4 fusion appears stable and in January of 2010 Dr. Knox noted that the claimant's x-rays showed stable alignment. He also noted that the claimant felt he was coming along from back surgery (Respondent's Exhibit No. 1 at p. 50). January 10, 2010 was the last appointment with Dr. Knox documented in the record for the claimant. There is some confusion in the record as to when the claimant was to return to see Dr. Knox subsequent to January of 2010. In a letter dated April 18, 2011, Dr. Knox clarifies that the return date, as July of 2010, not July of 2011 (Respondent's Exhibit No. 1 at p. 61). There is no documentation that claimant returned, as requested, to see Dr. Knox in July of 2010, and no documentation of an impairment rating assigned to post surgery by Dr. Knox.

DISCUSSION

The claimant has asked the Commission to determine the date of the end of the healing period. Arkansas Code Annotated §11-9-102(12) defines the healing period as:

“That period for healing of an injury resulting from an accident.”

The claimant suffered an admittedly compensable injury on May 3, 2007. In a prior opinion dated January 3, 2008, the claimant asked the Administrative Law Judge to determine his eligibility for temporary total disability from the dates of May 4, 2007 until June 27, 2007. In that opinion the Administrative Law Judge determined that the claimant was entitled to temporary total disability benefits from May 4, 2007 until June 27, 2007. That opinion was not appealed. It appears that the Administrative Law Judge in the January 3, 2008 opinion based his determination of eligibility for temporary total disability and the time period for benefits on the month in which Dr. Cathleen Vandergriff released the claimant from her care to return to work. In a letter dated June 1, 2007 Dr. Vandergriff notes:

“That the claimant is continuing to have pain and associated symptoms, I would like to refer him to a neurosurgeon for evaluation and treatment. He is in agreement with this. He is released from my care to return to work with the same restrictions” (Claimant’s Exhibit No. 1 at p. 30).

The same restrictions Dr. Vandergriff refers to are the restrictions she assigned him four days subsequent to his May 3, 2007 accident in which she sent him back to work on May 7, 2007

with no lifting greater than ten pounds and no above the ground work (Claimant's Exhibit No. 1 at p. 18). The Administrative Law Judge's determination that the temporary total disability should end on June 27, 2007 appears to be based on those documents releasing the claimant back to work in June of 2007. It should be noted, that there is no evidence that the claimant at any point re-entered a healing period related to his admittedly compensable injury. There is no documentation submitted by the claimant that would support such a finding of re-entry into a healing period. The surgery from July of 2009 cannot be found to trigger the re-entry of a healing period. Although the trier of fact has considered the ramifications of the July 2009 surgery on the healing period, said surgery was found in a prior opinion dated January 30, 2009 to not be reasonably and necessarily related to the treatment of claimant's admittedly compensable injury. That opinion was adopted and affirmed. In that opinion the Administrative Law Judge denied payment to the claimant for the July 2009 surgery based on a finding that the surgery was not reasonably and necessarily related to the treatment of the claimant's admittedly compensable injury. Having considered the documentation submitted and the testimony taken at hearing, related to the issue of the end of the healing period, I find that the claimant reached maximum medical improvement [pre July '09 surgery] and his healing period ended on June 27, 2007. While it is clear that Dr. Vandergriff documented his release from her care on June 1, 2007, I find that the date submitted by the Administrative Law

Judge of June 27, 2007, is the law of the case and must be used as the date on which the claimant's healing period ended and he reached maximum medical improvement prior to the July 2009 surgery (Claimant's Exhibit No.1 at p. 30).

The second issue to be addressed is the existence and extent of permanent physical impairment. Permanent physical impairment refers to a determination of anatomical disability as opposed to a loss of wage earning capacity. The percentage of permanent physical impairment must be established before the Workers' Compensation Commission can consider a claim for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment. Similarly, any consideration of the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity may not occur until the Commission has determined the percentage of permanent physical impairment. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W. 3d 882 (2000). In the instant case, we must determine the claimant's entitlement to a permanent physical impairment rating prior to the July 2009 surgery. As noted before the July 2009 surgery was found to not be reasonably and necessarily related to the treatment of the claimant's admittedly compensable injury. In the claimant's case, he suffered a low back/lumbar injury in May of 2007 in which he was treated by Drs. Vandergriff, Knox, & Nutter. In June of 2007, Dr. Knox reviewed the claimant's MRI and x-rays and noted:

"I could discern no evidence of fracture, no evidence of instability, and no evidence of

compressive pathology. I do not believe I have any thing to offer this gentleman from a surgical standpoint. I am going to refer him back to your care [Dr. Vandergriff's care]. I spoke to his nurse and informed her of the multiple Waddell findings, specifically the inability to increase range of motion of the lumbar spine with knee flexion, his nondermatomal distribution of weakness and numbness, his significant back pain to light touch, and significant back to hip rotation as well as significant back pain with axial compression. I informed Mr. Ochoa that his problems will improve with time. I do not believe I have any to offer from a neurosurgical standpoint." (Claimant's Exhibit No. 1 at p. 34,35)

Several months after seeing Dr. Knox in June of 2007, the claimant received an MRI and a diagnosis from Dr. Carolyn Nutter on the 3rd of March 2009. Her impression is as follows:

"Multi-level degenerative disc disease. These findings are most pronounced at the L3-4 level. At this level, there is moderate sized broad-based central and left paracentral disc herniation with evidence for impingement on the left L4 root. At this level there is also bilateral L3 foraminal narrowing and mild central canal narrowing." (Claimant's Exhibit No. 2 at p. 43)

In essence, the claimant has disc problems that are pronounced at the L3-4 level. However, in June of 2007 and up through July of 2009, the claimant received no surgical intervention for his complaints. Additionally, claimant continued to work at the same job for respondent. In order to assess a permanent physical impairment rating for the claimant we must refer to the American Medical Association's Guide to the Evaluation of Permanent Impairment (Fourth Edition) chapter 3, page 113, table 75. The claimant's condition is an unoperated on herniation at the L3-4

level. Such an unoperated herniation at one level based on Table 75 analysis of the AMA Guide would result in a 5% permanent physical impairment rating to the body as a whole.

In considering the 5% impairment rating, I cannot consider the July 2009 surgery and in any way increase the permanent physical impairment rating due to the surgery or the results thereof. The July 2009 surgery has already been found in a previous opinion to not be reasonably and necessarily related to the claimant's admittedly compensable injury. Therefore, the July 2009 surgery cannot increase or play a role in increasing the percentage of permanent physical impairment that was assigned to the claimant.

Next, the claimant has asked that the Commission determine the existence and extent of permanent functional disability for loss of wage earning capacity, including permanent total disability. Permanent total disability is defined in A.C.A. §11-9-519(e) (1) as the inability because of a compensable injury or an occupational disease to earn any meaningful wages in the same or other employment. The burden of proof is on the employee to prove an inability to earn any meaningful wages in the same or other employment. A.C.A. §11-9-519(e) (2). In this matter the claimant has been assessed a 5% permanent physical impairment rating. This rating is based on the testimony and documentary evidence prior to his July 2009 surgery. It is also based on the claimant's testimony that he returned to work from May of 2007 until some time mid-2009. I have also determined that the Commission should not consider the July 2009 surgery and subsequent situations and conditions related

to that surgery, because it has already been found to not be reasonably and necessarily related to medical treatment for the claimant's admittedly compensable injury. The claimant testified that he worked for the respondent at his pre-injury job in 2007, 2008, and 2009. The claimant by his own testimony has demonstrated that he has an ability to work even with the effects of his injury prior to the July 2009 surgery. While he testified that he worked with assistance from his co-workers and with allowed breaks to rest, it is inconceivable to the trier of fact that the claimant was able to take such breaks and to receive enough assistance to allow him to continue working if his situation was so dire. Therefore, I find that the claimant is not permanently and totally disabled.

A.C.A. §11-9-102(F) (ii) (a) requires that permanent benefits be awarded only upon a determination that the compensable injury as the major cause of the disability or impairment. The facts and procedural history of this claim require the consideration of this statutory section at two different points.

First, I have found that the admittedly compensable injury of May 3, 2007, is the major cause of the claimant's disability or impairment. As such, I have assessed a 5% permanent physical impairment to the body as a whole.

Secondly, res judicata prevents me from addressing the major cause issue as it relates to the 2009 surgery and its effects. Since the 2009 surgery has been determined by prior opinion to not be reasonably and necessarily related to the treatment of the

claimant's compensable injury, the Commission cannot determine if the 2009 surgery and its after effects is the major cause of the claimant's disability or impairment.

The Commission must next address the amount of permanent functional impairment as it relates to wage loss.

Because claimant sustained an injury to a portion of his body that was not scheduled under the Workers' Compensation Act, his entitlement to permanent disability benefits is controlled by A.C.A. §11-9-522(B)(1) which provides:

"In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experiences, and other matters reasonably expected to affect his or her future earning capacity."

Under this statute when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating and it can find the claimant totally and permanently disabled based on wage loss factors. Hensley v. Cooper Tire and Rubber Company, 2011 Ark. App. 593, citing Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 288, 233, 201 S.W. 3d 449, 454 (2005). The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood, Id. The Arkansas Supreme Court has affirmed that the wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Grimes v. North American Foundry, 316 Ark. 395, 872 S.W. 2d 59 (Ark. 1994).

Here, the claimant says he can't work because of health and pain issues. He testified to continued numbness, leg issues, and back pain. However, the claimant has already demonstrated an ability to work in 2007, 2008, and 2009, prior to his July 2009 surgery. His inability to work at this point appears to be related to the July 28, 2009 surgery and its after effects, including a possible stroke or hemiplegia. Such inability does not appear to be related to his initial low back/lumbar problems. The Commission cannot consider the July 2009 surgery and its after effects in determining whether the claimant should have a functional impairment rating above the permanent physical impairment rating already assessed. Therefore, I find that the claimant is not entitled to an increased percentage of functional impairment for purposes of wage loss. He is not entitled to wage loss benefits. The claimant's inability to work post surgery is not a part and cannot be a part of this analysis. The claimant demonstrated an ability to work pre-surgery by his own testimony. While I note that the claimant suffered an admittedly compensable injury in May of 2007, and while I have found that he does have some impairment due to the admittedly compensable injury, the claimant's pool of available jobs has not been reduced due to the injury of May 2007. The nature of the claimant's education, work history, and experience as well as his own testimony at the hearing to his continued work for respondent, does not support the contention that his pool of jobs has been decreased due to his admittedly compensable injury of May 2007. It is conceivable that the

claimant's pool of jobs and wage earning capacity has been reduced by the July 2009 surgery and its after effects. However, since that surgery was not reasonably and necessarily related to the treatment of the claimant's admittedly compensable injury, that question cannot be addressed by the trier of fact.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. I find the date of the healing period to be June 27, 2007 based on the documentary evidence in the record as well as the determination made by the Administrative Law Judge in a prior opinion dated January 3, 2008, that has been affirmed and adopted.
2. Based on a MMI date of June 27, 2007, I find that the claimant is entitled to a permanent physical impairment rating of 5% based on an injury to the lower back and lumbar spine that resulted in an L3-4 herniation at one level, for which there was no surgical intervention.
3. I find that the claimant is not entitled to an increased percentage of permanent functional disability for the loss of wage earning capacity. Additionally, I find that the claimant is not permanently and totally disabled.
4. I find that the claimant's attorney is entitled to the appropriate attorney's fees

based on the existence and extent of a permanent physical impairment rating of 5%.

ORDER

The respondent shall pay to the claimant a permanent physical impairment of 5% to the lower back and lumbar spine due to the admittedly compensable injury from May 3, 2007.

The claimant is not entitled to an increase in the permanent functional disability percentage for loss of wage earning capacity.

The respondent shall pay to the claimant's attorney a fee based on the permanent physical impairment rating of 5%.

IT IS SO ORDERED.

AMY GRIMES
ADMINISTRATIVE LAW JUDGE