

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E504226/E504227/E504228

BARRY GOFF, EMPLOYEE	CLAIMANT
UNIMIN CORPORATION, EMPLOYER	RESPONDENT NO. 1
ZURICH INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JULY 29, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE FREDERICK S. "RICK"
SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by HONORABLE WILLIAM C. FRYE,
Attorney at Law, Little Rock, Arkansas.

Respondent NO. 2 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

Respondent No. 1 appeals and claimant cross-appeals
from a decision of the Administrative Law Judge filed June
18, 2002. The Administrative Law Judge entered the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction over this claim.
2. The stipulations agreed to by the parties and
set forth above are hereby accepted as fact.
3. The claimant failed to prove by a
preponderance of the evidence that the

recommended morphine pump implant is reasonably necessary for treatment of his compensable injuries.

4. A preponderance of the evidence establishes that the claimant is permanently and totally disabled as a result of his compensable injury.
5. The claimant has satisfied the requirements necessary to establish a compensable psychological injury.
6. The Second Injury Fund has no liability in this claim.
7. The claimant failed to prove by a preponderance of the evidence that medical benefits remain unpaid which are the liability of the respondents.
8. The claimant failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability compensation.
9. Respondent No. 1 controverted the claimant's entitlement to any permanent disability compensation in excess of the 10% permanent physical impairment, liability for the morphine pump, liability for a psychological injury, liability for any unpaid medical benefits, and liability for any unpaid temporary disability compensation.
10. The Second Injury Fund controverted any liability in this claim.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact

made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 1996).

For prevailing in part on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I respectfully concur in part and dissent in part from the principal opinion, which in all respects affirms and adopts the decision of the Administrative Law Judge. Specifically, I respectfully dissent from the principal opinion's affirmance of the Administrative Law Judge's

determination that a morphine pump is not reasonably necessary treatment for the claimant's compensable injury. I also respectfully dissent from the principal opinion's affirmance of the Administrative Law Judge's determination that claimant failed to prove that medical and temporary total disability benefits were not paid by the respondents. With all other aspects of the principal opinion, I concur.

SHELBY W. TURNER, Commissioner

Commissioner Yates concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that the recommended morphine pump implant was reasonably necessary for treatment of his compensable injuries, the finding that the claimant failed to prove by a preponderance of the evidence that medical benefits remain unpaid; and the finding that the claimant failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability compensation. However, I must respectfully dissent from the majority's opinion finding that a preponderance of the evidence established that the claimant was permanently and

totally disabled as a result of his compensable injury, and a finding that the claimant has satisfied the requirements necessary to establish a compensable psychological injury. In my opinion, the claimant has failed to meet his burden of proof.

The claimant sustained compensable injuries to his back and right knee while employed by the respondent-employer. These injuries were found compensable after a hearing conducted before an Administrative Law Judge. The medical records indicate that the claimant was first treated by Dr. Dennis Davidson, a general practitioner, who diagnosed an acute lumbosacral strain/sprain. Dr. Davidson ultimately ordered an MRI which revealed degenerative changes at L4-5 with desiccation of the disks and a "[l]arge accumulation of anterior epidural scar material encasing the left sided nerve root and creating a minimal indentation on the left anterolateral aspect of the thecal sac." The claimant had previously undergone back surgery in 1969. However, the MRI did not reveal any residual or recurrent herniated disks at L5-S1. Dr. Davidson ultimately referred the claimant to Dr. Scott Schlesinger, a neurosurgeon, who recommended conservative care.

The claimant was also examined by Dr. Jim Moore, a neurosurgeon, on July 12, 1995. Dr. Moore recommended a myelogram with a contrasted CT scan and electrodiagnostic

studies. Based on his clinical examination of the claimant, as well as the diagnostic studies that were conducted, Dr. Moore opined that the claimant's pain was primarily structural, and Dr. Moore recommended a discogram which was ultimately performed. However, subsequent to that procedure, Dr. Moore again opined that the claimant's pain was primarily structural and that surgery was not indicated. Dr. Moore obtained a second opinion from Dr. Thomas Fletcher, also a neurosurgeon, and Dr. Fletcher did, in fact, opine that surgery was indicated and he recommended "exploring both the L4-5 and L5-S1 nerve roots." Dr. Moore suggested a psychological evaluation prior to a final determination of whether surgery was, in fact, indicated. A psychological evaluation was performed by Dr. Winston Wilson on March 15, 1997. Dr. Wilson opined that the claimant was suffering from major depression. Dr. Moore then concluded that the claimant was a candidate for surgery, but he also recommended that an orthopedic evaluation be conducted prior to the surgery. Consequently, the claimant was referred to Dr. John Wilson, an orthopedic surgeon. After examining the claimant on August 27, 1997, Dr. Wilson questioned whether surgery would give the claimant the desired benefit of enabling him to return to gainful employment. Dr. Wilson did opine that more than 50% of the claimant's current problem was due to his compensable injuries. Then, in a

file note dated September 10, 1997, Dr. Moore reconsidered his prior recommendation of surgery in light of Dr. Wilson's psychological evaluation and in light of Dr. John Wilson's orthopedic evaluation. Consequently, surgery was not performed at that time.

The claimant subsequently sought treatment on his own initiative for depression which was causing suicidal ideations. In addition, Dr. Moore referred the claimant to Dr. Mark Hackbarth, who began treating the claimant on December 16, 1997. The claimant also returned to Dr. Moore on March 23, 1998, and Dr. Moore's report indicates that the claimant reported a worsening of his condition.

Subsequent to the April 8, 1998, hearing, Dr. Moore continued to follow the claimant. The claimant also sought treatment from the emergency room. According to the claimant's testimony, he was experiencing such extreme pain that he was unable to wait to obtain treatment from his regular authorized physicians.

On May 12, 1998, an MRI was ordered by Dr. Robert Foster. This MRI revealed findings consistent with the prior diagnostic findings. The claimant came under Dr. Foster's care after he presented to the emergency room complaining of severe back pain and low back and bilateral leg pain. Dr. Foster's report indicates that the claimant advised him that he wanted to be hospitalized in an effort

to "persuade the insurance company to allow a change of physicians." Dr. Foster made the following comments:

He is very angry with his Workmen Compensation situation. He states he needs someone to do his surgery. One surgeon told him that fusion would help and another one told him that it would not. It appears though that he wants his hospitalization to continue, and it appears that he wants his hospitalization to persuade the insurance company to allow a change in physicians. He is absolutely convinced that surgery would cure his problem. When ask (sic) if his pain were worse after surgery than before surgery and he would have to accept his pain afterwards without the use of narcotics, he stated it still would be worth it to him. At this time, I cannot see a justification for continued hospitalization as he has refused physical therapy and anesthesia assistance and currently he is laying in bed and taking his medications. I believe that he can do this at home, however, I do not recommend that he do this as he needs to be walking regularly. He is going to be discharged home on MS-Contin and Ultram. He will followup with Dr. Wesmee on an outpatient basis, if approved by his insurance, Workmen Compensation. He is currently medically stable.

The claimant returned to Dr. Moore on June 26, 1998. In his report of that visit, Dr. Moore opined that the claimant had stabilized and he again indicated that he did not recommend surgery. He also assessed the claimant with a 20% permanent physical impairment to the body as a whole as a result of his injuries. He indicated this rating

was "based primarily on the objective changes on the diagnostic studies, and the relative lack of objective abnormalities on physical examination." In a file note dated August 26, 1998, Dr. Moore opined that the claimant sustained a 7% permanent physical impairment to the body as a whole and he indicated that this impairment rating was based on the AMA Guides to the Evaluation of Permanent Impairment.

On October 7, 1998, Dr. Moore again opined that the claimant would not benefit from surgery. However, he referred the claimant back to Dr. John Wilson for another orthopedic evaluation. Dr. Wilson examined the claimant on November 4, 1998, and in his report of that date he indicated that the claimant's clinical examination had changed from his prior examinations. Dr. Wilson noted that the claimant seemed "to be deteriorating from when [he] saw him before." Then, in a report dated November 16, 1998, Dr. Wilson opined that the claimant would benefit from a decompressive laminectomy at L5-S1 and removal of the disk. The surgery was performed in mid-December of 1998. However, the medical reports indicated that within a month after the surgery, the claimant was again complaining of recurrent sciatica. In a report dated February 17, 1999, Dr. Wilson indicated that the claimant had experienced significant improvement as far as his leg pain, but that he continued to

experience difficulty with his back. However, in a followup report dated March 10, 1999, Dr. Wilson indicated that the claimant had recurrent sciatica on the left and he opined that the claimant was unable to work at that time. In a report dated August 26, 1999, Dr. Wilson stated that the claimant had reached the end of his healing period and he assessed the claimant with a 10% permanent physical impairment. In a narrative report dated January 5, 2000, Dr. Wilson stated that the claimant was unable to engage in any gainful employment. On February 5, 2001, Dr. Richard Owings, a psychiatrist, performed a psychological evaluation. Dr. Owings found that the claimant was suffering a major depressive episode and that the claimant's psychological problems were related to his health problems.

Subsequently, the claimant came under the care of Dr. Brian Nichol and Dr. Angela Lovett, pain specialists. These physicians have provided pain management treatment and they have recommended the implantation of a morphine pump.

In July of 2001, the claimant was admitted to Bridgeway Psychiatric Hospital by his wife. The claimant had demonstrated hostility and made threats toward certain individuals. He also had verbalized suicidal ideations. It was determined while he was there that his angry and violent behavior was due in part to a reaction to the narcotic medication that he had been taking.

The claimant now contends that he is permanently and totally disabled, has sustained a compensable psychological injury within the meaning of Ark. Code Ann. §11-9-113, is entitled to a morphine pump implant, and that certain medical expenses and temporary total disability benefits remain unpaid.

I find that the evidence does not support a finding of permanent and total disability. The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant'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 he 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 medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his 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 workers' future earning capacity. Such other matters are 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, he 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 considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 1982.

In my opinion, a review of the evidence indicates that the claimant is not permanently and totally disabled. The evidence shows that the claimant, during his function capacity evaluation examination, returned invalid results due to the claimant's self-limiting behavior and possible non-organic pain basis. Even so, the claimant still tested

at a level that led the FCE examiner to conclude that he was able to perform safely in a light-duty job.

The claimant and his wife presented testimony regarding the claimant's physical restrictions and limitations. However, the evidence shows that the claimant has been able to take college courses since his injury and has reported exercising a lot, as well as and walking long distances. As recently as March 16, 2000, he reported this exercise to his medical providers.

Other factors that mitigate against a finding of permanent and total disability exist in the record as well. The claimant is 52 years old and has a substantial and diverse work experience that includes 16 years in design engineering. The claimant also has experience supervising and managing up to 25 people in the design, bidding, and construction of industrial plants. The claimant has completed a one-year training program in major appliance repair at a junior college level, has a high-school diploma, and has completed several introductory-level college courses, including Psychology, Composition I, Western Civilization, Algebra, and Pre-Calculus. The claimant has also worked as a gunsmith, has experience in general maintenance, and is capable of using a computer for word processing and spreadsheet composition.

Dr. Wilson and vocational specialist Bob White have opined that the claimant could not return to work. However, Dr. Wilson's opinion regarding the claimant's ability to return to work is based merely on his visual observations of the claimant when the claimant was in his office for an examination. This opinion is not based on any objective criteria. Mr. White's report and history fail to indicate that the claimant has a 16-year history as a design engineer. Further, Mr. White apparently was under the impression that the claimant had undergone a lumbar fusion, as opposed to a laminectomy. The conclusions reached by Mr. White appear to be predicated upon far less information that was procured by Melissa Rhodes, a vocational rehabilitation counselor. Ms. Rhodes concluded that the claimant was able to work in a light-duty work. Ms. Rhodes actually provided the claimant with at least one job lead, which he admittedly did not pursue. The evidence indicates that the claimant has only applied for work at two locations since his compensable injury. Further, his testimony indicates that he has absolutely no interest whatsoever of finding employment out side of his home. Therefore, the claimant has no motivation whatever to resume working. Dr. Winston Wilson stated on March 15, 1997, that "with a lot of work and some luck, I believe this man can return to the workforce in a more challenging field than the one he left."

Last, but certainly not least, it appears that the claimant's compensable injury is not the major cause of his impairment at this point. The claimant developed a non-work related shoulder problem in 1997, which eventually led to an open acromioplasty performed by Dr. Anthony McBride on October 21, 1997. The claimant did not have a very good result from this surgery. The claimant has many limitations due to the shoulder problem which include only reaching over head with one arm, cannot work for extended periods with his arms overhead, cannot hold his hands out in front of him, and it was speculated that he may, ultimately, require an additional shoulder surgery. The claimant also suffers from non-work-related neck problems and was diagnosed with cervical radiculopathy by Dr. Charles Watson, on January 18, 2000. The claimant has undergone injection therapy at Dr. Watson's direction. The claimant admitted that his shoulder difficulties placed limitations upon his capacity to perform labor.

Therefore, after I consider all the evidence, I cannot find that the claimant is permanently and totally disabled. Accordingly, I would reverse the decision of the Administrative Law Judge.

Ark. Code Ann. § 11-9-102(5)(A)(i) (Repl. 2002)
defines compensable injury as:

An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence.

For injuries deemed to be mental injuries, Ark. Code Ann. § 11-9-102(5)(C) (Repl. 2002) states, "[t]he definition of 'compensable injury' as set forth herein shall not be deemed to limit or abrogate the right to recover from mental injuries as set forth in § 11-9-113 ..." § 11-9-113 states:

A mental injury or illness is not a compensable injury unless it is caused by a physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; ... no mental injury or illness under this section shall be compensable unless it is diagnosed by a licensed psychiatrist or psychologist and unless a diagnosis of the condition meets the criteria established in the most current issue of the diagnostic and statistical manual of mental disorders.

In considering the meaning of this statutory provision in light of the evidence presented in this claim, I note that Act 796 requires the provisions of the Arkansas Workers' Compensation Law to be strictly construed. Ark. Code Ann. § 11-9-704(C)(3) (Repl. 2002). Moreover, the General Assembly expressly admonished this Commission not to liberalize,

broaden or narrow the Workers' Compensation Statutes. Ark. Code Ann. § 11-9-1001 (Repl 2002). Thus, in applying the strict construction doctrine and considering the legislative admonishment, we cannot read anything into the Act that is not clearly stated in it's language, unless the failure to do so would do manifest violence to the intent of the General Assembly.

In my opinion, a review of the evidence indicates that the claimant is not suffering from any mental injury as a result of his physical injury. The claimant was admitted to the Bridgeway Hospital for evaluation and has been diagnosed with major depression or depressive episodes at various times. During his initial presentation at Bridgeway, the claimant related increasing difficulty with his right shoulder as one of the problems that he was suffering from. This is clearly a non-work-related factor. In fact, the claimant's chief complaint was simply that "my wife, my lawyer, and my doctor put me here." A review of the claimant's records suggest that it is his anger, rather an injury-related depression, which led to his period of hospitalization. Accordingly, I find that the facts are simply insufficient to establish that the claimant suffered a compensable psychological injury as a result of his physical injury as required by Ark. Code Ann. §11-9-113.

Goff- E504226, E504227
E504228

18

Therefore, for all the reasons set forth herein, I respectfully concur in part and dissent in part from the majority opinion.

JOE E. YATES, Commissioner