

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E004333

JOHN T. DOPIERALLA, (DECEASED) EMPLOYEE	CLAIMANT
GENERAL MOTORS ACCEPTANCE CORP., EMPLOYER	RESPONDENT NO. 1
ROYAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 4, 2005

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

Claimant represented by the HONORABLE JAMES W. STANLEY,
Attorney at Law, North Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WHITNEY MOORE
and HONORABLE MICHAEL J. EMERSON, Attorneys at Law, Little
Rock, Arkansas.

Second Injury Fund represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
order and opinion filed May 13, 2004. The administrative
law judge found that the claimant "has failed to prove by a
preponderance of the evidence that the changes to his
physical condition was the result of his compensable injury,

which would entitle him to a modification of the award and an increase in benefits." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge.

I. HISTORY

John Dopieralla (D.O.B. 3-15-52) testified that he was a high-school graduate and had attended college for two years.

The parties stipulated that the claimant sustained a compensable injury in February 1990. The claimant testified:

A. It was February the 2nd, 1990. I was in a company car, running an errand. And a car stopped in front of me quickly, and I stopped quickly to keep from hitting the car in front of me. And, when I stopped quickly, my briefcase went onto the passenger's side floor. And, as soon as my car settled down, I pulled my seat belt away from me and reached down into the floor to pick up some items. And I was struck from behind by two different vehicles. And then I was pushed into the car in front of me. When I sat back up, my neck, for some reason, went completely limp....I had to hold my head with my hands because it just went limp....

The claimant testified that after the compensable injury he began treating with Dr. F. Richard Jordan, a neurological surgeon. The claimant testified that he underwent a "facet neurotomy" on his low back in May 1991.

The claimant testified that he had only "eight days of relief from that procedure."

In February 2001, the parties stipulated that the claimant "received a 15% permanent physical impairment rating and was awarded wage loss disability for a total permanent partial disability rating of 35% to the body as a whole."

The claimant testified with regard to an event occurring in 2003:

What happened was it was June the 7th, and I was trying to - I was really getting tired of taking all the medication, and I was trying to better myself. And I had tried to walk some and go to the pool with my children and just stand in the pool....But, on that Saturday - it was 2003; yeah, 2003....I put my tennis shoes on and my shorts, and I decided I was going to take a walk.... So I walked. Some of it was uphill - not real up high, but an incline; downhill; pavement; no trails or anything; just in the neighborhood.... And I don't really know what happened. But I was going to physical therapy as I needed, and something happened. Something happened down my back. And I went to physical therapy, and I had something - I had either aggravated something, or something changed.

Dr. Jordan, the claimant's treating neurological surgeon, wrote to a psychiatrist, Dr. Raymond R. Rimmel, on July 15, 2003:

We saw John back in the office today for ongoing problems with his lumbar spine. He presents today with increasing back and bilateral leg pain, worse on the left. He was here for evaluation last in October of 2002. You might remember that he had a re-injury walking too much on June 07, 2003 which exacerbated the current back and leg symptoms....

An old MRI showed bulging discs at L2/3, L3/4 and L4/5 with some canal and foraminal compromise....

We have discussed a lumbar decompression from L3 to L5 and a simultaneous radiofrequency lumbar facet neurotomy; however, we want to obtain new studies to insure there have not been any changes since his last pictures. We made (sic) need a lumbar discogram if his changes are too diffuse.

The parties deposed Dr. Jordan on July 21, 2003. Dr. Jordan's testimony confirmed that he had performed a facet neurotomy on the claimant in 1991. The respondents' attorney questioned Dr. Jordan:

Q. So do we have different objective findings on diagnostic - the diagnostic films?

A. The diagnostic films now show more cervical spondylosis than he had before. And on the lumbar study, he had a bulging disc at L2-3, a bulging disc at L3-4, and another at L4-5, and these were causing both canal and foraminal compromise, that is the stenosis. And he had multilevel facet arthropathy. That is to say, arthropathy means that the joints are enlarged and distorted.

Q. Which joints?

A. The facet joints in the lumbar area....This time he has some striking spasm in his back and it's much more than it ever was before when I'd seen him. He had a quite palpable spasm and it

was identifiable in the muscles. It was in the left quadratus lumborum, you could outline the muscle, and in the gluteus medius on the left....

Q. Well, does Mr. Dopieralla really have what you would describe as true positive neurological findings or are they still basically negative? Other than -

A. I kind of thought I answered that just now....In that he has not heretofore had anything like this striking spasm that he has now....

Q. And, again, do you recall when I asked you back in '94, what's causing his back to hurt?

A. Well, we have more radiographic evidence now than we did before.

Q. Okay.

A. The disc changes are more evident than they were ten years ago. The facet arthropathy is more evident than it was ten years ago.

Q. What's caused the facet arthropathy to deteriorate, if you will, over the last nine or ten years?

A. We get older ten years, don't we? ... And what I would put before you is that this man probably had some degenerative changes of his spine and evidenced some CT before the accident that already showed some disc changes, abnormalities, and then had an accident which worsened or accelerated his degenerative problem. And the logic of it is fairly simple in that a normal spine probably wouldn't be affected as severely as an already abnormal one. Weak things are more easily broken than strong things. And that's really the only explanation I can give you.

The claimant's attorney questioned Dr. Jordan:

Q. Do you think that this injury he had in 1990 may have accelerated the natural aging process to some extent?

A. That's the conclusion that we've reached.

Dr. Jordan wrote to Dr. Rimmel on September 24, 2003:

We saw Mr. Dopieralla back in the office today with ongoing back and neck pain. The lumbar problems seem to be worse still.

He had a new MRI shows disc bulges at L2/3, L3/4 and L4/5 with canal and foraminal compromise. There is also a collapsed disc at the L5/S1 interspace....

We discussed surgery again with John which would include a posterior lumbar interbody fusion from L3 to S1. He plans to discuss matters with his family and then will call when he is ready to schedule the surgery. No routine return appointment was made.

A lumbar myelogram was taken on December 10, 2003, with the following impression:

1. Unusual filling defect seen in the thecal sac at the L2 and L3 level which is probably due to clumping of the nerves. The nerves are normally separated below this level. This most likely represent (sic) arachnoiditis.
2. Circumferential narrowing at the L3-4 level probably due to canal stenosis.
3. There are extra dural defects on the on the right at L3-4 and L4-5, possibly related to disc bulge/herniation.
4. A post myelogram CT will be performed and will be reported separately.

And the following impression resulted from a post-myelogram CT of the lumbar spine taken December 10, 2003:

1. There is clumping of the nerves in the mid thecal sac, beginning at the top of L2 and extending to the bottom of L3. This may well represent arachnoiditis. In retrospect, this finding was present on the MRI done in September of 2002. There is probably also thickening of the filum terminale.
2. Mild disc bulge at L1-2.
3. Right paracentral disc bulge at L3-4, combining with a more broad-based disc bulge, which compresses the thecal sac anteriorly. The pedicles are short and there is hypertrophy of the ligaments, resulting in canal stenosis.
4. Bilateral foraminal stenosis at L3-4, due to facet hypertrophy, short pedicles and disc bulge. The stenosis appears to be slightly more pronounced on the left than the right.
5. Soft tissue density, questionable disc fragment, behind the body of L4 in the left lateral recess.
6. Canal stenosis at L4-5, secondary to disc bulge and short pedicles.
7. Broad-based at L5-S1 with extension into the left neural foramen and also incomplete opacification of the left nerve root, suggesting compression from the disc bulge. There is also a degree of canal stenosis at L5-S1.

An orthopaedic specialist, Dr. Richard D. Peek, wrote to the claimant's attorney on February 5, 2004:

John Dopieralla has extreme problems with arachnoiditis and stenosis. He has a catastrophic lumbar spine problem. We could consider surgical treatment; however, he is at high risk and it may not be successful. He is going back to see Dr. Jordan since he handles his workman's compensation claim.

He is disabled from employment. I do not anticipate significant improvement in his condition. Arachnoiditis is a very bad finding in

that surgery can make that worse instead of improve it.

His condition has deteriorated to some degree. He is totally and permanently disabled from employment. Since I am not part of his workman's compensation proceeding, I am not assigning an impairment rating. His impairment rating has been assigned previously. Impairment and disability are two different conditions.

A pre-hearing order was filed on February 18, 2004.

The claimant's contentions included "entitlement to permanent and total disability benefits or additional wage loss disability benefits." Respondent No. 1 contended that it had accepted a 15% anatomical rating as well as a 20% wage loss disability; that it had paid "all of the disability indemnity benefits that are owed and due the claimant."

A hearing was held on April 14, 2004. The claimant testified:

A. I have cervical, thoracic, and lumbar damage. The problem that's changed significantly is my lower, lower lumbar.

Q. How is it different now?

A. The last two discs have almost - Well, they are already compressed. And the last one is almost fused.

Q. How is it different symptom-wise now than say it was three or four years ago - your lumbar spine? How does it feel? And, as far as your use

of your lumbar spine, how is it different, John, than it was several years ago?

A. Well, as far as the - the medications aren't as effective as they once were. The change in my spine is notably different, not only on the film but in the way I feel.

Q. How do you feel? How is it different?

A. It hurts. It hurts to sit up....

Q. In light of all your disabilities you've told us about today, do you know of any work you think you could do on a regular basis, putting them all together? Your work-related disabilities we're talking about.

A. No.

The administrative law judge found, "The claimant has failed to prove by a preponderance of the evidence that the changes to his physical condition was the result of his compensable injury, which would entitle him to a modification of the award and an increase in benefits." The claimant appealed to the Full Commission. In an order filed November 23, 2004, the Full Commission acknowledged receiving notice on October 26, 2004 of the claimant's death as verified in a Certificate of Death.

II. ADJUDICATION

The claimant sustained a compensable injury in February 1990. The case is therefore governed by Arkansas law as it

existed prior to the enactment of Act 796 of 1993. The workers' compensation statutes prior to Act 796 of 1993 are to be liberally construed in accordance with the law's remedial purposes. Farm Air Corp. v. Reader, 11 Ark. App. 72, 666 S.W.2d 717 (1984).

In finding that the claimant had not proved any changes to his physical condition, the administrative law judge relied on Ark. Code Ann. §11-9-522(1987), which provides:

(d) In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

Neither party argues that the administrative law judge erred as a matter of law in relying on §11-9-522(d).

Ark. Code Ann. §11-9-704(c)(1)(1987) provides that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical and mental findings." Moreover, doctors are not confined to any specific chart or guideline in making their evaluation of the existence or extent of physical impairment. Keller v. L.A. Darling Fixtures, 40 Ark. App. 95, 845 S.W.2d 15 (1992). Permanent partial disability can

consist of functional disability or loss in earning capacity or a combination of both. Dacus Casket Co. v. Hardy, 250 Ark. 886, 467 S.W.2d 713 (1971), citing Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968).

In the present matter, the Full Commission finds that the claimant experienced changes to his physical condition as a result of the compensable injury, to the extent that the claimant was rendered permanently and totally disabled. The parties stipulated that the claimant sustained a compensable injury in February 1990. The claimant credibly testified that his neck "went limp" immediately after the compensable injury. The claimant began treating with Dr. Jordan, and the parties stipulated that the claimant had sustained a 15% permanent physical impairment rating and 20% wage loss disability, "for a total permanent partial disability rating of 35% to the body as a whole."

The claimant credibly testified that his condition worsened in June 2003. The claimant testified that "something happened down my back" while he was walking. The claimant again began treating with Dr. Jordan. Dr. Jordan subsequently testified that the claimant's spinal joints had become "enlarged and distorted." Dr. Jordan testified that

the claimant's disc changes had become more evident, and that the compensable injury had worsened and accelerated the claimant's degenerative problem. Dr. Jordan also described "striking spasm" which he had observed upon physically examining the claimant. The Commission determines that claimant has shown changed circumstances.

In September 2003, Dr. Jordan wrote that additional diagnostic testing had shown "a collapsed disc at the L5/S1 interspace." Previous diagnostic testing had not shown this change in the claimant's physical condition. A lumbar myelogram and post-myelogram CT taken in December 2003 further confirmed the objective change in the claimant's physical condition. We also note the opinion of an orthopaedic specialist, Dr. Peek, who stated in February 2004, "His condition has deteriorated to some degree. He is totally and permanently disabled from employment."

Based on our *de novo* review of the entire record, the Full Commission finds that the he suffered a change in his physical condition in June of 2003. Pursuant to Ark. Code Ann. §11-9-522(d) (1987), the Full Commission finds that the claimant proved that as of June 2003, the claimant was permanently and totally disabled. The decision of the

administrative law judge is reversed. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(1987). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(1987).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

KAREN H. MCKINNEY, Commissioner