

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304700

BOBBY JOHNSON, EMPLOYEE	CLAIMANT
R & G MASONRY, EMPLOYER	RESPONDENT
NORTHWESTERN NATIONAL CASUALTY COMPANY, CARRIER	RESPONDENT

**OPINION FILED APRIL 18, 2005**

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

Claimant represented by HONORABLE KRISTOFER E. RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE DAVID LANDIS, Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed in part, as modified and reversed in part.

OPINION AND ORDER

The respondents appeal this case to the Full Commission from an opinion filed herein by an Administrative Law Judge on January 30, 2004. The Administrative Law Judge found, in relevant part, that (1) the claimant is entitled to permanent partial disability benefits to correspond with a 10% anatomical impairment sustained as a result of his compensable back injury of October 27, 2000; (2) the claimant is entitled to permanent total disability benefits commencing with the end of the claimant's healing period

until such time as the respondent carrier has satisfied its obligation pursuant to applicable Worker's Compensation statutes; and, (3) the respondent carrier is responsible for all reasonably related medical, hospital, nursing, and other apparatus expenses relative to the claimant's compensable back injury, to include the trial of the dorsal column simulator.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he is entitled to an award of benefits as described above. Therefore, the decision of the Administrative Law Judge is hereby affirmed in part, as modified, and reversed in part.

The claimant, a mason, sustained a compensable back injury in the form of a herniated disc on August 27, 2000, while laying block. He continued to work for the respondent employer until approximately March 12, 2001, at which time he saw Dr. William R. Hurst for back and leg pain. Dr. Hurst referred the claimant for diagnostic testing, which revealed broad base disc herniation at L4-L5. Based upon further medical evaluations and recommendations, Dr. Gregory F. Ricca recommended that the claimant undergo

decompression and a diskectomy at L4-5 on the left. This surgery, which was performed by Dr. Ricca without complication on April 17, 2001, reportedly provided the claimant with complete relief of his symptoms for approximately four to five weeks, after which time the claimant began complaining of leg pain. The claimant denied any reinjury.

A post-operative MRI taken on June 5, 2001, showed no evidence of a recurrent herniated or bulging disc at L4-5, and no apparent nerve root impingement. Although there was some scar tissue present at the surgery site, it was not thought to be the source of the claimant's new reports of pain. From his examination of the claimant on June 25, 2001, Dr. Ricca reported that the claimant had a normal gait, that he had good range of motion, no muscle spasms, and only slight weakness of dorsiflexion on the left as compared to the right. Dr. Ricca suspected that the claimant was suffering from neuropathic pain, and he warned the claimant that surgery cannot heal a damaged nerve. Dr. Ricca agreed that the claimant should continue to seek treatment from pain specialist, Dr. Savu.

On October 30, 2001, Dr. Savu performed a transforaminal lumbar epidural steroid injection at L4-5. On November 14, 2001, Dr. Savu noted that the claimant had reported "about 25 to 30% improvement in his back pain" after the injection. Dr. Savus stated that he was not surprised" with this outcome, "as the spread of the contrast through the foramen was severely limited by what appeared to have been significant scar formation at the site." Dr. Savu further stated that should additional "medical or interventional attempts" to alleviate the claimant's pain fail to "significantly improve his situation any time soon," he planned to evaluate the claimant for a spinal cord stimulation device. As of the claimant's December 11, 2001, return visit with Dr. Savu, the claimant reported gradual improvement in his left thigh and upper leg discomfort. During that visit, Dr. Savu performed a transforaminal decompressive neuroplasty on the left at L4-5, which reportedly brought the claimant "complete disappearance of the pain and numbness in the territory involved." Due to the claimant's reports of continued pain and numbness in his left leg and foot, on January 31, 2002, Dr. Savu assessed him with "failed back surgery syndrome." Dr. Savu continued

the claimant on his present medical regimen with a more targeted physical therapy approach. Dr. Savu concluded his report of that visit with the following comments:

I doubt very much he will be able to return to his previous job without any restriction. On the other hand, moderate restrictions to include prevention of repetitive lifting, bending and twisting as well as occasional periods of brief rest each couple of hours are more than reasonable and balance to offer him a reasonable level of comfort and provide him all the necessary rests to allow him to perform his daily duties without much hindrance.

On January 21, 2002, the claimant underwent an independent evaluation by Dr. Laverne R. Lovell. In a report of that evaluation, Dr. Lovell made the following comments:

NEUROLOGICAL EXAM: He has 1 of 4, equal and symmetric reflexes at the knees and the ankle reflexes are absent bilaterally. His motor strength is full throughout. The patient will not flex the lateral four toes when asked to; however, when told to stand on his toes with his shoes and his socks off, he clearly flexes these toes to maintain his balance. It is not clear to me why he is not participating in that part of the exam.

Dr. Lovell reported similar discrepancies in testing involving the claimant's tibia. In addition, the

claimant demonstrated "full strength in his gait," and the ability to heel and toe walk with "the toes extended very high on both feet, with no weakness in distribution. Based upon these inconsistencies, Dr. Lovell further stated, "Again, it is not clear to me why he is feigning weakness with motor exam using my hands." Dr. Lovell added, "The patient bends to the waist all the way down to touch the toes bilaterally with the fingertips." Dr. Lovell concluded that the claimant was experiencing "subjective symptoms" in the distal left lower extremity postoperatively, for which there was "absolutely no findings on the imaging studies or on the exam to confirm." Dr. Lovell did not think that the claimant was suffering from any sort of reflex dystrophy or severe neuritic pain, and he opined that the claimant was capable of returning to his previous job or "certainly to a wide variety of other jobs." Dr. Lovell, pronounced the claimant at MMI, assigned him with a 7% PPI rating, and gave him a prescription of Capsaicin cream.

On March 2, 2002, Dr. Ricca reevaluated the claimant and reported that there were no objective findings to confirm his neuropathic pain. However, because Dr. Ricca believed the claimant to be "honest in his history," he

recommended a dorsal column stimulator trial for the claimant, and job re-training for light duty work.

On June 12, 2002, Dr. Lovell approved by signature a letter from the claimant's medical case manager, Ms. Sharon McCarroll. In that letter, which was a recap of a recent conversation between Dr. Lovell and Ms. McCarroll, the latter confirmed that the claimant was not a good candidate for any type of dorsal column stimulator.

In August of 2002, the claimant had a pacemaker implanted, which was completely unrelated to his compensable back injury. The claimant has claimed no disability due to his heart condition.

On January 2, 2003, the claimant underwent a functional capacity assessment administered by Jim L. Keller, Ph.D., with the American Physical Therapy Center, Inc. During this test, the claimant presented a demonstrated capability of performing light to medium work.

On September 22, 2003, the claimant was seen for a second opinion by Dr. Robert E. Abraham. Based upon his assessment of the claimant's condition, Dr. Abraham opined that the claimant was capable of light to medium work duty. Accordingly, the claimant was released to work with

restrictions against bending, stooping, crawling, twisting, and lifting (no greater than 40 pounds).

In a report by vocational consultant, Mr. Edie Nichols, dated January 3, 2003, Mr. Nichols concluded that the claimant is able to work at light to medium duty, and he recommended placement efforts be made to secure physically appropriate work for the claimant "at the highest wage possible." In her vocational status report dated October 10, 2003, Ms. Melanie Davidson indicated that the claimant had made minimal effort in finding a job and contacting area adult educational opportunities during the previous two months.

The Worker's Compensation Statute requires payment of permanent partial disability benefits based upon an anatomical impairment rating as established by the American Medical Association, Guides to the Evaluation of Permanent Impairment, Fourth Edition. See, Ark. Code Ann. §11-9-522(a), (g). However, an injured worker bears the burden of proving by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Furthermore, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from

the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994).

At the conclusion of the claimant's healing period, Dr. Lovell assigned the claimant with a 7% impairment rating to the body as a whole, which the respondents accepted and paid. Subsequently, the Administrative Law Judge increased the claimant's impairment rating to 10%. According to Table 75 of the AMA Guides, the claimant would be entitled to a 10% rating pursuant to his spinal surgery if pain and rigidity were taken into consideration. However, the Commission cannot consider complains of pain when determining physical or anatomical impairment. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); See also, Ark. Code Ann. §11-9-522(g) (1) (B) & Ark. Code Ann. §11-9-102(16) (A) (ii). Moreover, any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. See, Ark. Code Ann. §11-9-704(c) (1) (B); See also, Emerson Elec. v. Gaston, 75

Ark. App. 232, 58 S.W.3d 848. The claimant's continuing complaints of pain cannot support an increase in the claimant's impairment rating, and in spite of the claimant's argument otherwise, the claimant's persistent complaints of pain are not objectively explained by medical evidence. Therefore, the claimant has failed to meet his burden of proof to establish that he is entitled to an increase in his physical impairment from 7% to 10%. According to the AMA Guides, the claimant is entitled to an 8% physical impairment, which is a 1% increase over that assigned by Dr. Lovell. Therefore, the claimant should be awarded benefits based upon an 8% impairment rating to the body as a whole.

Furthermore, the claimant has failed to establish by a preponderance of the evidence that he is permanently and totally disabled. Although it is established that the claimant can most likely not return to the heavy physical demands of his former occupation as a brick layer, the weight of the credible evidence in this case establishes that the claimant is capable of performing light to medium work. Arkansas Code Annotated §11-9-519(e)(1) defines "permanent total disability" as an inability, because of

compensable injury or occupational disease, to earn a meaningful wage in the same or other employment.

Furthermore, the statute provides that the burden of proof shall be on the injured employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. 11-9-519 (e) (2). The question of permanent total disability is an issue of fact and all relevant evidence bearing upon the issue should be considered by the Commission. Revere Cooper & Brass Co., Inc. v. Birdsong, 267 Ark. 922, 593 S.W.2d 54 (1979). Moreover, the Worker's Compensation Commission is required to consider factors other than mere physical disability in making an award of permanent total disability. In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. 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). A

claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

The claimant was 46 years old at the time of his compensable back injury. The claimant completed his high school education, and has performed at a post-high school level for reading and high school level for spelling on standardized tests. Therefore, the respondent's argument that the claimant is still relatively young and capable of completing vocational education, which will allow him to perform at a light to medium work capacity, is persuasive. Furthermore, the claimant's demonstrated lack of motivation to return to work and to pursue vocational rehabilitation training "impedes an assessment of the claimant's loss of earning capacity." Betty Cox v. Klipsch & Assoc. and Liberty Mutual Ins., Co., Arkansas Worker's Compensation Full Commission Opinion filed October 15, 1995 (No. E117076). As correctly stated by the respondent, the claimant's lack of motivation to return to work is confirmed by the fact that the claimant refused to investigate several areas of employment for "various and ever changing reasons." Furthermore, the claimant denies that his heart condition,

which required the implantation of a permanent pacemaker in August of 2002, has contributed to his inability to return to gainful employment. However, in the report of the claimant's functional capacity assessment, Mr. Kellar noted that the claimant's "cardiovascular fitness may be an obstacle for his return to repetitive heavy work."

The most compelling evidence in this claim that supports a finding that the claimant is capable of returning to some type of gainful employment, and therefore not permanently and totally disabled, is the opinions of his various physicians who overwhelmingly agree that the claimant is at least capable of light to medium employment. Therefore, taking all things into consideration, the weight of the credible evidence fails to establish that the claimant is permanently and totally disabled. In addition, the claimant's negative attitude in looking for work is an impediment to a full assessment of wage loss in this claim.

Finally, employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). Injured employees, however, have the burden of proving by a preponderance of the evidence that the medical

treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). The claimant has failed to present objective medical evidence in this claim to verify his subjective complaints of pain. Therefore, his award of additional medical treatment, specifically a dorsal column stimulator, should be denied. Dr. Lovell adequately summed up the reason that the dorsal column stimulator is not reasonable and necessary to the treatment of the claimant's compensable injury as follows:

[The claimant] does not appear to be a good candidate for any type of dorsal column stimulator. His symptoms are too vague and inconsistent. There are no objective findings either in the radiological studies or by exam that would warrant such a procedure.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the

evidence that he is entitled to 10% anatomical impairment rating, to permanent and total disability benefits, and to additional medical treatment to include the trial of the dorsal column simulator. Accordingly, the Administrative Law Judge's decision is hereby modified in part to reflect an 8% anatomical impairment and hereby reversed in part, as all other benefits are hereby denied.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.