

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E706402

BARRY MEREDITH, EMPLOYEE	CLAIMANT
BLUE GLASS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 16, 2005

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

Claimant represented by HONORABLE REX CHRONISTER, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE JEFFREY RICKARD, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision filed by an Administrative Law Judge on July 13, 2004. The compensability of the claimant's injury is not challenged. In relevant part, however, the Administrative Law Judge found that the claimant's medical treatment under the direction of Dr. Hughes and Dr. Tonymon was unauthorized, and the respondent is, therefore, not liable for the payment of this medical treatment. In addition, the Administrative

Law Judge found that the claimant is entitled to temporary total disability benefits beginning September 19, 1997 and continuing through April 1, 1998, and that the respondent is entitled to a credit for unemployment compensation benefits paid to the claimant during that time. Further, the Administrative Law Judge found that the claimant has established that he sustained a permanent physical impairment of 10 percent to the body as a result of his compensable injury. Finally, the Administrative Law Judge found that the claimant has not been "made whole" by the proceeds of a third-party settlement and that the respondent is, therefore, not entitled to a statutory lien on these settlement proceeds.

A carefully conducted de novo review of this claim in its entirety reveals that the Administrative Law Judge was correct in finding that medical treatment that the claimant received under the direction of Dr. Hughes and Dr. Tonymon was not authorized. Therefore, the respondent is not liable for payment of said medical treatment or services. Further, although the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 19,

1997 and continuing through April 1, 1998, pursuant to Ark. Code Ann. §11-9-506, the respondent is entitled to credit for any and all unemployment benefits paid to the claimant during that time. In addition, based upon the statutory provisions set forth in Ark. Code Ann. §11-9-410 and the "made whole" doctrine, the claimant has proven by a preponderance of the evidence that he was not made whole by the settlement he received as a result of his third-party claim against Farm Bureau Insurance. More specifically, the respondent has failed to provide documentary evidence which shows that the claimant received compensation from this settlement in excess of the amount required to make him whole. Therefore, the Administrative Law Judge was correct in denying the respondent a statutory lien against these settlement proceeds in the amount of \$4,775.74. Accordingly, we find that these findings of the Administrative Law Judge are correct and should be affirmed. However, we find that the Administrative Law Judge erred in finding that the claimant sustained ten percent permanent physical impairment to the body as a whole as a result of his compensable injury. A preponderance of the evidence indicates that the claimant sustained a permanent physical impairment of 2

percent to the body as a whole as a result of his compensable injury of May, 1997. Therefore, we find that the decision of the Administrative Law Judge should be affirmed with the exception of the degree of permanent physical impairment, which is hereby modified to reflect a 2 percent permanent physical impairment to the body as a whole.

In determining that the claimant had sustained a permanent physical impairment of 10 percent to the body as a whole, the Administrative Law Judge relied heavily upon the written opinion of Dr. Tonymon. The Commission is entitled to examine the basis for a physician's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled. Further, the injured worker bears the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, 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).

Dr. Tonymon correctly based the claimant's impairment rating on the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition (the "Guides"). The claimant's condition falls under Category II of Table 75 of the Guides. Accordingly, the claimant is entitled to an 8 percent permanent physical impairment rating for a surgically treated, lumbar disc lesion without residual signs or symptoms. The record clearly establishes that the claimant underwent a left hemilaminotomy at L5-S1 in 1991. This 1991 surgery, then, was the claimant's first surgery. Therefore, the surgery performed on the claimant's lumbar spine in February of 1998 was, in the words of Dr. Tonymon, a "re-do" of the claimant's previous surgery. In other words, the claimant's 1998 surgery was, in fact, his second surgery. The Guides provide that the claimant is entitled to an additional 2 percent permanent physical impairment rating for his second surgery. Therefore, although based upon his first and second lumbar surgeries combined Dr. Tonymon was correct in assigning the claimant 10 percent permanent physical impairment to the body as a whole, the respondent

is only liable for payment of 2 percent of that impairment rating, which represents the second surgery that he underwent in 1998 as a result of his compensable injury.

Based upon the above and forgoing, the Administrative Law Judge's decision is hereby affirmed in part and modified in part as described in detail above. That portion of the decision in which the Administrative Law Judge awarded the claimant 10 percent permanent physical impairment is hereby modified to reflect a 2 percent permanent physical impairment to the body as a whole.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur with the Majority's Opinion except to the extent that it reduces the claimant's permanent impairment from 10% to the body as a whole to 2% to the body as a

whole. For the reasons set out below, I dissent from that portion of the Majority's Opinion.

Dr. Kenneth Tonyman, the claimant's treating physician who performed surgery on the claimant's injured disc, opined that the claimant had a 10% permanent impairment to his body as a whole. Dr. Tonyman based that opinion on his evaluation of the AMA Guides. The Administrative Law Judge found that the rating was correct and awarded the claimant permanent disability benefits based upon that rating. However, the Majority, is reducing that award and holding that the claimant is entitled to only 2% impairment to the body as a whole. In my opinion, the Majority is incorrectly applying the AMA Guides.

Dr. Tonyman's rating is based upon the impairment the claimant sustained from **this injury**. The Majority is reducing this impairment rating based upon a similar injury the claimant sustained in 1991. They contend that, since the claimant's prior injury at that level would have resulted in some impairment, a second injury at the same level only entitles him to an additional 2%. However, in my opinion, the injury the claimant sustained as a result of this compensable injury, by itself, entitles him to receive

impairment of 10% to the body as a whole. The prior injury occurred several years before the one which is the subject of this claim. As explained by Dr. Tonyman, while the prior injury may have made the claimant somewhat more susceptible to a second herniated disc, the claimant's subsequent injury was a new event caused by his job related accident. I believe that the impairment assessed by the doctor was based upon the present injury, and that the Commission should not lessen the impairment rating based upon a prior injury which was totally unrelated to the claimant's current problem and had completely resolved with no residual effects.

Another issue which concerns me is that, prior to the hearing, the respondent had contended only that the claimant was not entitled to any permanent impairment. It was only after this matter was appealed that the respondent raised the issue that Dr. Tonyman had not correctly assessed the claimant's permanent impairment. In my opinion, it is not fair for the respondent to wait until this time to make this new argument. It is well settled law that an argument raised on appeal for the first time, cannot be considered. Had the respondent made this argument prior to the hearing, Dr. Tonyman could have been more directly questioned

regarding how he computed the rating and other factual evidence could have been developed regarding the extent of the claimant's impairment. By waiting until after the matter is on appeal to raise this issue, the respondent has prevented the claimant from developing a factual response to it.

For the reasons set out above, I respectfully dissent from the Majority's reduction of the claimant's permanent impairment rating.

SHELBY W. TURNER, Commissioner