

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104731

GUY E. MOORE,
EMPLOYEE

CLAIMANT

HARVEY MANUFACTURING,
EMPLOYER

RESPONDENT

GIBRALTAR NATIONAL INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 1, 2005

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

Claimant represented by the HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MELISSA ROSS-
CRINER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and Respondents cross appeal an
opinion and order of the Administrative Law Judge filed
September 15, 2004. In said order, the Administrative
Law Judge made the following findings of fact and
conclusions of law:

1. The parties stipulate to the employer/
employee relationship on 4/20/01, when
claimant sustained a compensable injury

to his left arm.

2. The parties stipulate that the claimant's average weekly wage of \$352.00 entitles him to TTD benefits in the amount of \$232.00 per week and PPD benefits in the amount of \$174.00 per week in the event those benefits are found to be appropriate.

3. The claimant's alleged work related neck injury has been controverted in its entirety.

4. The respondents paid the claimant TTD through 9/12/01.

5. The claimant has proved by a preponderance of the credible evidence that he sustained a compensable cervical injury on April 20, 2001.

6. The claimant is entitled to reasonably necessary medical treatment for that cervical injury.

7. The claimant proved by a preponderance of the credible evidence that he is entitled to additional temporary total disability compensation from July 18, 2003 through August 15, 2003. The claimant failed to prove by a preponderance of the credible evidence that he is entitled to any temporary disability compensation for the period between September 13, 2001 and July 17, 2003.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee allowed by applicable law on the benefits awarded herein.

9. Attorney Jerry James has not filed a lien for attorney's fees for any work that he performed in this case.

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

We therefore affirm the September 15, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion 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. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001.

Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, 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(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur with the majority in their affirmance of the Administrative Law Judge's findings that Claimant sustained a compensable cervical injury on April 20, 2001, that Claimant is entitled to reasonable necessary medical treatment, that Claimant proved by a preponderance of the evidence that he is entitled to additional temporary total disability from July 18, 2003 through August 15, 2003 and that his attorney is entitled to the maximum statutory attorney's fee allowed.

I respectfully dissent from the affirmance of the Administrative Law Judge's finding that Claimant did

not prove by a preponderance of the credible evidence that he is entitled to temporary disability compensation for period between September 13, 2001 and July 17, 2003.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the clamant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on April 20, 2001, and is therefore entitled to reasonable and necessary medical benefits and temporary total disability benefits from July 18, 2003 through August 15, 2003.

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 sustained a compensable neck injury on April 20, 2001, and that he is therefore, entitled to benefits associated with this injury. However, I concur in the finding that the claimant is not entitled to temporary total disability benefits from July 18 through August 15 of 2003.

On April 20, 2001, the claimant was helping dismount a tire on a large forklift that he and his co-worker's were in the process of "building." The claimant testified that the tires on the forklift were approximately six feet tall. The claimant stated that he was holding a bolt in place from the back side of one of the tires while another worker attempted to "break the bolt off" from the opposite side of the tire with a 3500 pound impact wrench. Apparently, the threads on the bolt stripped as the claimant's co-worker was turning the wrench, and the claimant stated that "when he spun it [the wrench], he spun me." The claimant reportedly experienced immediate numbness in both of his arms. The injury being on a Friday, the claimant did not seek medical treatment for his injury until the following

Monday, at which time he was seen by his personal physician, Dr. Dewey McAfee. Dr. McAfee diagnosed the claimant with tendonitis, he prescribed him medications, and he returned the claimant to work. When the claimant's doctor sent him back to work, the claimant filled out the appropriate paperwork in order to seek authorized medical treatment through worker's compensation. Thereafter, the claimant was seen and treated by Dr. Terry G. Green, who took X-rays of the claimant's elbow and wrist. When the results of these x-rays were unremarkable, Dr. Green diagnosed the claimant with left elbow sprain, he gave the claimant an injection for inflammation, and he took him off of work for a week. Due to marked improvement in the claimant's condition as of May 4, 2001, Dr. Green released the claimant to return to light work duty.

The claimant continued to seek medical treatment through Dr. Green for what he described as worsening symptoms. An MRI of the claimant's cervical spine taken on May 21, 2001, revealed degenerative disc disease at C5-C6, with a small midline disc herniation

seen at C5-C6. In addition, a small midline left posterolateral disc herniation was seen at C6-C7, which caused slight indentation of the thecal sac and cord displacement. In his follow-up report dated May 25, 2001, Dr. Green stated that he discussed surgical treatment with the claimant, which he scheduled pending approval by the claimant's liability carrier. Dr. Green also scheduled an MMPI and a psychological consultation. Dr. Green took the claimant off of work until after the tentatively scheduled surgery of June 14, 2001.

On June 5, 2001, the claimant underwent an independent medial evaluation by Dr. Earl Peeples. In his report of that evaluation, Dr. Peeples noted that the claimant displayed chronic pain along the paraspinous muscles of the cervical and thoracic region, which he did not believe was related to the claimant's cervical disc abnormality. Further, Dr. Peeples stated that an EMG/NCV study showed no evidence of neurologic damage or nerve injury. Dr. Peeples stated that the mechanism of the claimant's injury was suggestive of a possible brachial plexus or stretch type injury. Dr.

Peeples did not view the claimant as a surgical candidate, recommending instead that the claimant use "noninvasive" methods of treatment, such as a TENS unit.

On July 17, 2001, Dr. Charles Pearce examined the claimant. Based upon his examination and review of the records, Dr. Pearce opined that the claimant had reached MMI for his April injury. Dr. Pearce recommended a scan of the claimant's left shoulder be made to rule out a rotator cuff tear, and he suggested that the claimant be treated with steroid injections.

An MRI taken of the claimant's left shoulder taken on July 23, 2001, revealed moderate hypertrophic change of the claimant's acromioclavicular joint with evidence of a mild degenerative cystic deformation in the humeral head. Otherwise, the findings from this study were unremarkable, and there was no evidence of a rotator cuff tear. The claimant was seen in consultation by Dr. Steven Cathey on August 28, 2001. In a letter to Dr. Pearce summarizing the findings from that consultation, Dr. Cathey stated:

Chuck, I feel certain we are dealing with a musculoskeletal injury that should resolve without specific treatment. Although he was initially offered cervical disc surgery by Dr. Terry Green in Searcy, I see no clinical evidence of cervical nerve root impingement and would agree with Dr. Earl Peeples that cervical disc surgery is not indicated in this case.

Dr. Cathey continued the claimant on pain medications and anti-inflammatories, and he arranged for a two-week regimen of daily physical therapy sessions. By September 12, 2001, Dr. Cathey stated that he was convinced that the claimant suffered from comorbid depression which was having an "adverse affect on his perception of pain." Dr. Cathey still saw no indication for spinal surgery or other neurosurgical intervention at that time. Dr. Cathey instructed the claimant to "start liberalizing his activities in anticipation of going back to work at regular duty whenever he feels he can handle himself there." In a follow-up letter to Kim Battisto dated October 29, 2001, Dr. Cathey stated:

I indicated in my letter to Dr. Charles Pearce, his attending orthopedic surgeon, that I had no problem allowing Guy to return to work at regular duty at that time. Moreover, I do not believe he has sustained any permanent

impairment as a result of the injury he sustained while on the job in April of this year. Lastly, I did not place any physical restrictions on his ability to return to work.

On March 19, 2002, the claimant underwent an independent medical evaluation by Dr. Edward Saer. Based upon his physical examination of the claimant and a review of his medical records, Dr. Saer assessed the claimant with symptoms compatible with myofascial injury or cervical strain and agreed that the claimant was unlikely to benefit from surgery. Dr. Saer recommended that the claimant continue with an aggressive conservative treatment plan under the supervision of a nonoperative specialist.

An MRI taken of the claimant's cervical spine in June of 2003, confirmed degenerative disc disease at C5-C6 and C6-C7. In addition, this study showed evidence of neurological sequelae at C5-C6, causing right sided affects on the spinal cord at that level. On June 18, 2003, the claimant was examined by Dr. Ronald Williams, who performed an anterior cervical fusion and diskectomy at C5-C6 on July 18, 2003. In an operative report from

that surgical procedure, Dr. Williams noted that "no evidence of any ruptured disc was seen." Dr. Williams diagnosis of the claimant both before and after surgery was cervical spondylosis and cervical instability on the right at C5-C6, without myelopathy.

In this claim, the respondents do not dispute the validity of the claimant's work related arm injury of April 2001, for which benefits have been paid. However, the claimant has failed to prove by a preponderance of the evidence that his cervical neck condition resulted from the same incident. First, on April 25, 2001, Dr. Green, diagnosed the claimant with a sprained elbow. By May 4th, Dr. Green saw enough improvement in the claimant's condition that he released him to return to light work duty. When the claimant's symptoms reportedly persisted, Dr. Green ordered an MRI of the claimant's cervical spine, which showed the presence of degenerative disc disease in the claimant's neck with slight herniation. Based upon these findings, Dr. Green recommended surgery. However, based upon their individual examinations of the claimant and various

diagnostic studies, Dr. Peeples, Dr. Cathey, Dr. Pearce, and Dr. Saer agreed that the claimant's work related injury consisted of a stretch type injury which was thought to be musculoskeletal in nature. In addition, each of these doctors was opposed to surgery as a viable treatment option for the claimant's condition. In fact, as of July 17, 2001, Dr. Pearce pronounced the claimant to be at MMI for his work related injury, and on October 29, 2001, Dr. Cathey, released him to unrestricted work duty. When the claimant ultimately underwent neck surgery, Dr. Williams noted the presence of abnormality into both nerve root foramina; specifically, "an osteophyte that was moved across the interspace into both nerve root foramina." In addition, Dr. Williams noted that there was no herniation present in the claimant's cervical spine. Dr. Williams failed to state whether this operatively observed condition was somehow causally related to the claimant's injury two years earlier. Other than his diagnosis of spondylosis, Dr. Williams fails to render any medical opinion in this matter concerning the possible cause of the claimant's

cervical condition. Based upon the above and foregoing, it is more likely than not that the claimant's cervical condition, specifically, degenerative disc disease, was not causally related to the incident which resulted in an injury to his arm. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable neck injury on April 20, 2001.

Because I find that the claimant has failed to prove that his neck condition is compensable, an award of temporary total disability benefits should be denied. Nevertheless, I further find that the claimant has failed to prove that he is entitled to temporary total disability benefits from September 13, 2001 through August 15, 2003. As described above, according to Dr. Pearce, the claimant had reached MMI as of July 17. By October 29th of 2001, Dr. Cathey opined that the claimant could return to regular work duty. These medical opinions are consistent with the claimant's demonstrated physical abilities as observed in surveillance video taken of the claimant on August 3,

2001. Specifically, the claimant is shown in the videos cleaning his above-ground pool which involved extensive use of his upper extremities. The claimant appears to have no difficulty with the tasks demonstrated in the tapes. Thus, the claimant has shown by his own actions that he was not totally incapacitated from performing work and earning wages during the time that he claims to have been totally incapacitated. Therefore, I find that the Administrative Law Judge was correct in finding that the claimant is not entitled to temporary total disability benefits from September 13, 2001, through August 15, 2003.

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

KAREN H. MCKINNEY, Commissioner