

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E707648

FLOYD SAVAGE, EMPLOYEE

CLAIMANT

CITY OF LITTLE ROCK,
A SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 12, 2005

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

Claimant represented by HONORABLE EDDIE WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE BETTY J. DEMORY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to a 8% permanent impairment rating for his sacroiliac joint condition and a 30% loss in wage earning capacity. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

In July of 1997, the claimant was working as a police officer. He went to a disturbance call and was in the

process of arresting a man for disorderly conduct who resisted arrest when he sustained a low back injury and a right sacroiliac joint injury. The claimant underwent a sacroiliac joint fusion surgery, but he did not have surgery for his herniated lumbar disc.

This case has a long and varied history before the Workers' Compensation Commission. The first hearing in this case involved a change of physician. The second hearing involved the compensability of the sacroiliac joint injury.

In an opinion filed March 12, 2002, the Administrative Law Judge found that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment for his low back and right hip. The Administrative Law Judge found that the claimant was entitled to additional treatment that was reasonable and necessary and causally related to the claimant's compensable injury. The Administrative Law Judge further found that the claimant had a pre-existing condition in his right hip in the form of a congenital hip deformity which was asymptomatic at the time he sustained the injury in July of 1997, and the need for treatment was causally related to the injury. The Administrative Law Judge also found that the

claimant proved by a preponderance of the evidence that he remained in his healing period and was entitled to temporary total disability benefits from September 15, 1998 through January 7, 2002. Finally, the Administrative Law Judge found that the claimant failed to prove he was entitled to permanent impairment. The Full Commission affirmed the Administrative Law Judge's findings on appeal on January 9, 2003. However, the Commission vacated the finding of the Administrative Law Judge that the claimant had failed to prove entitlement to permanent impairment.

The claimant, in this new request, contends that he is entitled to permanent partial disability benefits for wage loss and an anatomical impairment for his SI joint fusion. The respondents contend that they were not presented with an impairment rating from the claimant's treating physicians following his surgery, therefore, an anatomical impairment rating is not appropriate and has not been controverted. The respondents also contend that the claimant cannot meet his burden of proof that he is entitled to any wage loss disability benefits in excess of a permanent anatomical impairment from his 1997 injury.

The Administrative Law Judge assigned the claimant a 8% permanent impairment rating based upon Table 75 of the American Medical Association Guides to the Evaluation of Permanent Impairment (4th Ed. 1993) ("the Guides"). Table 75 is the appropriate table to use when a claimant has an impairment to his spine. However, Table 75 does not address the claimant's sacroiliac joint fusion. The only table in the Guides that even references the sacroiliac joint is Table 64, which indicates that a sacroiliac joint fracture would be a 1% to 3% whole person impairment. The claimant did not fracture his sacroiliac joint, but merely had a sacroiliac joint fusion performed upon his sacroiliac joint.

Injured workers bear 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). Physical

impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

Ark. Code Ann. § 11-9-704(c) (1) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined as: "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Id. Furthermore, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests

shall not be considered objective findings." With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks and Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998). The Commission has the authority and the duty to weight medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794 (1989); Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984); Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7, 727 S.W.2d 391 (1987). Likewise, 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. However, as with any evidence, we can not arbitrarily disregard the testimony of any witness.

Furthermore, Ark. Code Ann. § 11-9-522(g) (Supp. 1997) provides that the Commission shall adopt an impairment rating guide to be used in the assessment of anatomical impairment and specifically provides the guide shall not

include pain as a basis for the impairment. In compliance with this statutory mandate, the Commission adopted the Guides with the enactment of Commission Rule 34. To the extent that the Guides allow the use of subjective criteria for the establishment of an impairment rating, the statutory definition of objective findings takes precedence.

It is clear that the Administrative Law Judge used the Guides to assess the claimant the 8% permanent impairment rating. However, the Administrative Law Judge used a table that is not in any way, shape, form or fashion, applicable to the claimant's condition. The claimant did not receive an assessment of permanent impairment by any of his treating physicians. Moreover, the medical records do not demonstrate that the claimant warranted a permanent impairment rating after the surgery. There is an assessment of an impairment rating prior to the surgery, but we find that this is not controlling. In a report dated December 13, 2002, Dr. Sadasivan, who was the claimant's treating physician for the SI joint, stated:

Mr. Floyd Savage underwent a SI joint fusion on June 19, 2001. He has recovered nicely from the surgery and is released to return to work January 7, 2002. He should be restricted to light duty for two months. He may be released

to full duty after the two-month period of time.

There is nothing in Dr. Sadasivan's report, or any other report, indicating what, if any, the impairment rating the claimant had after the SI joint surgery in June of 2001. Furthermore, the Guides fail to address an impairment involving a sacroiliac joint fusion. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent anatomical impairment.

The claimant has also requested wage loss disability benefits in addition to permanent anatomical impairment. In Wren v. Sanders Plumbing Supply, 83 Ark. App. 111, 117 S.W.3d 657, (2003) the Arkansas Court of Appeals stated:

Pursuant to the plain language of Ark. Code Ann. §11-9-522(b)(1), "the percentage" of permanent physical impairment must be established before the Commission can consider a claim for permanent partial-disability benefits "in excess of the employee's percentage" of permanent physical impairment.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no

further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained a permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). In the case presently before us the claimant failed to prove by a preponderance of the evidence that he is entitled to any permanent anatomical impairment. Therefore, the claimant is not entitled to any wage loss disability benefits.

Even if the claimant could prove he had a permanent anatomical impairment, a finding which we do not make, our review of the evidence demonstrates that the claimant is not entitled to any wage loss disability benefits.

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Cross v. Crawford County Mem. Hosp., 54

Ark. App. 130, 923 S.W.2d 886 (1996). In reaching our determination, we may consider age, education, work experience and other factors reasonably expected to affect a claimant's future earning capacity in determining wage loss disability. Id.

Mr. Savage's testimony is indicative that he is not entitled to wage loss disability benefits. He testified:

Q. Okay. Now in your deposition, when I took it back on August the 23rd, 2000, you told me that you felt like you could return to work since January 1999. Was that a correct statement?

A. I did. That sounds correct to me.

Q. Okay. In fact, I believe your testimony was, "Since January 1999 I feel physically able to do any position at the Police Department."

A. I don't know if I said "any position" but I felt like I was able to go back and work that desk job I was working.

Q. Well, we'll see if we can refresh your recollection on exactly what you said in your deposition back in August 2000. ...

A. Okay. I see it. Okay, I'm on page 44.

Q. Let me read, starting at line number 10, and see if I read this correctly. "Since January of '99 have you felt physically able to do any of the positions that they have available?"

"Since January of '99? "Yes." Answer:
"Yes." Did I read that correctly?

A. You read that correctly.

In approximately March of 2001, the claimant began to receive treatment at the Louisiana State University Health Science Center (LSU). The only history the claimant gave was that of being injured on the job. Nothing in the notes reveals to the LSU medical center that he had prior SI joint problems.

Following the claimant's treatment for his SI joint arthritis, the second hearing in this case was conducted. At the hearing, the claimant testified that his condition was much improved, in fact that was one of the reasons benefits for the SI joint fusion treatment was awarded. The fact that the treatment improved the claimant's condition was referenced as a reason the surgery was reasonably necessary. At the hearing in February 2002, the claimant indicated he was almost 100 percent. He was looking for work at that time, and even indicated he was ready to return to work for the respondent employer.

The evidence shows that the claimant stated he could work, and was in fact working until he started having

his mini strokes. The record demonstrates that in February of 2002, the claimant suffered from mini strokes. The claimant was working as a desk clerk for a motel. Since the claimant started having mini strokes, in February or March of 2002, the claimant has not looked for any work. The claimant was released to return to work by his doctor to full duty two months after his SI joint fusion. After reviewing all the evidence of the record, we cannot find that the claimant is entitled to any wage loss disability benefits.

Accordingly, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the opinion of the majority finding that the claimant failed to prove by a preponderance of the evidence entitlement to a permanent physical impairment rating for his sacroiliac joint condition and entitlement to wage loss benefits.

Administrative Law Judge Linda K. Marshall found that the claimant sustained an eight percent (8%) impairment rating for his SI joint surgery, and a 30% wage loss disability from the 1997 work-related surgery. In my opinion, the claimant has met his burden of proof entitling him to a total permanent impairment rating of 60% (10 % physical impairment rating for the SI joint syndrome and 50% wage loss benefits).

In July of 1997, the claimant was working as a police officer. He went to a disturbance call and was in the process of arresting a man for disorderly conduct who resisted arrest. The claimant sustained a low back injury and a right sacroiliac joint injury as a result of the incident. The claimant was diagnosed with a herniated disc in his back for which he has not received surgery. The

claimant did receive a sacroiliac joint fusion surgery. The claimant has participated in two previous hearings, the history of which is discussed above in the majority opinion.

The claimant was diagnosed as having a herniated disc in his lumbar spine and was assessed a 7% permanent physical impairment rating. The claimant underwent sacroiliac joint fusion surgery on June 9, 2001.

_____The claimant contended entitlement to permanent physical impairment as a result of his sacroiliac joint fusion and he contended he was entitled to permanent disability benefits greatly in excess of his permanent physical impairments.

_____The respondents contended that since the claimant has not presented an impairment rating subsequent to his sacroiliac joint fusion, they are not liable for any permanent physical impairment and they further contended that the claimant is not entitled to any permanent disability benefits based upon wage loss.

The Administrative Law Judge assigned the claimant a 8% permanent physical impairment rating based upon Table 75 of the AMA Guides. Table 75 is the appropriate table to use when a claimant has an impairment to his spine. However,

according to the Guides, the chapter on the musculoskeletal system "includes sections on the upper extremity, the lower extremity, the spine, and the pelvis." The sacroiliac joint is a part of the pelvis, therefore the appropriate section of reference in the Guides is section 3.4. In my opinion, the appropriate reference in the Guides for the claimants sacroiliac joint fusion would be on page 131, section 3.4 which states in relevant part:

Disorder	%Impairment of the whole person
3. Healed fracture(s) <i>with</i> displacement, deformity, and residuals sign(s) involving: ... f. Sacrum, into sacroiliac joint	10

I feel that this is the appropriate section of the Guides because during the healing of a sacroiliac joint fusion the body heals as though it was healing a fracture. During the surgery all the cartilage in the sacroiliac joint was removed and a bone graft was used to aid in the fusion of the bones. According to the Spine University website: "Without the articular cartilage of the joint, the body treats the two raw bone surfaces just like a fracture and

tries to heal them as it normally would any broken bone.”
(<http://www.spineuniversity.com/public/spinesub.asp?id=89>).

The existence of the SI fusion in and of itself constitutes evidence of permanent impairment because the motion lost as a result of the fusion can never be replaced and it is therefore a permanent condition.

In making determinations regarding the existence and extent of anatomical loss of use, we are not limited solely to medical evidence.

In a progress note dated July 15, 1999 Dr. Stuart I. Phillips states:

There is a question of whether or not his sacroiliac syndrome is associated with objective findings. The answer is that he has a Trendelenburg gait and Trendelenburg signs. Both are objective signs of sacroiliac abnormalities.

...

He is unable to return to work. The sacroiliac syndrome gives him a 10% loss of function of the body as a whole according to the AMA Guide.

Therefore, the claimant has met his burden of proving that his physical impairment is supported by objective and measurable physical findings.

The Commission may assess its own impairment rating rather than rely solely on its determination of the validity of ratings assigned by physicians. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003). The Court has held in cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, the Commission has the duty to determine whether the claimant has met his burden of proof by using the AMA Guides when determining the existence and extent of permanent impairment. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

The claimant has been assessed by Dr. Ronald N. Williams with a 7% whole person impairment for his nonoperatively treated herniated disc in the lumbar spine which was accepted by the respondents. In a response to a May 5, 1999 letter from the claimant, Dr. Stuart I. Phillips states:

...The doctor is exactly right - the 7% disability for an unoperated lumbar disc is exactly out of the AMA Guide. As you note, he did not rate you for your sacroiliac problem and you do indeed have a sacroiliac problem, and that would add another 10% of the body as a whole....

Although this impairment rating was assessed before the claimant's surgery, it is still a valid rating since many times the Guides will assess extra percentages following surgeries; whereas it is quite unusual to lessen the percentages in relation to relief of pain after the surgery has been performed.

It is my opinion, that more weight should be given to Dr. Phillips assessment of the claimant's impairment rating that is supported by the Guides, than to Dr. Sadasivan's lack of assigning an impairment rating. Dr. Phillips has seen the claimant many times whereas Dr. Sadasivan was only the surgeon for claimant's SI fusion surgery. Accordingly, it is my opinion, that the claimant has met his burden of proving by a preponderance of the evidence that he is entitled to a permanent physical impairment of 10% to the body as a whole.

The claimant has also contended that he is entitled to wage loss disability benefits. Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

In my opinion, the record supports a finding that the claimant has met his burden of proving that he is entitled to 50% in wage loss disability benefits.

The claimant has a twelfth grade education, he is 51 years of age. The claimant worked for the City of Little Rock for seven and one-half (7 ½) years prior to his 1997 injury and before that he worked for the police department at Southern State University in Magnolia, Arkansas and before that he worked for the Houston Police Department for fifteen (15) years. At the time of his injury while a police officer for the City of Little Rock the claimant was earning \$36,997.00.

The claimant testified that he worked for the police department for approximately 13 months after his injury and that in August of 1998, he ended up having to stop work because the City actually put him on a harder job. The claimant also testified that he was willing to try to do some kind of work for the City of Little Rock after his SI surgery, but they did not allow him to return to work.

The claimant testified that he attempted to work at a motel but was unable to perform the job because of his back and hip pain and also because of TIA's. In regard to the TIA's, the claimant testified that he does not have any physical problems and was not placed on any permanent

restrictions. The claimant testified that he has looked for work that he would be capable of performing.

In a second opinion report on August 6, 1998

Dr. Stuart Phillips stated:

His inability is in walking, climbing stairs, bending, stooping and lifting weights of over ten pounds. As to whether or not he is ever going to get well, I don't think so. This has been going on since July of 1997 and I think he will need a job in a protected environment that doesn't require him to bend and stoop, work in the stooped position and lift weights, climb stairs, stand for long periods of time, walk for long periods of time for the foreseeable future. If any surgery was ever contemplated, this man would need a discogram and post-discogram CT and a sacroiliac anthrogram. He would probably need both his lumbar disc and his sacroiliac joint fused. That means that he wouldn't be able to be restored to vigorous health and ability to work unrestricted as a police officer.

In a letter dated August 18, 1998 Dr. J. Greg Pesnell states:

Mr. Savage is a patient of mine since 1988.
...

This patient most recently was seen by Dr. Phillips, an orthopedic surgeon who recommended surgery to correct his problems. I personally have examined and treated Mr. Savage on several visits and have examined his x-rays and MRI's. I agree and concur with Dr. Phillips

findings. I also think he is disabled to do his job as a police officer.

Dr. Robert E. Holladay offered the following restrictions for the claimant in a January 1, 2003 report:

Mr. Savage is physically capable of sitting, use of his upper extremities for grasp, fine manipulation, pushing and pulling, and reaching overhead. He is capable of sitting, standing, or walking for periods up to 45 minutes to an hour before he takes a position break. He is capable of sitting, standing, or walking for a total during the day of approximately 4-5 hours.

At this time, Mr. Savage should refrain from frequent repetitive bending, any heavy lifting of weights that weigh more than 25 pounds on a regular basis.

Dr. Holladay diagnosed the claimant's primary condition as post-op fusion right sacroiliac joint. Secondarily, Dr. Holladay diagnosed chronic pain syndrome, anxiety and depression. He made no comment about TIA's or any other health condition not related to the claimant's job related injury. Considering the restrictions that Dr. Holladay placed upon the claimant, it is clear that he could not return to general police work because of the possibility of having to handle combative suspects and

assist in moving people or property in motor vehicle accidents.

The claimant testified that he regularly takes prescription medications including Ultraset, Parafon and Bextra. He testified that the Ultraset causes nausea sometimes and that the pain causes him a problem sleeping.

The claimant testified that he was making approximately \$5.15 an hour when he attempted to work for the motel. He also testified that he only worked three days a week for a total of two or three weeks because the job made his back hurt a lot more.

The Administrative Law Judge properly considered various vocational factors in this case and the decision to award wage loss disability benefits is consistent with the preponderance of the evidence. In fact, when I consider that the claimant was earning approximately \$37,000.00 at the time of his injury and can no longer return to the type of employment that he performed for over twenty (20) years and that he is restricted to sitting, standing or walking for a total during the day of approximately 4 to 5 hours, I feel that the wage loss disability benefits should be modified to 50%.

For the foregoing reasons, I must respectfully dissent. The Administrative Law Judge's decision should be modified to reflect a total permanent impairment rating of 60% (10 % physical impairment rating for the SI joint syndrome and 50% wage loss benefits).

SHELBY W. TURNER, Commissioner