

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403161

RICKY STEWART, EMPLOYEE	CLAIMANT
GAITHER'S APPLIANCE, EMPLOYER	RESPONDENT NO. 1
WESTPORT INSURANCE CORPORATION, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED APRIL 24, 2007

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

Claimant represented by the HONORABLE NELSON V. SHAW,  
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE,  
Attorney at Law, Little Rock, Arkansas.

Second Injury Fund represented by the HONORABLE DAVID L.  
PAKE, Attorney at Law, Little Rock, Arkansas.  
Decision of Administrative Law Judge:

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

OPINION AND ORDER

Respondent No. 1 appeals and the claimant cross-appeals  
an administrative law judge's opinion filed March 17, 2006.  
The administrative law judge found that Respondent No. 1  
should pay the claimant a 10% permanent impairment rating.

The ALJ found that the claimant did not prove he was entitled to wage-loss disability, and that the claimant did not prove he was entitled to medical treatment or pain management after April 21, 2005. After reviewing the entire record *de novo*, the Full Commission affirms the ALJ's finding that the claimant proved he was entitled to an anatomical impairment rating, but we find that the claimant proved he was entitled to a 12% rating. We reverse the administrative law judge's finding that the claimant did not prove he was entitled to wage-loss disability or additional medical treatment. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 15%, and that the claimant proved he was entitled to additional medical treatment as recommended by his treating physicians.

I. HISTORY

Ricky Dan Stewart, age 52, testified that he attended school through the 11<sup>th</sup> grade. Mr. Stewart testified that he served in the United States Army from 1972 through 1978, working first as a motor pool sergeant and then making dentures. The claimant testified that he obtained a General Educational Development diploma while enlisted in the Army. Following his honorable discharge, the claimant testified,

he built houses for his father and worked at General Dynamics for 90 days, performing paperwork. The claimant then worked for a year as an appliance repair technician.

The claimant testified that he attended technical school and obtained a certificate to repair household appliances such as washers and dryers. The claimant testified that, beginning in about 1981, he worked as a home appliance repairman for General Electric. The claimant testified that he left GE in about 1990 and built houses for one year before becoming employed at Gaither's Appliance in about 1991. The claimant testified that the respondent-employer hired him as "a service technician, in-home repair technician," and that he worked on "washers, dryers, refrigerators, stoves, microwaves, dishwashers, pretty much anything in the house." The claimant testified that the work required frequent pulling, lifting, climbing, and squatting.

An MRI of the claimant's cervical spine was taken in July 2000, with the impression, "1. HNP extending across the canal anteriorly at the C3-4 level compressing the subarachnoid space anteriorly and the nerve root sheath, worse on the left."

In October 2002, an MRI of the claimant's cervical spine was taken and was compared to the July 2000 MRI: "1. No change in the stenosis and narrowing of the nerve root sheaths bilaterally at C3-4. 2. Minimal to moderate stenosis at 5-6 as above with moderate narrowing of the nerve root sheaths bilaterally."

The claimant testified that he had suffered from swelling in his neck since August 2003 as a result of "pulling an air conditioner and reinstalling one on a service call."

An MRI of the cervical spine was taken in October 2003: "1. Moderately severe narrowing of the nerve root sheaths bilaterally at C3-4 and C5-6 with a moderate stenosis, unchanged. 2. Minimal narrowing in the AP plane at 4-5."

A patient history in October 2003 indicated that the claimant had complained of neck pain for three years and that he had "jammed neck in doorway overhang" in August 2000.

Dr. Scott L. Blumenthal examined the claimant in October 2003 and stated, "MRI scan is reviewed. He has disc bulges at 3-4 and 5-6 resulting in bilateral neuroforaminal stenosis, perhaps a bit of central stenosis at 3-4, but no signal change within the cord." Dr. Blumenthal diagnosed,

"Cervical radicular syndrome with possible left elbow dysfunction as well."

Dr. Blumenthal noted in November 2003, "Results of his myelogram and post myelogram CT confirm the MRI findings of three-level disease, 3-4, 4-5, 5-6, with varying degrees of stenosis."

The parties stipulated that the claimant sustained "a compensable back injury" on March 19, 2004. The claimant testified that he and co-worker Harold Brown had moved a double oven in order to perform a repair. The claimant testified on direct:

Q. After you made the repairs, tell the Judge what happened.

A. After we were made the repair (sic) and we did our checks but before we installed it we put the racks back in and everything back in and everything back together. At that time is when we went to reinstall the oven back into the hole that it had come out of. Upon lifting the appliance, Harold Brown being - he's a little shorter than me. He's probably four inches shorter than I am. When we picked the oven up, as we were going back in with it, when we got to the point where we were just a couple of inches or so back from the opening, to having it to the height to put it in, he basically had run out of any arm - he was at his maximum that he could do and when he was, I gave it the last jerk to get it up into the hole. When I did that, it was like - it was almost like

we had cut the power back on to the oven and 240 volts of electricity shot straight through me, all the way through my shoulder blades and down my back.

Q. What happened after you felt this?

A. At the time I probably made some sort of a sound, I don't recall, but I told Harold, get the oven, get the oven, I can't hold it. We already had it in the hole so he at that time slid the oven back in and I was on my way out the door from nausea. I was physically ill from the pain....The pain at that time was in my back, in between my shoulders, and in my neck....

Q. What type of physical problems were you experiencing after March 19, 2004?

A. After March 19, 2004, sir, I have experienced swelling, pain in my neck, pain in my arms. I've had a tingling sensations (sic) in my arm, also some numbness in my fingers. Basically I really just couldn't do nothing.

Q. Have you ever had any of those problems before March 19, 2004?

A. Not to that extent, no, sir.

Q. What was different about them?

A. What was different about it was that I was just about totally incapacitated. I couldn't do much of anything.

Q. Before or after?

A. After.

Q. After the injury?

A. Yes, sir.

Harold Brown testified and corroborated the claimant's testimony.

The claimant testified that he did not work after March 19, 2004.

The record indicates that a physician saw the claimant on March 29, 2004 and diagnosed chronic neck pain and cervical strain.

The claimant testified that the respondent-carrier sent him to Dr. Warren D. Long. The claimant treated with Long, a neurological surgeon, in May 2004. Dr. Long noted, "the problem is he does have a C6 nerve root impingement involving the C6-7 interspace, and probably the C5-6 interspace on the left, and to a certain extent, the right." Dr. Long diagnosed "Cervical spondylosis with left radiculopathy, possibly at C5-6." Dr. Long recommended additional diagnostic testing and opined that the claimant was an excellent candidate for surgery.

An MR of the claimant's cervical spine was taken on May 25, 2004:

There is mild to moderate posterior disk bulging at C3-4 and C5-6 and mild posterior disk bulging at the C4-5 level. On axial images, at C3-4, there is moderate broad-based posterior disk

bulging that completely effaces the anterior CSF and abuts the cord. Minimal posterior CSF space is maintained. Overall, there is mild AP canal stenosis. Similar findings are present at C4-5 and C5-6. Mild posterior disk bulging at C3-4, C4-5 and C5-6, broad-based and smoothly effacing the anterior CSF to a mild to moderate degree perhaps producing mild AP canal stenosis although some posterior CSF space is still maintained and the central portion of the canal measures greater than a centimeter in AP dimension.

The impression from a cervical spine myelogram in June 2004 was, "C spine myelogram shows posterior disc bulging/osteophytes from C2 to C6 levels with central canal stenosis most prominent at C3-4 level."

The claimant testified that Dr. Long referred him to Dr. David Cavanaugh. Dr. Cavanaugh, a neurosurgeon, examined the claimant in June 2004 and assessed the following: "1. Cervical spondylosis without myelopathy. 2. Neck pain due to the above. 3. Arm pain due to the above without definite evidence of radiculopathy other than sensory changes in the left C7 distribution....I told him I am very reluctant to consider surgery based on the current studies showing so many levels involved."

Dr. Cavanaugh stated the following on June 23, 2004:

I reviewed his CT/myelogram from Christus-Schumpert Highland from last week. This is an excellent quality study and does show significant spondylosis at C3-4 with spinal stenosis and some spinal cord flattening. At C4-5 and C5-6 he has spondylosis with bilateral foraminal narrowing. At C6-7 this level looks all right. At C2-3 there is a small midline bulge of no clinical consequence.

I called and discussed this with the patient. I told him although I was not as impressed with his original study, this study does show significant changes and I would recommend proceeding with an anterior cervical discectomy, fusion and anterior instrumentation C3-4, C4-5 and C5-6. Tentatively this will be scheduled at Schumpert Medical Center on 6-30-04 pending insurance approval.

Dr. Cavanaugh performed the following procedure on July 21, 2004: "Microsurgical anterior cervical discectomy, C3-4, C4-5 and C5-6 with bilateral foraminotomies, machined bone spacer allograft fusion with anterior instrumentation with 60 mm Synthes small stature plates C3-4, C4-5 and C5-6." Dr. Cavanaugh's pre-operative, post-operative, and intra-operative findings were as follows: "Cervical spondylosis, C3-4, C4-5, and C5-6."

The claimant followed up with Dr. Cavanaugh and his staff after surgery.

The claimant testified that he did not think surgery had helped him: "I really haven't had any - I still have a lot of swelling. I still have a lot of pain. The only thing - I was told that I had a pinched nerve and I believe that he did remedy that, but outside of that, that's pretty much the only difference that I have noticed."

Following electrodiagnostic testing, Dr. Reginald J. Rutherford reported on January 13, 2005: "The nerve conduction study and needle examination are normal. There is no evidence via electrodiagnostic parameters to suggest cervical radiculopathy, brachial plexopathy, entrapment neuropathy or peripheral neuropathy. By description Mr. Stewart suffers from mechanical spinal pain. Referral for pain management should be considered."

Dr. Cavanaugh noted on January 27, 2005, "We had some discussion about his attitude toward his chronic pain problem. He wanted to let me know when he said he was ruined, he just meant from his previous work, but he stays very active, and wants to do some type of work. We discussed vocational rehabilitation. I feel at this point, he needs a Functional Capacity Evaluation so MMI can be determined. He also needs pain management referral and his case manager will work on that."

The following conclusions resulted from a Functional Capacity Evaluation of the claimant on February 7, 2005:

Mr. Stewart underwent functional evaluation this date with reliable results for effort. Mr. Stewart demonstrates the ability to perform work at the MEDIUM Physical Demand Classification as determined through the Department of Labor for an 8-hour day with the above limitations.

Medium Work is exerting 20 to 50 lbs of force occasionally, and/or 10 to 25 lbs of force frequently, and/or greater than negligible up to 10 lbs of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work....

Dr. Cavanaugh planned the following on April 21, 2005, "I have told him once again I feel that his symptoms are stable, and he has reached maximum medical improvement at this time. I previously reviewed his Functional Capacity Evaluation, and agree with its findings. He is not awaiting occupational medicine evaluation to give him a disability rating. He cannot see the pain management group until that has all been done." Dr. Cavanaugh assessed, "1. Status post ACDF at C3-4/C4-5/C5-6 with anterior instrumentation, 7-21-04. 2. Persistent neck pain. 3. Persistent left arm symptoms, stable."

The claimant testified that he was paid temporary total disability compensation until the finding of maximum medical improvement.

The claimant saw Dr. Bruce L. Safman on May 5, 2005:

The basis of the impairment rating will be the fact that he has had a three level cervical fusion. I will try to obtain copies of his MRI from 2003 and compare with that done in 2004. The patient has had preexisting problems of a similar nature. The determination that this is a new injury would be based on the MRI findings. Based on the fact that he has had a three level fusion Table 75, page 113 of the Guides to the Evaluation of Permanent Impairment, Fourth Edition would give him a 10% disability rating based on single level spinal fusion in the cervical spine with residual signs and symptoms with an added 2% for additional two levels leaving a 12% whole person impairment rating.

James Harper, a representative of Dr. Cavanaugh, noted on July 15, 2005:

He returns today stating that things are unchanged and he continues to have significant symptoms with neck pain radiating down the left arm to the biceps....He states the only thing he has been able to do is some slight maintenance work for apartments, but cannot lift anything over 5 or 10 lbs. When we had seen him last, we had recommended pain management evaluation, but apparently this has been denied through his workman's comp....We will be glad to send him a letter in reference to pain management, as I feel this will

certainly be needed, and possibly be a long-term benefit for him....This patient is seen and examined by myself, as well as Dr. Cavanaugh.

On or about August 10, 2005, Dr. Long filled out a Medical Opinion form. Dr. Long indicated that the claimant's compensable injury was the major cause of the claimant's disability and need for medical treatment. Dr. Long indicated that the claimant needed surgery.

A pre-hearing order was filed on August 22, 2005. The claimant contended, among other things, that he was entitled to "permanent partial disability benefits, additional travel and medical expenses and attorney fees associated with his March 19, 2004 compensable injury. Claimant further contends he is entitled to wage-loss disability benefits and vocational rehabilitation."

Respondent No. 1 contended, among other things, that "most of the claimant's 15% rating is pre-existing in nature and that the claimant was symptomatic at the time of the injury. Secondly, Respondents No. 1 contend that the claimant does not have any wage loss disability. If he does have wage loss, it is due to a combination of present problems and his pre-existing disability. Further,

Respondents No. 1 contend they have accepted and paid a 3% permanent impairment."

Respondent No. 2 contended, among other things, that the claimant "must decide prior to a hearing on the extent of his disability whether he is going to request job placement or a program of vocational rehabilitation."

The parties agreed to litigate the following issues:  
"1. Whether the claimant is entitled to additional TTD benefits as a result of his March 19, 2004 compensable injury (the claimant withdrew this issue at hearing). 2. Whether the claimant is entitled to additional medical treatment related to his March 19, 2004 compensable injury. 3. To what extent, if any, the claimant is entitled to PPD benefits due to his March 19, 2004 compensable injury. 4. Whether the claimant is entitled to vocational rehabilitation due to his March 19, 2004 compensable injury. 5. Whether the claimant is entitled to wage-loss disability benefits, and 6. Attorney fees."

Dr. David H. Berns, a neuroradiologist, corresponded with Midwest Diagnostic Management on November 30, 2005:

I have been asked to provide a comparison study on two different MRIs on Ricky Stewart....In conclusion, the two studies; one from October 6, 2005 (sic) and the other from May 25, 2004,

show no great interval change. I do not believe that the patient developed substantial further pathology on the latter study. I do not believe that the study of May 25, 2004 shows any acute disease....

The parties deposed Dr. Cavanaugh on December 2, 2005. Dr. Cavanaugh noted the claimant's history, beginning in August 2000, of periodic chest pain, left arm pain, and anterior neck pain. Dr. Cavanaugh testified that a post-injury CT myelogram had shown "significant changes," including cord compression, when compared to previous diagnostic studies. Dr. Cavanaugh agreed that the claimant did not have "a soft ruptured disk."

The respondents' attorney questioned Dr. Cavanaugh:

Q. What's the purpose of the decompression? What are you trying to accomplish?

A. Relieve compression on the spinal cord and the nerves, and through this approach through anteriorly I would also fuse the neck. And the purpose is to relieve symptoms, primarily nerve symptoms, as well as some mechanical symptoms of neck pain. We tell patients neck surgery of this nature is not for neck pain, it is more for the neurologic symptoms of nerve root compression or spinal cord compression....

Q. In this situation, does it appear to you that this was just a progression of his stenosis and spondylosis?

A. Well, certainly from those reports, yes. By the patient's history that I obtained, which is what I have to go on, it was worsened by the event that he described as far as his symptoms.

Q. All right. But as far as the actual condition, does it appear that - can you say within a reasonable degree of medical certainty that his stenosis or spondylosis was worsened by that incident?

A. Not as far as from the anatomical standpoint. Again, it would be more by the symptoms that he gave me by history....

Q. Now, as far as impairment, I understand he got a 12-percent rating. That would be for doing the compression of the three levels; is that correct?

A. And I do not know. I do not get into ratings and percentage. I refer that to someone with occupational medicine experience and would defer to their recommendations.

Q. As we sit here today, can you state that any of his permanent impairment was due to the March 19 incident?

A. Well, I don't think I could say that it - certainly it all was not due to that. I don't think I could say that none of it was due to that. But obviously you have shown records that indicate that they were certainly present beforehand and symptoms remain similar throughout that time period even before the injury, after, and after surgery. As we always say, there certainly can be aggravation of underlying conditions by an injury, and

he probably had some of that; however, it is pretty apparent that his symptoms remain pretty constant.

Q. Okay. Would you say at least 50 percent, if not more, of his impairment was due to his pre-existing problems?

A. I would certainly say at least 50 percent, if not more, was, yes.

A hearing was held on December 20, 2005. At that time, the parties agreed not to litigate the issue of the claimant's entitlement to vocational rehabilitation.

The claimant testified on direct:

Q. Do you feel like you need further medical treatment today, Mr. Stewart?

A. Yes, sir.

Q. What do you need this medical treatment for?

A. Well, like I say, I have a lot of pain, a lot of muscle spasms, headaches really bad, I get headaches almost daily. I was told that they were cervical headaches is what the term was that was given to me.

Q. Had you had these headaches before March 19, 2004?

A. No, sir.

Q. They came up afterwards?

A. Yes, sir....

Q. How is your flexibility now as compared to before this injury that you have testified to?

A. Well, I'm pretty limited in my movement, in the range of movement of my head and my neck. I can only turn so far left or right. I can look up or bend my neck in a position to where - you know, for two or three minutes is about the maximum that I can do that without having pain.

Q. Did you have any flexibility problems prior to March 19, 2004?

A. No, sir. I was able to do anything that I wanted to do.

Q. Could you do that appliance repair work today?

A. No, sir. If I had to go back to work today, I wouldn't make it. If I made it the first day, I wouldn't make it the second.

The respondents' attorney cross-examined the claimant:

Q. Have you looked for work anywhere else?

A. No, sir.

Q. Were you interested in trying to find work?

A. No, I wasn't able to work, sir.

Q. Well, now, you were contacted by Heather Naylor, weren't you, of Rehabilitation Management?

A. Yes, sir.

Q. And from what I understand here today, you all declined her services. Is that correct?

A. We did not decline her services, we declined to speak to her until after January.

Q. Well, did you understand that coming here today and asking for permanent disability that you are waiting (sic) rehabilitation?

A. That's fine by me.

Q. But you understood when you came here today that you all had made the decision not to visit with Ms. Naylor, correct?

A. Yes, sir.

The administrative law judge found, in pertinent part:

4) The claimant has proven by a preponderance of the evidence that Respondent No. 1 should pay the claimant for a 10% permanent whole body impairment based on the PPD rate stipulated to herein, and that the claimant is entitled to the maximum statutory attorney's fee allowed by Arkansas Law consistent with the findings herein.

5) The claimant has failed to prove ... that he is entitled to any wage loss disability benefits.

6) The claimant reached MMI on 4/21/05 and is not entitled to any medical treatment or pain management after 4/21/05.

Respondent No. 1 and the claimant appeal to the Full Commission.

## II. ADJUDICATION

### A. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The administrative law judge found in the present matter, "The claimant reached MMI on 4/21/05 and is not entitled to any medical treatment or pain management after 4/21/05." The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable injury on March 19, 2004 and the claimant was subsequently diagnosed with cervical strain. In July 2004, Dr. Cavanaugh performed surgery at three cervical levels. The claimant testified, however, that he still suffered from pain following surgery. Dr. Rutherford examined the claimant in January 2005 and opined that a pain management referral

should be considered. Dr. Cavanaugh agreed that the claimant needed a pain management referral.

The Full Commission recognizes that Dr. Cavanaugh assessed maximum medical improvement on April 21, 2005. Nevertheless, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004). Dr. Rutherford and Dr. Cavanaugh both opined that the claimant needed a pain management referral to treat his neck pain. We also note Dr. Long's opinion in August 2005 that the claimant might require additional surgery. The claimant testified at hearing that he needed additional medical treatment for the symptoms he experienced following the compensable injury of March 19, 2004. The Full Commission finds that a referral for pain management as recommended by the treating physicians is reasonably necessary in connection with the claimant's compensable injury.

B. Anatomical Impairment

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-

9-102(F)(ii)(a). 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. Ark. Code Ann. §11-9-102(F)(ii)(b). "Major cause" means more than fifty percent (50%) of the cause. Ark. Code Ann. §11-9-102(14)(A).

In order to assess anatomical impairment, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993). See, Ark. Code Ann. §11-9-522(g); Commission Rule 099.34. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B).

The administrative law judge essentially found in the present matter that Respondent No. 1 was liable for a 10% anatomical impairment rating. The Full Commission finds that the claimant proved he was entitled to a 12% anatomical impairment rating. We recognize that the claimant suffered from pre-existing cervical stenosis, as reported no later than October 2002. The parties stipulated, however, that

the claimant sustained "a compensable back injury" on March 19, 2004. The record indicates that the claimant subsequently sought medical treatment primarily for his neck and cervical spine and the respondents did not controvert this treatment. Dr. Long examined the claimant following the compensable injury and noted that the claimant had an "impingement" at the C6 nerve root. There was no medical opinion before the compensable injury indicating that the claimant suffered from an impingement.

In June 2004, Dr. Cavanaugh noted that diagnostic studies showed "significant changes" in the claimant's cervical spine following the compensable injury. Dr. Cavanaugh performed surgery at C3-4, C4-5, and C5-6. Dr. Cavanaugh pronounced maximum medical improvement on April 21, 2005 and the claimant was referred to Dr. Safman for an impairment rating. Although the respondents at deposition sought Dr. Cavanaugh's opinion with regard to the major cause of the claimant's anatomical impairment, Dr. Cavanaugh expressly testified that he did not assign ratings. Dr. Cavanaugh also testified that he would defer to another physician's opinion with regard to the extent of the claimant's anatomical impairment. We also are aware of Dr. Berns' letter opinion indicating that post-injury diagnostic

testing showed "no great interval change" and no "substantial further pathology." Dr. Berns' use of the words "great" and "substantial" in this case indicate his implicit agreement that there had been some interval change and there was some pathology following the compensable injury.

Dr. Safman, the physician who assessed the claimant's post-injury anatomical impairment, recognized in May 2005 that the claimant had pre-existing degenerative problems in the cervical spine. Dr. Safman still opined, based on the applicable Guides to the Evaluation of Permanent Impairment, that the claimant had sustained a 12% whole-person impairment rating. Dr. Safman expressly determined, based on the MRI findings, that the claimant had sustained "a new injury." The Full Commission finds that the 12% rating assessed by Dr. Safman was based on objective medical findings and comported with the Guides. We also find that the March 19, 2004 compensable injury was the major cause of the claimant's 12% anatomical impairment. The preponderance of evidence does not demonstrate that cervical spondylosis or any other pre-existing condition was the major cause of the claimant's impairment. The Full Commission therefore

finds that the claimant proved he was entitled to a 12% anatomical impairment rating as assessed by Dr. Safman.

C. Wage Loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

The administrative law judge found in the present matter, "The claimant has failed to prove ... that he is entitled to any wage loss disability benefits." The ALJ determined, among other things, that the claimant had "waived vocational rehabilitation."

Ark. Code Ann. §11-9-505(b)(3) provides:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate

in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

The respondents on appeal argue that the claimant waived vocational rehabilitation. An employer relying upon this statutory defense must show that the claimant refused to participate in a program of vocational rehabilitation or job-placement assistance, or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors, and that such refusal to cooperate was without reasonable cause. *Burris v. L&B Moving Storage*, 83 Ark. App. 290, 123 S.W.3d 123 (2003).

The record in the present matter does not demonstrate that the claimant refused to participate in a program of vocational rehabilitation. The claimant testified that the respondents provided temporary total disability compensation until the finding of maximum medical improvement on April 21, 2005. A pre-hearing order was filed on August 22, 2005. The claimant contended at that time that he was entitled to a program of vocational rehabilitation. Respondent No. 1 did not contend that the claimant had refused to participate

in a program of vocational rehabilitation. Nor did Respondent No. 1 contend that it had offered the claimant such a program. Respondent No. 1 instead contended that the claimant was not entitled to any wage-loss disability. The parties agreed to litigate whether or not the claimant was in fact entitled to a program of vocational rehabilitation. The record does not demonstrate that the respondents had offered any sort of vocational rehabilitation program to the claimant.

The Full Commission recognizes that the respondents on cross-examination asked the claimant if he had been contacted by a vocational rehabilitation consultant, and the claimant replied, "we declined to speak to her until after January." Yet, the record before us still does not demonstrate that a rehabilitation program was offered to the claimant. Further, counsel for Respondent No. 1 on cross-examination led the claimant to believe that, merely because the claimant was asking for wage-loss, he was waiving vocational rehabilitation. *See, Hearing Transcript, page 74, lines 8-11.* That is not a correct statement of the law.

Based on the facts of the present matter, the Full Commission finds that the claimant did not without reasonable cause refuse to participate in a program of

vocational rehabilitation. We must therefore determine whether the claimant proved he was entitled to wage-loss disability pursuant to Ark. Code Ann. §11-9-522(b)(1). The claimant is age 52 and has a G.E.D. diploma which he earned while serving in the Army. Most of the claimant's work history has involved home appliance repair. The claimant testified that he began working for the respondent-employer in about 1991. The parties stipulated that the claimant sustained a compensable injury on March 19, 2004. The claimant testified that he did not work for the respondent-employer after that time and that he had felt "totally incapacitated."

Dr. Cavanaugh performed surgery on the claimant's cervical spine in July 2004, but the claimant testified that he continued to suffer from significant pain symptoms. A functional capacity evaluation in February 2005 showed that the claimant could perform medium-level work. Dr. Safman assigned a 12% anatomical impairment rating, and we have determined that the claimant's compensable injury was the major cause of his anatomical impairment. The claimant testified that he had a limited range of motion in his neck following the injury and surgery. The claimant also testified that he was unable to return to his livelihood of

appliance repair work. Although the Full Commission has determined that the claimant did not waive a program of vocational rehabilitation, the record also demonstrates that the claimant has not tried to find any sort of full-time remunerative employment within his physical restrictions. The claimant's lack of motivation impedes an assessment of his loss of wage-earning capacity. *Logan County v. McDonald*, 90 Ark. App. 409, \_\_\_ S.W.3d \_\_\_ (2005).

Based on the claimant's age, education, work experience, and lack of motivation, the Full Commission finds that the claimant has sustained wage-loss disability in the amount of 15%. We find that the claimant's compensable injury was the major cause of his 15% wage-loss disability.

D. Second Injury Fund

There is a tripartite test for establishing Second Injury Fund liability. The test requires that: 1. The employee must have suffered a compensable injury at his present place of employment. 2. Prior to that injury the employee must have had a permanent partial disability or impairment. 3. The disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Patterson v. Arkansas Dep't of*

*Health*, 343 Ark. 255, 33 S.W.3d 151 (2000), citing *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

The instant claimant sustained a compensable injury at his present place of employment on March 19, 2004. The first part of the test has therefore been satisfied. The second part of the test has not been satisfied, in that the claimant did not have a permanent partial disability or impairment prior to the compensable injury. The record does not demonstrate that the claimant had a disability or impairment as a result of his pre-existing degenerative cervical condition, nor does the record demonstrate that the claimant was entitled to a prior disability or impairment as a result of his neck. The claimant testified that he had suffered from pre-existing knee problems, but there is no medical evidence before the Commission demonstrating that the claimant suffered from a permanent partial disability or impairment related to his knees. Yet even if the claimant did have a permanent partial disability or impairment prior to the compensable injury, which we do not find, there is no evidence before the Commission demonstrating that prior disability or impairment combined with the recent compensable injury to produce the claimant's current

disability status. The claimant testified that he had no physical limitations preventing full-time work before the March 19, 2004 compensable injury. The claimant testified, "I was able to do anything I wanted to do" before the March 19, 2004 compensable injury. In the instant matter, the Second Injury Fund is not liable for the claimant's wage-loss disability.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's decision in part as modified, and we reverse in part. The Full Commission finds that the claimant proved he sustained a 12% anatomical impairment rating, and that he sustained additional wage-loss disability in the amount of 15%. The claimant's anatomical impairment and wage-loss disability shall be the sole responsibility of Respondent No. 1. The March 19, 2004 compensable injury was the major cause of the claimant's anatomical impairment and wage-loss disability. We find that the claimant proved he was entitled to additional medical treatment, including pain management, as recommended by the claimant's treating physicians. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal, the claimant's attorney is entitled to

an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion.

My carefully conducted de novo review of this claim in its entirety reveals that any degree of permanent physical impairment that the claimant now experiences is the result of preexisting degenerative disc disease in the claimant's cervical spine.

Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that the compensable incident of March 19, 2004, is the major cause of his permanent physical impairment. Moreover, I find that

the finding by the Administrative Law Judge that the claimant is not entitled to wage-loss benefits above and beyond his anatomical impairment is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Ark.

Code Ann. §11-9-102(4)(F)(a) states that 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 awarded only upon a determination that the compensable injury is the major cause (more than 50%) of the disability or impairment. The record establishes that the claimant had preexisting degenerative cervical disc disease which had become symptomatic in 2000. The record further establishes that the claimant received extensive medical treatment, including multiple diagnostic studies and prescription medications, for his cervical condition prior to the incident of March 19, 2004.

In addition to showing that the claimant had a preexisting degenerative cervical condition, the record further demonstrates that the claimant's compensable work-related injury is not the major cause of his

current rate of physical impairment. The record includes the December 5, 2005, deposition of the claimant's treating neurosurgeon, Dr. David A. Cavanaugh. This doctor's testimony reflects that upon his initial examination of the claimant on June 22, 2004, the claimant reported that he had injured his cervical spine in August of 2000. In support of this testimony, an excerpt from Dr. Cavanaugh's clinic report of that visit states the following:

This 49-year-old right-handed white male has had neck and arm problems for some years. He states this initially began in about 2000. He states he had some pain in his left shoulder and anterior chest and became very anxious and felt like he was probably having an anxiety attack but went to the ER and was evaluated for heart disease. He was kept two days, and then had an MRI scan of the neck and was told he had two disc problems in his neck and that was the problem. Since that time, he would hurt take time off and get better and then go back to work again. The only trauma he remembers about that time was walking in the house and hitting the top of his head on something jamming his head into his neck. Otherwise, he denies trauma.

Medical reports contained within the record verify that the claimant was diagnosed in as early as

July of 2000, with problems associated with cervical disc disease and compression. For example, an MRI taken on July 14, 2000, showed a moderate extension of the C4-5 disc anteriorly with bilateral compression of the root sheath, more prominent on the left. A subsequent MRI performed on October 19, 2002, showed no change in the stenosis and narrowing at C3-4, and minimal to moderate stenosis at C5-6 with moderate narrowing of the nerve root sheaths bilaterally. A third MRI taken on October 6, 2003, showed moderately severe narrowing of the nerve root sheaths bilaterally at C3-4 and C5-6, with minimal narrowing in the AP plane at C4-5.

The claimant was seen by Dr. Blumenthal at the Texas Back Institute (TBI) on October 13, 2003, which was approximately five months prior to his compensable back injury of the following March. An intake questionnaire from that date reflects that the claimant presented with ongoing symptoms associated with his cervical condition for "about 3 years", or since August of 2000. At that time, the claimant attributed his problems to an incident where he reportedly "jammed his neck in [a] doorway overhang". To questions pertaining to his physical symptoms, the claimant responded

affirmatively to experiencing weakness, tingling, and numbness in his arms and hands; pain at night and sleep disturbances; the inability to walk more than three blocks or lift heavy objects from the floor; and, the inability to perform his "usual work", which he listed at the time as "appliance tech". Moreover, the claimant furnished a somewhat conflicting history of his symptoms by indicating that although certain listed activities such as sitting, standing, walking, lying down and rising from a chair did not affect his pain, "physical activity" and "recreational activity", in general, made his pain worse. As previously mentioned, diagnostic studies conducted in association with the claimant's treatment at TBI confirmed that he suffered from degenerative disc disease, which was gradually worsening.

Following the work-related incident of March 19, 2004, the claimant was initially seen at the Wadley Health System clinic in Texarkana, Texas. Thereafter, he was referred to neurologist, Dr. Warren Long, Jr., for a neurosurgical evaluation. In his report dated May 5, 2004, Dr. Long stated:

In October 2003, patient was evaluated at Texas Back Institute by Dr. [Blumenthal] who saw him twice. Dr. [Blumenthal] finally told him there was nothing he could do. He did not recommend any further work up, and started him on Celebrex.

Subsequent diagnostic testing under the direction of Dr. Long confirmed that the claimant suffered from cervical spondylosis for which Dr. Long opined he would need surgery. Because Dr. Long no longer performed surgeries, he referred the claimant to neurosurgeon, Dr. David Cavanaugh for further evaluation and treatment.

Returning to Dr. Cavanaugh's report of June 22, 2004, he described the mechanics of the claimant's March 19, 2004, work-related incident as follows:

March 19, 2004 he was putting an oven into place with a co-worker. That person could not hold the oven up and all the weight shifted on him. He states that immediately caused him to jerk and have an electric type pain in his neck and down his arm.

Dr. Cavanaugh testified that, based on his physical examination of he claimant and a review of an October 24, 2003, CT myelogram, he initially assessed

the claimant with multilevel degenerative changes in his neck. "And so my assessment at that time," explained Dr. Cavanaugh, "was cervical spondylosis, or the degenerative changes in the neck, bony spurring, without evidence of myelopathy or signs of pressure on the spinal cord." A subsequent CT myelogram taken on June 23, 2004, confirmed Dr. Cavanaugh's diagnosis. Because this most recent study showed significant cervical changes, especially with regard to stenosis at C3-4, Dr. Cavanaugh revised his earlier assessment of the claimant's condition to include a surgical recommendation. The claimant underwent anterior cervical discectomy and fusion with anterior instrumentation at C3-4, C4-5, and C5-6 on July 21, 2004. Thereafter, the claimant was prescribed Lortab and placed in a program of physical therapy.

The claimant continued to complain of symptoms including neck pain and numbness in his left arm. On April 21, 2004, Dr. Cavanaugh found that the claimant had reached maximum medical improvement following his surgery. Due to the claimant's continuing subjective complaints, however, Dr. Cavanaugh referred him for an functional capacity evaluation. Prior to this study, on

January 5, 2005, the claimant underwent a nerve conduction study performed by Dr. Reginald Rutherford. The results of this EMG study were normal. Subsequently, a functional capacity evaluation conducted on February 7, 2005, revealed that the claimant is capable of performing medium capacity work activities.

As Dr. Cavanaugh explained in his deposition, he does not assign physical impairment ratings. Therefore, on May 5, 2005, the claimant was evaluated by Dr. Bruce Safman. Based on his physical examination of the claimant and a review of his medical records, Dr. Safman assigned him with a 12% permanent physical impairment rating to the body as a whole as a result of the claimant's cervical fusion surgery.

It is well established that medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). Further, the Commission has the authority to accept or reject a medical opinion and the authority to determine its medical soundness and probative force. Green Bay Packing v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999). The Commission has the duty of weighing the medical

evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989). Although Dr. Safman, who examined the claimant on one occasion, opined that the claimant's physical impairment was due to his surgery, Dr. Cavanaugh, who of course performed the claimant's cervical surgery, testified that the claimant's permanent impairment was "... at least 50 percent, if not more ..." due to his preexisting condition. More specifically, Dr. Cavanaugh testified as follows:

A. Okay. He told me that he had a date of injury of August 2000, and Dr. Long says the paperwork shows it was March 19, 2004. According to Dr. Long's report I am reading from, he said, in August of 2000 he developed some periodic chest pain, left arm pain, anterior neck pain, and was worked up for any type of cardiac problems and released.

He had an MRI scan of his neck, which by report showed two disc problems. He was sent home and followed by his family physician. Then he took some vacation time, worked periodically until March 19, 2004, and then

the injury of lifting the oven with the partner and all that.

Q. Right.

A. So he had a history starting about 2000.

Q. All right. And what kind of problems did he indicate to you that he had been having since 2000?

A. Again, he described to me the same problem at that time, was shoulder pain, some anterior chest pain, and, you know, worried about anxiety attack versus cardiac problems and had the workup at that time.

He said since that time he would have some pain, similar symptoms, take time off and get better and get back to work again. He told me the only trauma he remembered was walking in the house hitting the top of his head on something and jamming his head down, in the past. So from that description, neck symptoms and apparently some arm symptoms.

Dr. Cavanaugh verified that upon his initial examination of the claimant, his physical findings were normal with regard to observed objective neurological deficits.

The neurologic deficit was mainly from the subjective standpoint of decreased sensation in the left arm and hand, and then some mild asymmetry of his reflexes, and then also the neck pain.

Dr. Cavanaugh further verified that his initial assessment of the claimant's condition was that it was a continuation of his preexisting problems.

Well, I also reviewed his CT myelogram from October 24, 2003, and noticed multilevel degenerative changes in his neck. And so my assessment at that time was cervical spondylosis, or the degenerative changes in the neck, bony spurring, without evidence of myelopathy or signs of pressure on the spinal cord.

Dr. Cavanaugh agreed that an incident such as the claimant had described of jamming his neck into a door can aggravate degenerative disc disease, causing it to become symptomatic. Further, Dr. Cavanaugh stated that the changes revealed from the claimant's most contemporary CT myelogram as compared to his study from the previous year, confirmed that the claimant would need surgery, primarily due to stenosis at C3-4 through C5-6 cervical vertebra. However, Dr. Cavanaugh stated unequivocally that these changes were due to preexisting degenerative disc disease as opposed to the claimant's recent work-related incident of March 2004. That the claimant did not have a soft-ruptured disc, or acute injury, was evident by the presence of bony spurring or

spondylosis at these levels, which was indicative of degenerative processes as opposed to trauma. Further, Dr. Cavanaugh agreed that the claimant's surgery was performed to alleviate physical symptoms associated with the claimant's degenerative disc disease, such as neck pain, and pain, tingling, numbness, and weakness in the claimant's shoulder, which all preexisted the claimant's compensable aggravation. Dr. Cavanaugh further agreed that taking certain medications on a daily basis, such as the claimant testified he did, was strongly indicative that he was experiencing significant ongoing problems with degenerative disc disease prior to the work-related incident of March, 2004.

Q. Okay. All right. We also took his [the claimant's] deposition, Doctor, and he indicated that from, I believe, 2002, up until March of 2004, that he was having to take Lortabs and Celebrex on a daily basis in addition to the hydrocodone, and I asked him what would happen if he didn't take those medications.

And he said it would be a pretty miserable existence, which it already is, but it would have been even worse. He also indicated to me that there were no days that he didn't have pain.

Does that sound like someone that has ongoing problems with spondylosis and stenosis?

A. Yes.

Dr. Cavanaugh admitted that he did not have records from TBI to review at the time of the claimant's initial assessment. Nor did the claimant indicate to Dr. Cavanaugh that he was dependent on pain medications at the time of the March 19, 2004, incident. Therefore, Dr. Cavanaugh was not fully informed of the claimant's medical history at that time. Based on a more comprehensive and thorough knowledge and understanding of the claimant's medical history and condition at the time of his deposition, Dr. Cavanaugh stated within a reasonable degree of medical certainty that the claimant's current level of physical impairment is due to his preexisting condition. And, although the doctor admitted that the event of March 19, 2004, "worsened" the claimant's subjective physical symptoms, Dr. Cavanaugh stated that from an anatomical, or objective standpoint, the claimant's stenosis and spondylosis had not been worsened by the incident in question. Finally, as to causation, Dr. Cavanaugh presented the following testimony:

Q. As we sit here today, can you state that any of his permanent impairment was due to the March 19 [2004] incident?

A. Well, I don't think I could say that it - - certainly it all was not due to that. I don't think I could say that none of it was due to that. But obviously you have shown records that indicate that they were certainly present beforehand and symptoms remain similar throughout that time period even before the injury, after, and after surgery.

As we always say, there certainly can be aggravation of underlying conditions by an injury, and he probably had some of that; however, it is pretty apparent that his symptoms remain pretty constant.

By that last statement, Dr. Cavanaugh was referring to prior testimony in which he stated that the claimant still complains of unresolved subjective symptoms since his surgery, despite objective diagnostic studies showing that his surgery, from a structural standpoint, was successful.

Dr. Cavanaugh concluded as follows:

Q. Okay. Would you say at least 50 percent, if not more, of his impairment was due to his pre-existing problem?

A. I would certainly say at least 50 percent, if not more, was, yes.

Based on the fact that Dr. Cavanaugh was the claimant's treating neurosurgeon, and therefore, possesses a more comprehensive understanding of the claimant's condition and medical treatment than Dr. Safman, who merely evaluated the claimant for an impairment rating, Dr. Cavanaugh's opinion should be given more weight than the opinion of Dr. Safman concerning the cause of the claimant's surrey physical impairment. Further, the weight of the medical evidence supports Dr. Cavanaugh's opinion that the claimant's preexisting cervical condition is the major cause of his current level of physical impairment, over the opinion of Dr. Safman that his impairment is due primarily to his surgery. In sum, the claimant's cervical problems manifested in August of 2000, when he hit a door overhang and jammed his neck. Diagnostic studies conducted thereafter revealed stenosis and other signs of degenerative disc disease in the claimant's cervical spine. The claimant continued to experience symptoms and receive medical treatment associated with this condition, until in August of 2003, his cervical symptoms sharply increased as the result of lifting an air conditioner. Following this lifting incident, the claimant sought and received medical treatment at Texas Back Institute for essentially the same symptoms

that he reportedly suffered as a result of the compensable incident of March 19, 2004. Although the claimant's subjective complaints of pain increased as a result of his March 19, 2004 compensable incident, subsequent diagnostic studies failed to show a change in the claimant's physical condition in terms of any anatomical changes attributable to trauma. In fact, Dr. Cavanaugh testified that the surgery he performed on the claimant's cervical spine in July of 2004, was necessitated by degenerative changes that were causing compression on the claimant's nerve roots, as opposed to the compensable aggravation of the claimant's preexisting condition. Finally, although the claimant's surgery was deemed successful in terms of having accomplished he its planned intent, the claimant still complains of many of the same subjective symptoms that he has experienced since the onset of his symptoms in 2000. Due to the degenerative nature of his cervical condition, Dr. Cavanaugh has predicted that the claimant will continue to suffer from ongoing symptoms.

Based on the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that the March 19, 2004, compensable injury was the major cause of the permanent impairment rating assigned to

him by Dr. Safman after he reached the end of his healing period. This is further supported by the fact that Dr. Cavanaugh testified within a reasonable degree of medical certainty that the claimant's preexisting degenerative neck condition was the major cause of his current impairment rating. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner