

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505070

JESSE TEDDER, EMPLOYEE	CLAIMANT
FLUOR CORPORATION, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 19, 2007

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

Claimant represented by HONORABLE FLOYD M. THOMAS, JR., Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 13, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this case in which an employer-employee-carrier relationship on April 3, 1995 at which time the claimant sustained compensable injuries to his back and right ankle at a compensation rate of \$270.00/\$203.00.

Medical expenses, temporary total disability benefits and impairment ratings to the back, 8% as assessed by Dr. Paul Tucker on January 17, 1996, and 14% to the lower extremity as assessed by Dr. Ruth Thomas on July 17, 1996 have been paid.

2. The claimant has failed to prove that additional medical treatment for his back is reasonable and necessary and related to the compensable injury.

3. Based on the invalid impairment rating and lack of work restrictions and considering the claimant's age, education, work experience and lack of motivation, I find the claimant has failed to meet his burden of proving he is entitled to any wage loss disability benefits.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's February 13, 2006 opinion. Based upon my de novo review of the record, it is my opinion that the Claimant has met his burden of proving the reasonable necessity of continued medical treatment and that he is permanently and totally disabled.

_____ Claimant appeals the Administrative Law Judge's February 13, 2006 opinion stating the following findings of fact and conclusion of law:

1. The Workers' Compensation Commission has jurisdiction of this case in which an employer-employee-carrier relationship on April 3, 1995 at which time the claimant sustained compensable injuries to his back and right ankle at a compensation rate of \$270.00/\$203.00. Medical expenses, temporary total disability benefits and impairment rating to the back, 8% as assessed by Dr. Paul Tucker on January 17, 1996, and 14% to the lower extremity as assessed by Dr. Ruth Thomas on July 17, 1996 have been paid.
2. The claimant has failed to prove that additional medical treatment for his back is reasonable and necessary and related to the compensable injury.
3. Based on the invalid impairment rating and lack of work restrictions and considering the claimant's age, education, work experience and lack of motivation, I find the claimant has failed to meet his burden of proving he is entitled to any wage loss disability benefits.

_____The first issue to be addressed is whether the Administrative Law Judge was correct in holding that the Claimant's physical impairment rating for his back injury was invalid. In a Pre-hearing Order filed September 28, 2005, the parties made the following stipulations:

The parties have agreed to the following stipulations: An employer-employee-carrier relationship on April 3, 1995 at which time the claimant sustained compensable injuries to his back and right ankle at a compensation rate of \$270.00/\$203.00. Medical expenses, temporary total disability benefits (from _____ to _____) and impairment ratings to the back, 8% as assessed by Dr. _____ on _____ [Paul Tucker and 1-17-96 written in] and 14% to the lower extremity as assessed by Dr. Ruth Thomas on July 17, 1996 have been paid.

The parties also agreed that the issues to be litigated at the hearing were limited to the following: Continuing medical treatment and payment of expenses; loss of earning capacity; controversion and attorney's fees. All other issues were reserved.

_____A stipulation is "an agreement between the attorneys respecting the conduct of the legal proceedings."

Dinwiddie v. Syler, 230 Ark. 405, 323 S.W.2d 548(1959). That agreement is the equivalent of undisputed proof and leaves nothing for the fact finder to decide as to the stipulated matter. Brown v. Keaton, 232 Ark. 12, 334 S.W.2d 676(1960). In Arkansas Louisiana Gas Co. v. Grooms, 10 Ark. App. 92, 661 S.W.2d 433(1983), the Court held that when the parties stipulate to certain facts, neither the ALJ nor the Commission may ignore that stipulation and to decide the matter on an issue which, because of the stipulation, had not been fully developed by the parties or upon which they had not introduced proof. The only exception is when the ALJ or Commission gives notice of their intent to do so and affords an opportunity to offer proof on that issue. Id.

The respondents contend in their brief to the Full Commission that the stipulations do not say that the rating was accepted as valid by the respondents, merely that two ratings were paid. Respondents further state that "it was not until the November 10, 2005, deposition of Dr. Tucker, made an exhibit to the record, that evidence first emerged that the rating was based upon unacceptable criteria."

_____ Dr. Tucker assessed that claimant with an impairment rating for his back on January 17, 1996, stating:

I gave him a 5% disability based on pain in the nerve root distribution and 15% disability based on strength (with the ratings going up to 37%). This would give him a total of 20% disability of the left leg. This amounts to an 8% disability of the whole person.

The hearing was held on November 16, 2005. The respondents had nearly 10 years to investigate the validity of the impairment rating. There was no discussion prior to the hearing as to the validity of the claimant's physical impairment rating by either the respondents or the Administrative Law Judge. It is ingenuous of the respondents to contend after the hearing that they did not stipulate to the validity of the impairment rating, but rather they just paid the rating but still objected to its validity. The rate and validity of the physical impairment rating was not an issue to be determined at the hearing, therefore, the Claimant was not informed to the fact that additional evidence supporting the impairment rating was needed.

_____ In my opinion, the parties stipulated to the amounts and validity of the impairment ratings and the Administrative Law Judge should be bound by those stipulations.

_____ The second issue to be addressed is the Claimant's entitlement to continuing medical treatment and payment of expenses. In my opinion, Claimant has met his burden of proving that additional medical treatment is reasonable and necessary and related to his compensable injury.

The Claimant sustained compensable injuries to his teeth, hand, back, and right ankle when he fell approximately 10 to 15 feet from a scaffolding on April 3, 1995. The Claimant was diagnosed with a fracture of the right medial malleolus from Jefferson Regional Medical Center on April 3, 1995. An open reduction and internal fixation of the fracture of the right medial malleolus was performed on April 4, 1995.

The Claimant also complained of back pain. A CT scan of the lumbar spine was interpreted as showing "modest annular bulging at L5, S1 and vertebral disc with some

calcification, or some associated osteophytic spurring, with no significant encroachment upon the thecal sac or nerve roots." The Claimant was first seen by Dr. Paul Tucker for his back complaints on May 16, 1995. In his report from that date, Dr. Tucker states: "I think the patient has a genuine problem and may have a lumbar disc at L4-5 on the left side."

On October 6, 1995, Dr. Tucker opines the following with regards to Claimant's post myelogram CT.

At L4-5 there was a bulging lateral disc on the left, fairly far lateral. At L5-S1, there was a spur in the lateral view of the lumbar myelogram and some bulging of the central portion of the L5-S1 disc. The lateral disc bulge at L4-5 on the left was called fairly prominent.

He may require surgery. He has a real deficit as an explanation for his pain. I suspected an L4-5 disc on the left clinically.

_____ Dr. Ruth Thomas, an orthopaedic surgeon, saw the Claimant on November 27, 1995 for "Grade 2 Degenerative Joint Disease" of the right ankle. She prescribed an elastic ankle brace and commented, "I am not optimistic that he will

return to his previous form of occupation." Claimant underwent a total of three surgeries to his right ankle and was given a 14% impairment rating to the foot by Dr. Thomas on July 17, 1996.

_____The Claimant was assessed with an 8% impairment to the body as a whole by Dr. Tucker on January 17, 1996.

_____The Claimant was seen by Dr. Young, an orthopaedic surgeon, in October and November of 1997, and July and September of 1998. The MRI of the lumbar spine was described as "normal". The Claimant's MRI results could not be correlated to radicular leg pain but there was some discussion about treating his left knee for a meniscal tear. The Claimant declined knee surgery.

_____The Claimant returned to Dr. Tucker on November 11, 1997. The following was stated in a progress note of the same date:

This 43 year old man had severe back pain radiating down the left leg. He had a problems (sic) with his ankle and his ankle has more or less been fused on the right side with decreased motion there. He had a serious fall. His myelogram with the post myelographic CT suggested he had an L4-5 disc on the left side on

10/20/95. There was a disc bulge at L4-5 which was fairly prominent. We talked about surgery. He has been on physical therapy and since then, this has more or less resolved. He has had no pain in the leg for about ten days but sometimes he still hurts at night and has pain in his back. The pain does not seem to go down into the leg or hip at all now. He still has some very mild weakness of ankle dorsiflexion and this could recur.

_____The Claimant returned to Dr. Tucker on February 12, 1998 and April 13, 1998, with complaints of severe left leg pain.

Dr. Ackerman examined the Claimant on September 11, 1998, and opined that the Claimant's back pain emanated from the facet joints. He prescribed a back stabilization program, aquatic therapy, and facet joint injection therapy. The doctor noted this treatment was directed toward pain management to increase the Claimant's activities of daily living. However, the doctor felt the Claimant would be unable to return to work.

The Claimant returned to Dr. Tucker on January 27, 1999. There is no indication of follow-up on Dr. Ackerman's recommendations.

In a February 2, 2000 progress note, Dr. Tucker made the following observations:

In looking at his legs, he had weakness in an L-5 pattern in the left leg with weakness of hamstrings and ankle dorsiflexion. The weakness has a little bit of a jerky quality. He does seem to have some atrophy, however. He still has muscle spasms. We could have given him something such as Baclofen but I did not. He walks favoring the right leg. He has a TENS Unit already for the ankle. He has some major pain problems.

In his May 31, 2000 progress note, Dr. Tucker stated:

He has weakness of all major muscle groups in the left leg and this is discouraging. He has some neurological findings which are clearly objective. The right knee jerk is 2+ but he has a crossed abductor reflex on the right and not the left. His ankle jerk is 1 to 2+ left and the right ankle is fused.

The Claimant has been seen by Dr. Tucker every three to four months from 2000 until 2004 for check-ups and prescriptions medication.

Employers must promptly provide medical services which are "reasonably necessary in connection with" the compensable injuries. Ark. Code Ann. §11-9-508(a). However,

injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, ___ S.W.3d ___ (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury." Greer v. Phillip Mitchell Construction, Full Commission Opinion, Filed February 14, 2003 (Claim No. E906565). In assessing whether a given medical procedure is reasonable necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full

Commission Opinion, Filed December 13, 1989 (Claim No. D511255).

_____The Claimant's complaints have not changed drastically over the last ten years. In my opinion, the medications prescribed by Dr. Tucker have helped to maintain the Claimant's level of healing and to prevent further deterioration of the damage produced by the compensable injury. In my opinion, the claimant has met his burden of proving that the medical treatments in the form of prescription medications are reasonable and necessary in connection with his compensable injury.

_____The last issue to be addressed is the Claimant's entitlement to wage loss disability. As discussed above, the respondents accepted the back injury as compensable and paid a permanent anatomical impairment rating to the body as a whole. The Claimant contends that he is permanently and totally disabled.

_____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 she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

_____The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000).

The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, supra.

_____ In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685(1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946(1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130(1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

_____ The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in

conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

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.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

_____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.

_____ The Claimant is 51 years old and has a high school education. His work experience includes jobs as a construction worker and boiler maker, earning \$16.00 to \$18.00 per hour plus benefits. Beyond his compensable injuries, the Claimant's health history includes an eye condition (pterygium) that has required four surgeries, kidney stones, and hepatitis.

_____ The Claimant stated he remains symptomatic with back pain, and weakness in his left leg which causes him to stumble and fall. Claimant walks with a cane. The pain causes sleep disturbances and limits his ability to walk or sit for long periods of time. The Claimant used to enjoy

hunting and fishing, but states that he has been very limited in his ability to continue with these activities.

_____The Claimant has not worked since his accident in 1995. His income is derived from a \$222,000.00 settlement in 1997 from a third party lawsuit; a \$900.00 per month pension from the Boilermakers union; and Social Security Disability benefits (since 1996) in the amount of \$1,200.00 per month.

The Claimant stated that he has not tried to go back to work because he has difficulty with standing or sitting for long periods. The pain in his back and weakness in his leg has made it very difficult for him to participate in many daily living activities.

Dr. Thomas and Dr. Ackerman have both commented that they did not feel that the Claimant would be able to return to work.

Claimant underwent a Functional Capacity Evaluation in 1997 in which it was reported that the Claimant did not pass the validity profile.

Although the Claimant has not been given any specific work limitations, it is clear from his testimony

that he is severely limited in his ability to perform activities required to return to the work force. In my opinion, based on the Claimant's age, education, work experience, medical evidence and other matters, the Claimant has met his burden of proving that he is permanently and totally disabled.

For the foregoing reasons, I respectfully dissent from the Majority's decision. It is my opinion, that the Administrative Law Judge's February 13, 2006 opinion should be reversed and the Claimant should be awarded additional reasonable medical treatment in the form of prescription medications prescribed by Dr. Tucker and permanent and total disability benefits.

PHILIP A. HOOD, Commissioner