

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G701275

ARTHUR FANNING, Employee	CLAIMANT
WASTE MANAGEMENT, INC., Employer	RESPONDENT #1
GALLAGHER BASSETT SERVICES, Carrier/TPA	RESPONDENT #1
DEATH & TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED AUGUST 17, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent #1 represented by MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas; although not participating in hearing.

STATEMENT OF THE CASE

On May 20, 2021, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 24, 2021, and a Pre-hearing Order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury on February 16, 2017 to his right hip.

4. The claimant is entitled to a weekly compensation rate of \$567.00 for temporary total disability and \$425.00 for permanent partial disability.
5. The claimant reached maximum medical improvement on April 2, 2019.
6. The Full Commission Opinion of December 9, 2020 is *res judicata* and the law of the case.
7. Respondent #1 has accepted a 15% whole body rating and all appropriate attorney fees on that 15% anatomical impairment rating.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether claimant is entitled to permanent partial disability regarding an anatomical impairment rating that is greater than the stipulated 15% to the body as a whole.
2. Whether claimant is entitled to permanent and total disability, or alternatively wage loss disability.
3. Whether respondent #1 should be penalized under A.C.A. §11-9-802.
4. Attorney's fee.

Claimant's contentions are:

“The claimant contends that he is entitled to permanent partial disability benefits. Dr. Edwards assigned the claimant a 30% whole person rating on November 30, 2020. The claimant also contends that he is permanently and totally disabled or, in the alternative, that he is entitled to wage loss benefits. Claimant also contends that he is entitled to penalties as per §11-9-802 and attorney's fees. All other issues are reserved.”

Respondents' contentions are:

“Respondents contend that all appropriate benefits are being paid with regard to Claimant's compensable injury sustained on 2/16/17. With regard to Claimant's request for additional permanent partial impairment, a second opinion is being obtained to address the 30% rating assigned by Dr. Edwards. It is noted that Claimant had a prior hip replacement before the compensable injury, and he would have been entitled to a 15% rating for the good result he had from the same. Additionally, Respondents No. 1 have already paid \$19,400 in PPD benefits as a result of the previously assigned 20% rating from Dr. Patel in December of 2017. Respondents

are unaware of any restrictions being assigned associated with Claimant's compensable injury. As such, wage loss disability would not apply. Claimant is not permanently totally disabled, nor is he entitled to benefits under §11-9-802."

Respondent #2 deferred to the outcome of litigation and waived its appearance at the hearing.

The claimant in this matter is a 66-year-old male who sustained a compensable injury to his right hip on February 16, 2017. The claimant gave direct examination testimony about his injury and his initial medical treatment as follows:

Q Just briefly tell the Judge – and I know we have had a hearing on this once before, but it was a different administrative law judge, so just for the Judge's edification, tell him what happened.

A On that particular morning, it was still dark. It was winter. I couldn't do anything outside. The mechanic - - and there was only one mechanic on the job at that time - - they had a front load truck that had a diaper, which is tore up on the top.

Q And explain to the Judge what we are talking about in terms of a diaper. What is that?

A This diaper is a piece of metal. It is a quarter-inch thick, 8-foot wide, about 4-foot wide one way and 8-foot the other way, and it sits on the top of the truck to keep the trash from falling onto the ground. It's hooked to hydraulics and when the can comes over to dump, this comes up to slide in and make sure everything goes in the truck.

Q So you all were replacing this?

A The mechanic on duty at that time was trying to put it on by himself, so I helped him. I was holding the canopy, the diaper in the middle to keep it stable.

Q This 4 by 8 quarter-inch steel?

A Holding it in place.

Q What happened?

A He was pinning it on the driver's side to hold it in place for that side and he got down to come over and pin it

on the left, the passenger's side, but he missed a pin on the right side and by the time he got down and started back up the ladder on the other side, everything shifted and I ended up with this 4 by 8 piece of metal flying to the floor.

Q About how far did it fall?

A Maybe three feet, two and a half, three feet.

Q And did you go to the doctor?

A They took me to the hospital.

Q And I know you've had several surgeries, but did you have surgery that day?

A No, sir. I had it the next day.

The claimant underwent surgery shortly after his compensable injury for a femoral shaft fracture. Dr. Buchannan performed surgery that included a lateral locked plating of the femur. I note that the claimant had previously had medical difficulties with his right lower extremity, including a broken femur when a horse fell on him in 1998 and a right hip replacement in 2010 performed by Dr. Allison. From all accounts present in the record, it appears that the claimant made a full recovery and was functional in his job duties after these prior incidents.

After the claimant's first post compensable injury surgery performed by Dr. Buchannan, he developed some deformity and displacement at the fracture site. The claimant was then seen by Dr. Patel who eventually performed a revision non-union surgery and installed a lateral locking plate on March 28, 2017. Dr. Patel continued to treat the claimant and authored a letter dated December 26, 2017 regarding the claimant. A portion of that letter follows:

The patient was found to have significant limitations with his work classification. He was deemed light classification of work, which includes occasional lifting of 11 to 20 pounds, frequent lifting of 1 to 10 pounds, and no constant lifting. Throughout the report and with physical therapy as well in the office, the patient continued to use a cane, which did balance activities. This best reflects his permanent impairment

from the injury. Therefore, based on table 36 on page 3/76, the patient was found to have a moderate lower limb impairment from gait derangement, which required the routine use of a cane.

This resulted in a whole person impairment of 20%. The patient reached the maximum medical improvement on 11/20/2017.

The claimant continued to have difficulties and was eventually seen by Dr. Paul Edwards at UAMS. Dr. Edwards evaluated and treated the claimant, and ultimately the claimant underwent a third surgical procedure on September 19, 2018. At that time Dr. Edwards performed a revision total hip arthroplasty with ORIF greater trochanter for a periprosthetic fracture.

The claimant continued to treat with Dr. Edwards after surgical intervention and was seen by Dr. Edwards on April 2, 2019. Following is a portion of that medical record:

HISTORY:

Patient returns to the office 6 mos s/p revision right Total Hip Arthroplasty with ORIF greater trochanter for a periprosthetic fracture. He has been walking with a limp but has not had to use a cane or walker. He feels a little weak but is getting a little better each week.

ASSESSMENT:

S/P revision right Total Hip Arthroplasty

PLAN:

Doing well.

Custom compound cream or NSAID cream for lateral hip

Return to work without restrictions

Return to the office 1 year.

The claimant again saw Dr. Edwards on June 5, 2020. Following is a portion of that medical record:

HISTORY:

Patient returns to the office several yr s/p revision right Total Hip Arthroplasty

Patient is doing well. Mild occasional pain.

ASSESSMENT

S/P REV RIGHT Total Hip Arthroplasty

PLAN

Doing well.

I shared with him that it appears like the stem has subsided on the plain radiographs. If he is having severe pain I can always get a triple phase bone scan to further evaluate. The patient said he would like to just follow-up in a year is not too bad and he does not want any type of surgery right now anyway.

Return to the office 1 year.

Respondent #1 in this matter has accepted a 15% whole body rating regarding the claimant's compensable injury. However, the claimant has asked the Commission to determine whether he is entitled to an anatomical impairment rating that is greater than the 15% body as a whole rating accepted previously by Respondent #1.

On November 25, 2020, Dr. Edwards authored a medical record regarding the claimant which included the issuance of an impairment rating. Following is a portion of that medical record:

Chief Complaint Pain right hip pain.

History of Present Illness

Patient has been seen in the office today for a final impairment rating.

He has met maximum medical improvement for quite some time now.

His initial injury was run through his private insurance and then after some litigation it was taken over by Workmen's Comp.

He underwent conversion/revision right total hip replacement by myself.

He has persistent pain at all times it does wax and wane. He has difficulty ambulating. He occasionally requires the use of any

cane or an assistive device. He needs to hold onto the railing of the stairs when he goes up and down. He is able to use public transportation.

The patient is a right handed 65 year old male seen today for the right hip pain. The symptoms began suddenly. Symptoms began April, 2020. The problem started after an injury. The problem Started after an injury at work. Onset date: 02/16/2016. Pain is moderate with a rating of 5/10. He describes the symptoms as aching. The symptoms are constant. Since the onset, he reports the problem is unchanged. The symptoms are made worse with kneeling, sitting, bending, stairs, twisting, moving, walking, standing and lifting. The patient experiences stiffness, limping, weakness and giving way. He is represented by attorney Andy Cauldwell. There is legal action pending. Prior testing: X-rays.

Hip/Pelvis Xrays: Revision total hip arthroplasty implants in good alignment there is a radiolucency surrounding the revision femoral stem does not appear to have subsided it appears to be stable but it is questionably loose. He does have a claw plate in good position. There is a small amount of heterotopic ossification bone.

Diagnosis Codes:

Z96.641 Presence of right artificial hip joint

Impression:

Status post complex revision right total hip replacement – work comp injury

Treatment Plan:

I will need to see him on an annual basis just to follow the implants.

There is concerned that it could fail over time as there is radiofluency around the femoral stem.

Patient is here for a impairment rating.

IR calculated using the AMA guides to the evaluation of permanent impairment 4th edition.

Page 87: Table 65 – rating hip replacement results

- Pain = moderate = 20 points

- Function
 - o Limp = moderate = 5
 - o Supportive Device = cane for long walks = 7
 - o Distance Walked = 3 blocks = 5
- Activities
 - o Stairs – Using railing = 2
 - o Putting on shoes and socks = difficult = 2
 - o Sitting = high chair = 2
 - o Public transportation = able to use = 2
- Deformity = None = 0
- ROM = None = 0
- Total = 45 points

Page 85. Table 64 – Impairment estimates for certain lower extremity impairments

Total hip replacement = Poor result (<50 points) =
Impairment Rating = 30% whole person
Patient will follow up in one year.

On January 27, 2021, at the request of Respondent #1, Dr. Earl Peoples issued a second opinion regarding the impairment rating issued by Dr. Edwards on November 25, 2020. Following is a portion of that medical record:

OBSERVATIONS:

1. Evaluation 5/15/18 revealed that apparent union of the femoral fracture in 2017 had failed with breakage of the fixation plate, explaining his 2017 continued pain complaints.
2. UAMS evaluation by Dr. Edwards confirmed this and repair was accomplished by plate and femoral stem removal with a long stem revision traversing the fracture site and claw plate fixing the trochanter performed 9-19-18.
3. Recovery from this repair of the fracture sustained at work proceeded to good recovery and postoperative appearance.
4. Dr. Edwards on 4-2-19 indicated good recover with callus formation at the fracture site and good alignment of the total hip system.
5. 6-5-20 evaluation by Dr. Edwards indicated some subsidence of the press fit prosthesis in “good position and alignment.” Follow-up was planned in one year. He was ambulating well and had only mild occasional pain.
6. 11-25-20 final impairment rating by Dr. Edwards indicated

occasional pain with some use of a cane. Some radiolucency around the prosthesis was noted but no additional subsidence had occurred. As if true for patients with THA implants follow-up exams yearly was planned. (This is true for all total hip arthroplasties in osteoporotic elderly patients to check for problems.)

7. Impairment rating was calculated by Dr. Edwards at 30% whole person. No work exclusion based on the anatomic appearance was included in the IME/rating exam by Dr. Edwards.

SUMMARY:

A stubborn periprosthetic fracture achieved union via appropriate revision stem surgery and trochanteric plate placement by Dr. Edwards.

I agree with the 30% body as a whole permanent impairment rating by Dr. Edwards. This is 10% above the 20% rating given previously which I addressed in my prior report of April 18, 2018.

No specific work exclusion was indicated as necessary by Dr. Edwards. Mr. Fanning can resume work appropriate for his age and health status if desired.

As with all of my hip arthroplasty patients, Dr. Edwards is planning to monitor yearly for evidence of problems. Thus far success has been achieved. Some osteoporosis, initial subsidence, and occasional pain complaints would be expected for a total hip after the fourth operation and in an elderly man.

The opinions stated in this report are based on the medical information in the form of medical records provided to me. Should additional medical information or records be provided, it is possible my opinions might be modified or changed. Medicine is not an inexact science; however, the opinions stated above are based on a reasonable degree of medical certainty.

It appears that both Dr. Edwards and possibly Dr. Peeples considered pain as an element in the calculation of the claimant's anatomical impairment rating. The consideration of pain is certainly used in the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fourth Edition*; however, it is prohibited by the Arkansas Workers' Compensation Act. After removing the 20 points provided for pain, particularly in Dr. Edwards' calculation of the claimant's impairment, and then

considering the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, the claimant is still entitled to a 30% whole person rating. The removal of the 20 points for pain does not change the outcome under the *AMA Guides, Fourth Edition*.

I find that the claimant has proven by a preponderance of the evidence that he is entitled to a 30% whole body anatomical impairment rating due to his compensable right hip injury. I note that the 15% whole body anatomical impairment rating previously accepted by respondent #1 is part of the 30% whole body anatomical impairment rating this administrative law judge is currently issuing. Respondent #1 would owe the claimant an additional 15% whole body anatomical impairment rating over and above the stipulated 15% rating for a total of 30%.

The claimant has also asked the Commission to determine whether he is entitled to permanent and total disability; or, alternatively, wage loss disability. The claimant's employment was terminated by the respondent employer in a letter dated February 6, 2018, but it appears he last worked for the respondent on December 8, 2017. The claimant has not been employed since that time. The claimant is 66 years of age, having only completed the ninth grade. The claimant has received vocational training as a welder and as a mechanic on STEMCO seals, brakes, and alignments.

The claimant testified that his work history included logging as a chainsaw operator and construction foreman which included backhoe and dozer operating. The claimant has graded construction sites and is proficient in welding. On cross-examination, the claimant testified that he is able to read blueprints.

The claimant has worked as a "milk hauler", picking up milk in a semitruck from dairy farms and transporting it to processing facilities. He has also driven semitrucks as an over-the-road truck driver for various companies and owned his own trucking company for roughly six years. The claimant has also spent time as a maintenance and building foreman for a charcoal plant for about two and a half years.

The claimant's employment with the respondent includes a very brief period of time as an operator of large equipment, but was quickly moved into a job as a welder.

The claimant has asked the Commission to determine if he is permanently and totally disabled. Pursuant to A.C.A. §11-9-519(e)(1), in order to prove that he is permanently and totally disabled the claimant must prove that he is unable to earn any meaningful wage in the same or other employment due to his compensable injury.

On November 1, 2017 the claimant underwent a functional capacity evaluation at the Functional Testing Centers in Mountain Home, Arkansas. The claimant put forth a reliable effort with “55 of 55 consistency measures within expected limits.” The claimant was found to be able to perform work in the light classification of work as defined by the U.S. Department of Labor.

In Dr. Patel’s December 26, 2017 letter regarding the claimant, he stated “The patient was found to have significant limitations with his work classification. He was deemed light classification of work, which includes occasional lifting of 11 to 20 pounds, frequent lifting of 1 to 10 pounds, and no constant lifting. Throughout the report and with physical therapy as well as in the office, the patient continued to use a cane, which did balance activities.”

However, in a medical note from April 2, 2019, Dr. Edwards states, “Return to work without restrictions.” I contrast Dr. Edwards’ April 2, 2019 medical record to his November 25, 2020 medical record that indicates the claimant’s use of railing when on stairs, has difficulty putting on shoes and socks, and needs to sit in a high chair.” Dr. Peebles accurately notes in his January 27, 2021 letter that, “No specific work exclusion was indicated as necessary by Dr. Edwards.” He further states, “Mr. Fanning can resume work appropriate for his age and health status if desired.”

The claimant gave direct examination testimony about his physical difficulties as follows:

Q And it looks like the last time you saw Dr. Edwards was on November 25th of 2020. Does that sound right?

A Right before Thanksgiving.

Q And at that time he reported that you were complaining of persistent pain that kind of comes and goes and you were having difficulty walking. Does that sound right?

A Yes.

Q You were occasionally requiring the use of a cane or assistive device?

A Yes, sir.

Q He also said you were having symptoms of aching. Those symptoms were made worse with kneeling, sitting, bending, climbing stairs, twisting, moving, walking, standing, lifting. And you were having stiffness, limping, weakness, and giving way. Does that sound right?

A Yes, sir.

MR. CALDWELL: Just for your purposes, Page 123 of the Claimant's medical, Judge.

THE COURT: Thank you.

Q [BY MR. CALDWELL]: So those were the symptoms that you were having and the complaints that you gave to Dr. Edwards back in November?

A Yes, sir.

Q Do you still have those complaints?

A I still have them, yes, sir.

Q And I notice you don't have a cane here today. Do you use your cane all the time?

A No, sir.

Q When do you use it?

A It's mainly if I am going somewhere, like shopping with the wife or if I have to get out in the yard and I walk around a bunch. I can't walk far.

Q As I understand your testimony, you use that essentially when you are going to be up on your feet a lot; is that right?

A Up on my feet a lot or outside a lot.

The claimant is not able to prove that he is permanently and totally disabled in that while he certainly does have limitations on his abilities due to his compensable work injury of February 16, 2017, they do not rise to a level that would make him unable to earn any meaningful wages in the same or other employment.

Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of impairment as well as the employee's age, education, work experience, and all other matters reasonably expected to affect his future earning capacity.

I do find that the claimant has suffered wage loss disability in this matter. Given his physical limitations as set out in the functional capacity evaluation, his credible testimony and, while contrasting at times, Dr. Edwards' medical records, I believe the claimant has suffered a loss in excess of his 30% whole body anatomical impairment rating. Prior to the claimant's compensable injury a certain number of jobs existed in the economy that the claimant was suited for given his age, education, work experience and physical abilities. After the claimant's February 16, 2017 compensable injury and his subsequent medical treatment that have caused physical limitations, the pool of jobs in the economy available for the claimant has shrunk. I find that the claimant is entitled to wage loss disability in an amount that would be equal to a 30% impairment rating to the body as a whole.

The claimant has asked the Commission to determine whether respondent #1 should be penalized under A.C.A. §11-9-802. The relevant section of that statute states as follows:

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§11-9-711 and 11-9-712.

On December 19, 2020, the parties entered into an Agreed Order that was executed by an administrative law judge on that date. As part of that agreement respondent #1 was to pay the claimant the sum of \$6,000.00 and an attorney's fee in the amount of \$1,500.00. A United States Postal receipt is found at Respondent 1's Exhibit 2, Page 1, which indicates the mailing of a first class envelope to the claimant's attorney from the respondent on December 22, 2020, a mere three days after the execution of the Agreed Order. E-mails between the parties found in Respondent #1's Exhibit 2 indicate that the checks placed in the mail by the respondent on the 22nd of December had not arrived by as late as January 11, 2021, and respondent #1 stopped payment on those checks. Respondent #1 then issued new checks and mailed them directly to the claimant's attorney. While the statute requires payment of an installment of an award within fifteen days, it does not require the actual tendering of monies within that period. It seems clear that the respondent made a good faith effort on December 22, 2020 and did pay the owed amounts by placing them in the mail. It appears to this administrative law judge that respondent #1 here acted in good faith by paying the owed amounts on December 22, 2020; however, through mailing issues beyond their control those payments were not delivered to the claimant in a timely manner. I find no merit in the claimant's request to penalize respondent #1 under Arkansas Code Ann. §11-9-802.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 24, 2021, and contained in a Pre-hearing Order filed that same date, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability regarding an anatomical impairment rating that is greater than the stipulated 15% to the body as a whole. Specifically, the claimant is entitled to an anatomical impairment rating of 30% to the

body as a whole. Therefore, claimant is entitled to an additional 15% anatomical impairment rating to the body as a whole over and beyond what has been stipulated to for a total of a 30% anatomical impairment rating to the body as a whole.

3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent and total disability.

4. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability in an amount that would be equal to a 30% whole body impairment.

5. The claimant has failed to prove by a preponderance of the evidence that the respondent should be penalized under Ark. Code Ann. §11-9-802.

6. The claimant has proven by a preponderance of the evidence that his attorney is entitled to an attorney's fee in this matter.

ORDER

Respondent #1 shall pay the claimant an additional 15% anatomical impairment rating over and above the stipulated 15% rating for a total anatomical impairment rating to the body as a whole of 30%.

Respondent #1 shall pay the claimant wage loss disability in an amount that would be equal to a 30% whole body rating.

Respondent #1 shall pay to claimant's attorney a statutory attorney fee on the above award.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**