

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-1422

YELLOW TRANSPORTATION, INC.,
SAFETY NATIONAL CASUALTY
INSURANCE and GALLAGHER
BASSETT SERVICES, INC.

APPELLANTS

V.

JAMES GRANT BENNETT

APPELLEE

Opinion Delivered May 27, 2009

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F502430]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

On appeal, appellant Yellow Transportation argues that the Arkansas Workers' Compensation Commission erred in its holding that appellee James Bennett was entitled to permanent partial disability benefits based on a twelve-percent, whole-body impairment rating instead of the two-percent, anatomical-impairment rating previously agreed upon by the parties. We disagree and affirm the decision of the Commission.

The parties stipulated that Bennett sustained a compensable injury to his left shoulder on February 11, 2005. Dr. William F. Hefley, Jr. performed surgery on February 25, 2005, and reported in March 2005:

Mr. Bennett had a MRI of the left shoulder prior to his left shoulder surgery. The MRI was done on 2/04/05 and indicated no full-thickness rotator cuff tear. The subscapularis tendon was in normal position. Then, a week later on 2/11/05, he sustained an injury at work when he was picking up a heavy butane tank and felt a pop in the left shoulder. Subsequently, I took him to the operating room for arthroscopy on 2/25/05 and found a 2.5-cm full-thickness

rotator cuff tear and a complete rupture of the biceps tendon. It is my opinion within a reasonable degree of medical certainty that the injury at work caused the rotator cuff tear and biceps tendon rupture and caused the majority of the pathology addressed at the time of his surgery on 2/25/05.

Dr. Hefley released Bennett to return to work in May 2005.

At the hearing on the matter, the parties stipulated that Yellow Transportation had accepted and paid a two-percent, whole-person impairment rating and—regardless of the ultimate percentage assigned to Bennett—it was entitled to a credit for all benefits paid to date. On appeal Yellow Transportation contends that after paying the two-percent rating, it had paid all benefits owed Bennett and that the Commission’s decision to the contrary was not supported by substantial evidence. Bennett responds that he was entitled to permanent partial disability benefits “based upon a 12% whole person impairment assessed by Dr. Hefley.”

The law requires only that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002). 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(4)(F)(ii)(a) (Repl. 2002). “Major cause” means “more than fifty percent (50%) of the cause,” and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14)(A) (Repl. 2002).

The testimony of Dr. Hefley is crucial to our review of the matter. On March 16, 2006, an attorney for Yellow Transportation questioned Dr. Hefley about the rating he assigned to Bennett:

Q. Let's talk permanent anatomical ratings based upon the Fourth Edition of the AMA Guidelines. I've seen a number of you (sic) records on a lot of cases, so I know you're very familiar with that. How much do you typically see as far as permanent anatomical impairment ratings for a partial tear procedure, which is what this gentleman had going in? How much would you have expected the gentleman to have sustained, under the anatomically under the Fourth Edition of the AMA Guidelines(sic)?

A. You know, I'd have to look that up. I don't know. But I would think, again, it would be perhaps a small increase for the cuff repair and the biceps tendon. The biceps tendon was not repaired, so he has a chronic biceps tendon rupture. But maybe a small increase but not a dramatic change in his MMI and his permanent physical impairment.

Q. From the partial to the full you mean?

A. Right. Not a dramatic change because we—you know, he's got a permanent - his biceps tendon is retracted and it was retracted and we did not chase that down his arm to retrieve it. We simply debrided the piece that was left in his shoulder. And so, he has a little bit of a permanent deformity there in his biceps and, you know, some mild weakness there, so it might have increased in a percent or two, but not a dramatic change because we repaired the cuff.

Q. Right. And the partial tear to the full tear rating would be how many percentage points approximately?

A. Yes. Including the biceps tendon and everything.

Q. Okay. So basically, the major cause of any anatomical rating would be the partial tear in the procedure that you already had scheduled; is that accurate?

A. Yeah, I would think so.

Q. Okay. And then, with the additional finding of a biceps tendon rupture and then the full tear, that would increase any rating that was already in existence by 1 or 2 percent anatomically?

A. Right.

Q. And so, the major cause of any rating in connection with the work incident would be one or 2 percent; is that accurate?

A. Yes. . . .

However, on January 12, 2007, Dr. Hefley ultimately issued Bennett a twenty-percent upper extremity and twelve-percent, whole-person, permanent-impairment rating. According to Dr. Hefley, the rating was based on the *AMA Guides to the Evaluation of Permanent Impairment*, 4th edition. Dr. Hefley further opined that as of January 3, 2007, Bennett had reached maximum medical improvement; that the impairment rating was based on objective findings and stated with a reasonable degree of medical certainty; and that Bennett's work-related injury was the major cause of the impairment.

The Commission, in its reversal of the decision rendered by the administrative law judge, noted that the ALJ had relied "on the portion of the deposition testimony when, without having a chance to consult the Guides, Dr. Hefley appeared to agree that any rating that exceeded 2% would be based on a pre-existing condition." However, there is substantial evidence contained in the record to support the Commission's determination that Bennett proved that he sustained a twelve-percent anatomical impairment as a result of his compensable injury.

Specifically, the record shows that Bennett sustained a compensable left-shoulder injury on February 11, 2005, and Dr. Hefley performed surgery on February 25, 2005. The post-operative diagnosis included a full-thickness rotator cuff tear, degenerative joint disease, and complete biceps-tendon rupture. Dr. Hefley opined on March 28, 2005 "that the injury at

work caused the rotator cuff tear and biceps tendon rupture and caused the majority of the pathology addressed at the time of his surgery on 2/25/05.” Dr. Hefley opined in his deposition that the trauma requiring surgery was caused by the compensable injury. And most importantly, Dr. Hefley issued a twelve-percent, permanent-impairment rating on January 12, 2007, which was expressly based on and supported by the Guides. As such, the Commission’s finding relating to Bennett’s appropriate impairment rating was based on objective medical findings. Likewise, the Commission’s conclusion that Bennett’s compensable injury was the major cause of the rating is supported by substantial evidence. The decision of the Commission is affirmed in all respects.

Affirmed.

ROBBINS and KINARD, JJ., agree.