

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS NOS. E311944 & E701489

ROBERT L. ANDREWS

CLAIMANT

**HYTROL CONVEYOR CO.
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED OCTOBER 2, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE KEITH BLACKMAN, Attorney at Law,
Jonesboro, Arkansas.

Respondents represented by the HONORABLE BILL H. WALMSLEY, Attorney at Law,
Batesville, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on July 24, 2003. A prehearing conference was held on April 24, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on January 30, 1997.
2. The compensation rate is \$305.

The claimant contends that he is permanently and totally disabled or, alternatively, entitled to wage loss benefits. The claimant further contends that he is entitled to continuing treatment by Dr. Gerald Fowler and that treatment is reasonable

and necessary. The claimant contends he became permanently and totally disabled on August 24, 1999.

The respondents contend that continuing treatment by Dr. Fowler, a psychiatrist, for a mental injury or illness is no longer reasonable and necessary. The respondents contend the claimant has seen Dr. Fowler on 69 occasions between December 10, 1999 through July 9, 2003 and has seen Dr. Robert Doyle, another psychiatrist, on 21 occasions. The respondents contend no permanent impairment has been assigned to the January 30, 1997, injury; therefore, there is no wage loss disability and the claimant's disability is primarily caused by his mental injury or illness, which we contend is not work related. Alternatively, if the mental injury or illness is work related, respondents contend the claimant is limited to 26 weeks of benefits pursuant to the statute.

From a review of the record as a whole, to include medical reports, documents, briefs from the parties, record from the June 21, 2001, hearing, August 22, 2001, administrative law judge Opinion, March 27, 2002, Full Commission Opinion, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable injury on January 30, 1997.
2. The compensation rate is \$305.

3. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to wage loss benefits, as a result of his compensable January 30, 1997, injury.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a permanent anatomical impairment related to his January 30, 1997, injury.

5. The claimant last worked for the respondent in August 1999 and the claimant has proven by a preponderance of the evidence that he is entitled to 26 weeks of disability benefits pursuant to Ark. Code Ann. §11-9-113.

6. The claimant has failed to prove by a preponderance of the evidence that additional ongoing psychiatric/psychological treatment pursuant to the January 30, 1997, injury is reasonable and necessary.

DISCUSSION

The claimant, 58 years old, sustained a compensable injury on January 30, 1997, when he was picking up a tub of casters and spray painting them. The claimant began his employment with the respondent employer in 1971 and left August 1999, when he was medically released. The claimant draws a pension from the employer and social security disability benefits.

According to the claimant's wife, Linda Andrews, the claimant sustained a compensable work-related back injury in 1993, which required surgery. The claimant recuperated and returned to work for the respondent and subsequently had carpal tunnel surgery in 1996. On January 30, 1997, the claimant sustained another compensable injury.

Ms. Andrews testified that Robert Marron attempted a rehabilitation evaluation on the claimant which lasted two and a half or three hours. The evaluation was terminated because Mr. Marron concluded the claimant was not understanding the questions and the claimant had not taken any medication that day. Ms. Andrews also accompanied the claimant to a functional capacity evaluation by Rick Byrd. The FCE lasted about two and a half hours. According to Ms. Andrews, the claimant lost his balance a couple times, she caught him some, Mr. Byrd caught him some, the claimant laid down on the floor some and the claimant did some exercises on his knees. According to Ms. Andrews, while attempting to get the claimant in the car after the FCE, he collapsed on the sidewalk and she had to struggle to get him into the car.

Under cross examination, Ms. Andrews verified that the claimant did not have another back surgery following the January 30, 1997, injury. Ms. Andrews also verified that she was unaware of a doctor's report taking the claimant off work in August 1999, when he ceased working for the respondent employer. Ms. Andrews testified that the claimant is worse than he was in December 1999, but with Dr. Fowler's treatments, the claimant is better able to cope with his pain.

The claimant's diagnostic testing following his January 30, 1997, work incident revealed disc bulging at L4-5 and L5-S1 with no herniations. Conservative treatments were ordered, to include physical therapy, medication, TENS unit and epidural injections. The claimant has not been assigned a permanent impairment rating for the 1997 work injury; however, the claimant was assigned a 10% permanent impairment rating following his 1993 injury and back surgery. The claimant has seen a variety of physicians, to include Dr. Rebecca Barrett Tuck, Dr. Terence Braden, Dr. Mark

Hackbarth, Dr. Riley Jones, Dr. Gary Kellett, Dr. Audrey Parker, Dr. Bruce Safman, Dr. William Ackerman, Dr. Ken Carpenter, Dr. Greg Cates, Dr. Robert Doyle and Dr. Gerald Fowler. No surgery was recommended following the claimant's 1997 injury and EMG studies were normal and no disc herniations were noted from the MRI and myelograms performed. The claimant was released to return to work light duty by Dr. Mark Hackbarth on September 23, 1997; was released to return to present light duty work on September 22, 1998, by Dr. Riley Jones; and was released to return to work full duty by Dr. Bruce Safman on January 22, 1999. The claimant ended his employment with the respondent employer in August 1999 and receives his pension from his employer and social security disability benefits.

While the claimant contends that he is permanently and totally disabled or, alternatively, entitled to wage loss benefits, the claimant has failed to prove by a preponderance of the evidence that he sustained a permanent impairment rating attributed to his January 30, 1997, work injury. In order to be entitled to permanent and total disability benefits or wage loss benefits, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. See, Ark. Code Ann. §11-9-522 and *Wal-Mart Stores v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000). Because there was no permanent impairment rating, permanent and total disability and wage loss are not available to the claimant.

The claimant last worked in August 1999 and has continued to seek psychological/psychiatric treatment at respondents' expense until sometime in 2003. Ark. Code Ann. §11-9-113 provides that where a claim is by reason of mental injury or

illness, the employee shall be limited to 26 weeks of disability benefits. Dr. Gerald Fowler has diagnosed the claimant with pain disorder (307.89) associated with his injury. The medical evidence indicates the claimant had some pre-existing psychological problems but the claimant's 1997 injury and pain precipitated the claimant's need for psychological treatment and his disability. Dr. Safman's October 5, 1999, report stated the claimant has significant emotional problems and the combination of physical and emotional problems make the claimant totally disabled. After reviewing the medical evidence and hearing the testimony in the present matter, the primary problems of the claimant seem to be centered on the psychological problems and coping with pain; therefore, I find that the claimant has proven by a preponderance of the evidence that he is entitled to a maximum of 26 weeks of disability benefits pursuant to Ark. Code Ann. §11-9-113.

The claimant next contends that he is entitled to continuing treatment with Dr. Gerald Fowler for his psychological problems resulting from his compensable work injury. The medical evidence provides a lengthy account of psychiatric visits with both Dr. Gerald Fowler and Dr. Doyle. Testimony by the claimant's wife and by the claimant reveal that his condition has worsened since 1999. The claimant's wife testified at the hearing that the psychiatric visits help her husband cope with pain better. A July 19, 2002, report from Dr. Bruce Safman reveals that he evaluated the claimant and discussed the claimant's progress with the claimant's wife. The claimant's wife related that after three years of treatment with Dr. Fowler, her husband's depression was worse. While the claimant may continue to need medication for his psychological condition, I find that the continued psychiatric sessions are no longer reasonable and

necessary to treat the claimant's ability to deal with pain. The medical evidence did not provide any guidance that the psychiatric treatment was successful.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to wage loss benefits as a result of his compensable January 30, 1997, injury. The claimant has failed to prove by a preponderance of the evidence that he sustained a permanent anatomical impairment related to his January 30, 1997, injury. The claimant last worked for the respondent in August 1999 and the claimant has proven by a preponderance of the evidence that he is entitled to 26 weeks of disability benefits pursuant to Ark. Code Ann. §11-9-113. The claimant has failed to prove by a preponderance of the evidence that additional ongoing psychiatric/psychological treatment pursuant to the January 30, 1997, injury is reasonable and necessary.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE