

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F001985**

**BOBBY G. BURTON, EMPLOYEE**

**CLAIMANT**

**RUBATEX CORPORATION, EMPLOYER**

**RESPONDENT**

**CONSTITUTION STATE SERVICE COMPANY,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED AUGUST 4, 2003**

Hearing before Chief Administrative Law Judge David Greenbaum on June 12, 2003

Claimant represented by Mr. Anthony W. Bartels, Attorney at Law, and Mr. Michael Sherman, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

\_\_\_\_\_ A hearing was conducted June 12, 2003 to determine claimant's entitlement to additional permanent partial disability benefits.

A prehearing conference was conducted in this matter on April 16, 2003 and a prehearing order was filed on April 18, 2003. At the hearing the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the prehearing order.

It was stipulated that the claimant sustained a compensable injury on January 21, 2000; that he earned sufficient wages to entitle him to compensation rates of \$273.00 per week for temporary total disability and \$205.00 per week for permanent

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partial disability; that the claimant's healing period ended April 29, 2002; that the claimant had been assessed a fifteen percent (15%) whole body impairment by Dr. Morris W. Ray which respondents accepted and were paying at the time of the prehearing conference; and that the claim had previously been controverted in its entirety for purposes of attorneys' fees.

At the hearing the parties indicated that claimant's permanent impairment had been paid in full. It must be noted that based upon the stipulation concerning the end of the healing period as well as claimant's fifteen percent (15%) whole body impairment, it would appear that permanent impairment benefits should have extended beyond June 12, 2003 because the rating would entitle the claimant to 67.5 weeks of permanent disability beginning April 30, 2002. However, by agreement of the parties, the sole issue presented for determination concerned the extent of claimant's permanent disability, specifically, claimant's entitlement to wage-loss disability, if any.

The claimant contended in summary that he was permanently totally disabled or, alternatively, that he had sustained wage-loss disability in excess of the impairment in an amount to be determined by the Commission. Conversely, respondents contended that the claimant had not sustained any permanent disability in excess of the impairment rating.

The claimant was the only witness to testify at the June 12, 2003 hearing. The record is composed solely of the transcript of the hearing containing numerous exhibits. It should be noted that this claim was the subject of a prior hearing which was conducted on October 13, 2000. An Opinion was filed on November 7, 2000 awarding

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benefits. No appeal was taken by either party from the prior decision. The record of the previous hearing as well as the Opinion filed therein are hereby incorporated by reference and made a part of the record herein. 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 claimant and to observe his demeanor, the following findings of facts and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On January 21, 2000 the claimant sustained a compensable injury arising out of and during the course of his employment with Rubatex Corporation at which time he earned sufficient wages to entitle him to compensation rates of \$273.00 per week for temporary total disability and \$205.00 per week for permanent partial disability.
3. The record reflects that the claimant has undergone multiple surgeries and has had various healing periods as a result of recurrent herniated disc at L4-L5.
4. Claimant's last healing period ended April 29, 2002.
5. The claimant sustained a fifteen percent (15%) whole body impairment as

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a result of his compensable injury and subsequent surgeries.

6. The claimant has proven by a preponderance of the credible evidence that in addition to his permanent impairment he has sustained a wage-loss disability of sixty percent (60%) to the body as a whole for an overall permanent partial disability of seventy-five percent (75%) to the body as a whole.
7. Respondents remain responsible for continued reasonably necessary medical and related treatment for claimant's January 21,2000 industrial injury.
8. Respondents have previously controverted this claim in its entirety. However, because respondents have specifically controverted all wage-loss disability requiring an additional hearing, respondents are responsible for the maximum statutory attorney's fee on the wage-loss disability awarded herein.

DISCUSSION

\_\_\_\_\_The claimant, Bobby G. Burton was the only lay witness to testify. The facts in this claim are basically undisputed. The claimant is forty-five (45) years old. He completed eleven years of formal schooling before dropping out of school. He subsequently received a G.E.D. The only vocational training the claimant received beyond his formal schooling was a small engine repair course provided by the Federal Government through the Social Security Administration when the claimant was a young man. The training course was cut

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short. The record reflects that the claimant had a pre-existing congenital condition, specifically, a partial phocomelia bilaterally. This bilateral upper extremity deformity eventually resulted in the claimant's qualifying for social security disability when he was a young man. The claimant's partial phocomelia left him with short arms and he is limited in the use of both upper extremities. The claimant is left-hand dominant. He stated that he has more problems with his right hand than the left and is unable to manipulate small objects using the right hand. In addition, the claimant has significantly less strength in his right hand. The claimant described both upper extremities as "crooked". The claimant has range of motion in his shoulders, but not his elbows. The claimant is capable of gross manipulation.

(TR 17-19)

Despite the claimant's significant pre-existing disability he was able to secure gainful employment through sheer determination and strong motivation to work. A portion of the claimant's testimony reflecting his work ethic is set out below:

Q. In your lifetime - - I understand you worked at Rubatex when you were a teenager?

A. It was Halstead then.

Q. Halstead then, all right. And worked at Addison Shoe as a teenager?

A. Right.

Q. Then I understand you filed for social security disability and did, in fact, receive social security disability for a number of years.

A. Yes.

Q. While drawing social security, did you do any work at all?

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A. I got out - - they have a nine-month work - - I don't know what it is called. You can work nine months to try to regain work, and I don't know how many years I drew disability, but I did do the nine month deal.

Q. I believe it is referred to as trial work period.

A. Yes, trial work period is what it was called, yes.

Q. Okay. So you worked - - did some seasonal work, is that right?

A. For Cross County Farmers Association. I loaded fertilize and jumped a airplane wing for crop dusting.

Q. So you did that for three or four summers?

A. Four summers, yes, sir.

Q. Then you were - - then you decided you were going to try to get back into the workforce full-time?

A. Yes.

Q. And you sought out employment. What happened?

A. I went back to Rubatex and talked to Mr. Looney, and he told me that I had to work a year somewhere else to show that I was going to work and stay on my job and what have you. So I went to work - - I went and talked to a man at Halstead. The guy, I don't remember his name, that does the hiring and he allowed me a chance at Halstead. I worked for over nine months there before going to Rubatex.

Q. What did you do at Halstead for those nine months?

A. I started out - - I don't know what you call it. They've got 100, 150 foot length of copper. They bring it in on a crane. You have to flip it off of the table and put a die, they call it, in it and you put a squirt of oil in it and hook a vacuum to it and it sucks that die out, and it pulls it on the end down to a nipple, and then you throw it off and a crane picks it up and carries it to another department. It goes from two to three inches down to a quarter-inch or ever how size copper pipe that they want to make it. After you do that, you were supposed to go to another - - you throw this off and then you go around to another spot, and you have to

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take it after it comes back - - it's in big coils, about 200 or 250 pound coils, and you have to stick it in a machine, but I couldn't do that. So they were going to fire me because I couldn't do it. Another foreman - - they had a meeting, and my foreman told another foreman that I was the hardest worker that he'd ever seen a man try to keep a job, so he asked me if I would run a tool buggy. It's a gold cart that you run from different places in the work to deliver the dies. You go to the die shop, and they'd have to polish them. You get sacks of dies. I wore a little beeper. So when anybody needed me, they'd beep me and I'd call them and they'd tell me what to get, and I'd go get sacks of dies and bring it to their department.

Q. So when you were doing this tool buggy job, what were the physical demands of that job in terms of lifting?

A. I had to lift anywhere from 10 to 35 or 40 pound sacks of them dies. What time I wasn't - - when nobody was calling me, I had to have a - - run an electric band saw and cut scrap copper that had dropped, broke - - had to cut it up into pieces that they could carry back and remelt.

Q. Why did you leave Halstead?

A. Because the job on the tool buggy was a labor grade three and that was as high as I could ever get. You know, I knew that I could never do nothing other than drive that buggy, and Rubatex, I knew if I could get there, I could work and do the work that anyone else could do and get more money, get a higher labor grade, and it was lighter, easier work than that, too.

Q. So you did, in fact, get that job at Rubatex and left Halstead?

A. Yes.

Q. How long did you work at Rubatex before your injury?

A. Almost eight years. (TR 10-13)

Again, it is undisputed that the claimant sustained an injury on January 21, 2000 as a result of a specific incident identifiable in time and place of occurrence while working for Rubatex Corporation. The claimant eventually came under the care and

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treatment of Dr. Morris Ray, a neurosurgeon at the Semmes Murphey Clinic in Memphis, Tennessee. Dr. Ray has remained the claimant's primary treating physician. The claimant subsequently underwent surgery performed by Dr. Ray on March 31, 2000. Following an extremely short healing period the claimant was released By Dr. Ray to return to work with restrictions, and, in fact, returned to work for Rubatex Corporation at various times. As previously pointed out a prior hearing was conducted in this claim on October 13, 2000 and an opinion issued on November 7, 2000.

The record reflects that the claimant sustained numerous recurrences related to his admitted back injury. Following each recurrence the claimant would return to Dr. Ray for additional treatment. Respondents apparently paid the claimant appropriate temporary total disability for the various dates between this compensable recurrences because there is no claim for additional temporary total disability. The record reflects that after claimant's return to work on May 10, 2000 he experienced recurrences requiring follow-up medical treatment in July, 2000; August, 2000; November, 2000; February, 2001; May, 2001 and a final episode near the end of June, 2001. Again, the claimant returned to Dr. Ray following each recurrence. As reflected by Dr. Ray's office note dated August 6, 2001, following the last episode the claimant underwent a current MRI which revealed a large defect at L4-5 on the right which was interpreted as a recurrent L4 disc which prompted a second surgery. (Cl. Ex. 4(b-i))

Following the claimant's second surgery Dr. Ray repeatedly recommended that the claimant consider seeking disability benefits. His office note dated January 14, 2002

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is set out in part below:

This man is having continued trouble with his back. He has now had multiple back operations for recurrent disc. He has a partial phocomelia with very short arms. I think that he is putting more strain on his back because he is not able to use his arms as a normal individual would. We are going to try working one more month, but if he is not able to function at the end of that time then I think he needs to consider going back on social security disability ( he was on this earlier just for his arms and now he certainly has additional problems with his back). (Cl. Ex. 4(n))

In a letter dated March 20, 2002 addressed "To Whom It May Concern" Dr. Ray replied to an inquiry concerning his recommendations for work activity. He again offered an opinion that he did not believe the claimant was going to be able to be gainfully employed because of his two disabilities and recommended that he seek disability retirement; however, Dr. Ray failed to indicate the specific restrictions that he placed upon the claimant. (Cl. Ex. 4(p))

Dr. Ray last examined the claimant on April 29, 2002 at which time he found that the claimant had reached maximum medical improvement. Although, it can be argued that Dr. Ray assessed a whole body impairment of seventeen percent (17%) to the body as a whole, the parties stipulated that Dr. Ray assessed a fifteen percent (15%) whole body impairment which respondents accepted while controverting all wage-loss disability. (Cl. Ex. 4(q))

WAGE-LOSS DISABILITY

\_\_\_\_\_The claimant sustained an injury to that portion of his body which is not

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scheduled under the Workers' Compensation Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522 (Repl. 2002). Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass vs. Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W. 2d 130 (1990); *Cross vs. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W. 2d 886 (1996). When it becomes evident that the workers' underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a living at that time, he is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manf. Co.*, 235 Ark. 195, 357 S.W. 2d 504 (1962).

Clearly, the claimant has significant anatomical disability which impairs his earning capacity. In addition to the admitted fifteen percent (15%) impairment related to the claimant's back injury he also has a pre-existing congenital impairment involving both

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of his upper extremities. With or without vocational rehabilitation assistance, I am persuaded that the claimant has sustained substantial wage-loss disability. Unfortunately, respondents failed and or refused to offer the claimant vocational rehabilitation assistance, and, the claimant elected not to pursue such benefits because he applied for and was approved for social security disability. At the time of the within hearing the claimant was receiving \$1,038.00 per month in social security disability. Based upon my review of the entire record I find that if the claimant elected to attempt a return to gainful employment he would only be able to secure a job earning minimum wages or slightly above minimum wages for any entry level employment within his significant physical restrictions. Nevertheless, I do not find that the claimant is permanently totally disabled within the meaning of our workers' compensation laws. I feel compelled to point out that under the amended law the Commission and the Courts are not permitted to consider the "odd-lot doctrine". Ark. Code Ann. §11-9-519 (f) (Repl. 2002).

After consideration of the claimant' age, education, and work experience, it is herein concluded that a finding of sixty percent (60%) wage-loss disability to the body as a whole fairly and accurately reflects the extend of claimant's entitlement to wage-loss disability.

AWARD

\_\_\_\_\_Respondent, Insurance Company of Pennsylvania and its Third-Party Administrator, AIG Claim Services, Inc. is hereby directed and ordered to pay to the claimant permanent partial disability benefits at the rate of \$205.00 per week, beginning

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April 30, 2002 and continuing for 337.5 weeks representing an overall permanent partial disability of seventy-five percent (75%) to the body as a whole, fifteen percent (15%) for claimant's permanent impairment and sixty percent (60%) to the body as a whole for claimant's wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount; however, respondents may claim credit for any permanent disability benefits previously paid.

Respondents remain responsible for continued reasonable necessary medical treatment.

Additionally, claimant's attorneys, Anthony W. Bartels and Michael Sherman are hereby awarded the maximum statutory attorneys fees on this entire award pursuant to A.C.A. §11-9-715; *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W. 2d 345 (1990); and *Chamness v. Superior Industries & Sedgwick James of Ark., Inc.*, Arkansas Workers' Compensation Claim No. E019760 (March 5, 1992).

This award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge