

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E714922

TROY HAMILTON

CLAIMANT

BELLA VISTA POA

RESPONDENT

NORTH RIVER INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 31, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by CHRISTINE CRYER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 12, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on March 18, 2003. This pre-hearing order set out the stipulations offered by the parties, and outlined the issues to be litigated and resolved at the present time. Immediately prior to the hearing, the parties announced their stipulation concerning the appropriate compensation rates and the pre-hearing order was amended accordingly. A copy of this amended pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On October 12, 1997, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate compensation rates are \$296.00 for total disability and \$222.00 for permanent partial disability.
3. On October 12, 1997, the claimant sustained a compensable injury to his back.
4. There is no dispute over the payment of medical expenses or temporary total disability benefits.

5. The healing period ended on or about November 18, 1999.
6. The respondents have accepted a permanent physical impairment of 13% to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time are limited to the following:

1. The claimant's entitlement to additional permanent disability benefits for "functional" disability or loss of wage earning capacity.
2. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

- (a) That the claimant sustained an injury while in the scope and course of his employment with the respondent to his back on October 12, 1997.
- (b) Claimant was originally treated conservatively but ultimately required an operation on March 10, 1998 for L4-5 foraminal extreme lateral disc herniation with radiculopathy in the form of a fusion. Because of continued complications with the hardware, a second surgery was performed in November of 1999 to remove the hardware.
- (c) Mr. Hamilton followed up with his authorized treating physician, Dr. Luke Knox, which on November 18, 1999 issued a 13% permanent partial disability based upon "The AMA Guides to evaluation and Permanent Impairment, Fourth Edition, page 113 Table 75, Roman numeral II, Section E, under the subheading of "lumbar." Added to this would be 2% for the second operative harvesting the bone graft, and 1% for removal of hardware for a total of 13% permanent partial disability.
- (d) That the respondents have accepted 10% of this 13% rating but have controverted the additional 3%.
- (e) That the claimant remains unable to be substantially and gainfully employed making the same or similar wages and is therefore permanently and totally disabled or, in the alternative, has wage loss disability.
- (f) That the claim has been controverted has described above and the claimant is entitled to controverted attorney's fee.

In regard to these issues, the respondents contend the claimant was released by his treating physician Dr. Luke Knox on November 22, 1999. At that time he was assigned

a 13% permanent physical impairment rating to the body as a whole, which the respondents have paid out to the claimant. Respondents contend the claimant is entitled to no wage loss disability benefits over and above this rating.

DISCUSSION

The central issue in this case is the claimant's entitlement to additional permanent disability benefits for permanent "functional" disability or loss of wage earning capacity. The burden rests upon the claimant to prove the existence and extent of such permanent disability.

The claimant's entitlement to permanent disability benefits for his unscheduled permanent injury is controlled by the provisions of Ark. Code Ann. §11-9-522. In addition to permanent disability benefits for permanent physical impairment, subdivision (b) provides that permanent disability benefits may be awarded, in excess of the percentage of permanent physical impairment, for permanent "functional" disability or loss of wage earning capacity. In resolving this issue, the Commission is directed to take into consideration not only the percentage of permanent physical impairment produced by the compensable injury, but also such factors as the claimant's age, education, work experience, and any and all matters reasonably expected to affect his future earning capacity. However, the claimant may only be awarded permanent benefits for this "functional" disability or loss of wage earning capacity, upon a showing that the compensable injury was the "major cause" of such permanent disability, §11-9-102(4)(F)(ii)(a).

In the present case, the medical evidence reveals that the claimant has received a 13% permanent physical impairment to the body as a whole. This degree of impairment is solely the result of the effects of his compensable injury and the extensive surgical intervention it has required. The greater weight of the credible evidence further shows that this compensable injury and its natural sequelae have prevented the claimant from

engaging in any employments requiring substantial lifting and bending or twisting at the waist. He has also been precluded from engaging employments requiring stooping, sitting more than 30 minutes at a time, and standing or walking more than 15 minutes at a time. His employment must allow him to alternate, as necessary, between these positions.

The claimant testified that his compensable injury has resulted in chronic pain in his lower back and left lower extremity with an area of diminished sensation in his left leg. I find this testimony, concerning the presence of chronic pain and sensory complaints, to be credible and supported by the medical evidence presented. Although chronic pain cannot be considered in determining the existence or extent of permanent physical impairment, it is certainly a consideration in determining the existence and extent of permanent limitations and the "functional" disability or loss of wage earning capacity these limitations have produced.

The medical evidence shows that the claimant has been under the care of Dr. R. David Cannon, a chronic pain specialist, since July of 2000. These chronic pain complaints and the resulting treatment with narcotic pain medication would also have an adverse affect on the claimant's potential employability, precluding him from employments requiring considerable concentration or hand/eye coordination.

The record further discloses that the claimant is and has been working part-time, doing paperwork in a hospital. He earns \$136.00 per week in this employment. He is also drawing social security disability benefits. The evidence shows that, although an initial unsuccessful attempt was made to return the claimant to employment with this respondent, no recent attempt has been made to return the claimant to respondent's employ, obtain employment elsewhere for him, or provide him with any vocational assistance or rehabilitation.

Finally, the evidence proves that the claimant is 53 years old. He is a high school graduate with an associate degree in nursing and a RN license. He also has an associate

degree in firefighting and is a certified paramedic.

His previous work experience consists of being a self employed dairy farmer, and as a firefighter/paramedic. He began working for the respondent in September of 1991, as a firefighter/paramedic. At the time of his injury, on October 12, 1997, he was earning approximately \$25,000.00 per year.

After consideration of the physical limitations and restrictions placed upon the claimant's potential employment activities, caused solely by the effects of his compensable injury, in light of his age, education, previous work experience, I find that the claimant has proven by the greater weight of the credible evidence that his compensable injury is the "major cause" of an additional permanent partial disability of 25% to the body as a whole. Clearly, the restrictions placed upon the claimant's potential employment activities, solely as the result of the effects of his compensable back injury, prevent him from returning to employment in his usual capacity as a firefighter/paramedic. These limitations would further restrict to the claimant from engaging in most nursing positions. Obviously, these restrictions would further prevent him from operating a dairy farm or engaging in any form of manual labor and most factory or assembly line positions.

These restrictions would not prevent the claimant from engaging in various types of clerical or sales positions. He would also be physically capable of some position in the nursing field, including employment performing medical reviews and audits. Thus, there would still remain available to the claimant a sufficient number of employments, within his physical restrictions, to provide him with a realistic and reasonable opportunity for gainful employment. However, most of these employments would be at wages less than those he was receiving at the time of his compensable injury, or than he could receive as a firefighter/paramedic or in most RN positions.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 12, 1997, the relationship of employee-employer-carrier existed between the parties.
3. On October 12, 1997, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$296.00 for total disability and \$222.00 for permanent partial disability.
4. On October 12, 1997, the claimant sustained a compensable injury to his back.
5. There is no dispute at the present time, over the claimant's entitlement to the payment of expenses incurred for reasonably necessary medical services related to his compensable injury.
6. There is no dispute, at the present time, over the claimant's entitlement to temporary total disability benefits.
7. The claimant's healing period from the effects of his compensable injury ended on or about November 18, 1999.
8. The claimant has sustained a permanent partial disability of 38% to the body as a whole. This includes a permanent physical impairment of 13% to the body as a whole, and a permanent partial "functional" disability for loss of wage earning capacity in the amount of 25% to the body as a whole.
9. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits in excess of 13% to the body as a whole.
10. An appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded which are in excess of 13% to the body as a whole.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits equivalent to a 38 % permanent partial disability to the body as a whole. The respondents shall be entitled to credit for the benefits previously paid for permanent physical impairment.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded, in excess of 13% to the body as a whole. One-half of this fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondents from such benefits.

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.

MICHAEL L. ELLIG
Administrative Law Judge