

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E911871

JOSE HERNANDEZ, EMPLOYEE	CLAIMANT
ENERGY DEVELOPMENTS, LTD., EMPLOYER	RESPONDENT
FEDERAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 24, 2003

A hearing was held on August 21, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Zan Davis, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The hearing was held on August 21, 2003, in Pine Bluff, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's compensation rates are \$354.00 for temporary total disability and \$266.00 for permanent partial disability.
3. The claimant sustained a left lower extremity injury on September 27, 1999.
4. The respondent accepted and paid a 27% permanent impairment rating to the claimant for his left lower extremity injury.

The issues to be litigated at the hearing were as follows:

1. Is claimant permanently and totally disabled?
2. Is claimant entitled to an attorney's fee?

The claimant is 49 years of age. He is originally from Mexico, and completed the third grade. He cannot read or write English. He has been in the United States since 1984, and has worked physically stressful jobs. When the claimant was injured he was making \$13.25 per hour. He testified that prior to his injury, he was able to lift at least 100 pounds without any problems. It was stipulated that the claimant sustained a left lower extremity injury. The claimant testified that a large pipe fell onto his right shoulder and leg. Since the compensable injury, he has an extensive history of multiple surgeries due to a devastating injury to his left ankle. The claimant testified that he needs the complete use of his left foot to operate most excavation machines.

Subsequent to claimant's injury, he accepted light duty, but even that caused pain and left leg swelling. Subsequent to his injury, he went to work for his friend Mike Dobson, and Mr. Dobson's son-in-law, part time. The claimant testified that he does not work everyday, and most of the time does not work a full day. The claimant testified that he is unable to find a permanent full time job. His leg is always hurting and he is pain. He takes Vioxx and other medications for pain. He is concerned that other companies will not give him regular breaks to rest his legs like Mr. Dobson does. He has searched for jobs, but has had no result.

Mr. Dobson testified that the claimant is able to do some excavation occasionally, but not regularly.

On cross-examination, the claimant testified that he is sometimes able to

work 8 to 10 hours three days a week at \$12.00 an hour. He is not able to work as much or make as much money as he did in the past. He wears a leg brace up to his knee.

After the claimant's injury, he returned to work for Energy Development Inc., and ran a bull dozer, but he was laid off in November, 2002. The claimant stated that if he hadn't been laid off he would still be working. (T-44) The claimant testified as follows:

“Q. And as far as your current activities, in addition to working for Mr. Dobson that you've already told us about, the bulldozer work, is that the only thing you do for him?

A. Yes, ma'am.

Q. Just driving a bull dozer when he needs it.

A. Yes, that's it.

Q. Have you driven a bull dozer or done any jobs for anyone else, other than Mr. Dobson since you were laid off?

A. No, I been around because if I see construction, but I see no construction work.

Q. Don't see any out there?

A. No.

Q. You've been drawing unemployment benefits, though, is that right?

A. Yes, ma'am.

Q. Three hundred and forty-five dollars, (\$345.00), a week?

A. Yes, ma'am.

Q. And that's since November of 2002, since you were laid off?

A. Yes, ma'am.

Q. As far as your activities, you're still able to drive a car.

A. Yes, ma'am.

Q. And you do that okay?

A. Yes, ma'am.

Q. I think you told me that you also do your own yard work?

A. Yes.

Q. Mow your yard, weed eat and that kind of stuff?

A. Yes, mow the yard.

Q. Are you able to chop wood? You said you had some wood that was in your trees or something had fallen?

A. Yes, I did that for a little while.

Q. And you help your wife with housework?

A. Yes."
(T-45, 46)

Mike Dobson testified that he is in the construction business and has owned his own company since 1988. He has known the claimant for four or five years. He hired him as a bull dozer operator and stated that the claimant is an exceptional employee. He testified that he gave the claimant some work so that he could help the claimant out - a charity gesture. He testified that the claimant was one of the best bull dozer operators, but the claimant cannot stay with the job long because of his left foot. He stated that if he were not a friend of the claimant and were not trying to help him, he could not continue to employ him. He stated that the claimant sets his own hours. He testified about his knowledge of the claimant's ability to find a job:

"Q. I take it since you've been in the construction business for so long, you probably know a lot of people in this business that hire dozer operators?

A. Yes.

Q. Do you know if any of those other people will hire him?

A. I sent him to some guy I knew, and they won't hire him. They are scared of him. In the first place, they are going to want him to do stuff he can't do.

.....

A. (H)e's got other people that try to help him, you know. Like I tried to get him on out here at Wal-Mart, they are not going to hire him. There's nobody going to hire him unless they know him, and they want to help him and his family. That's the only reason I hired him."

(T-59)

.....

Well, for instance, I had an operator to go out there this morning and he had to walk 200 yards across the field with clods in it that big to get to his dozer (indicating). Jose can't do that. He would break his leg. If he jumps off that dozer, it's going to shatter his leg. We help him on and off of it, you know. I mean, I don't want to hurt Jose's feelings, he is a friend a mine, but compared to what he was before, it's no comparison. He's 20 percent maybe, tops, to the man he was when he first went to work for me. I can't just put him out there. I mean, he's a good operator, but I worry about him. I go check on him, you know. When he gets off that dozer, if something happens to his leg, and that's how come nobody is going to hire him."

(T-60)

.....

"Q. And if his testimony was three days a week, would you agree with that?

A. No. No, I wouldn't. Now, he might work three days this week or three days the week before, but three days every week, no.

JUDGE CURDIE: Does he usually operate the same type of machine when he works for you?

THE WITNESS: Yes.

THE WITNESS: The machine I've got, he don't have to use his leg, his bad leg, it just lays there. Granted, it's bouncing up and down and everything, you know, and that's something else, you know. Very few

dozers, the majority of them, he's going to have to use that bad leg. I mean, if I had to put him on one of the other dozers, I couldn't use him." (T-64)

Mr. Dodson testified that the only way the claimant could work for him is to use the machine when he does not have to use his left leg often. (T-64) Mr. Dodson testified that there are not a whole lot of the type of machine which claimant uses (Caterpillar D-5, 1996 model). That machine does not require the left leg to run it, but there are "not a whole lot of them out there." (T-67)

Mr. Dodson testified that he did not plan to keep the claimant on the job much longer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's compensation rates are \$354.00 for temporary total disability and \$266.00 for permanent partial disability.
3. The claimant sustained a left lower extremity injury on September 27, 1999.
4. The respondent accepted and paid a 27% permanent impairment rating to the claimant for his left lower extremity injury.
5. The preponderance of the evidence reflects that the claimant is not permanently totally disabled, pursuant to A.C.A. 11-9-519 and 521 (Repl.2001.)

DISCUSSION

It was stipulated that the claimant sustained a compensable left lower extremity injury on September 27, 1999. The respondents accepted and paid the 27%

permanent impairment rating for the left lower extremity injury. Because there was no impairment disability to any part of the claimant's body except his left lower extremity, permanent injuries were reduced to scheduled injury under the statute and the injury could not be apportioned to the body as a whole in determining the extent of disability. The Commission cannot consider a wage earning loss in addition to the functional loss in this scheduled injury case. The claimant is not entitled to permanent partial disability benefits in excess of the percentage of physical impairment.

However, the claimant has requested that the Commission find that the claimant is permanently totally disabled. Ark. Code Ann. § 11-9-519 states in relevant part: "(b) In the absence of clear and convincing proof to the contrary, **the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.** (c) In all other cases, permanent total disability shall be determined in accordance with the facts...."

11-9-519(e)(1): "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment."

Ark. Code Ann. § 11-9-521, as amended by Act 796 of 1993, states in relevant part: (g) Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above **except as otherwise provided in § 11-9-519(b).**

The parties were given an opportunity to submit any additional briefs and argument relating to the statutory interpretation between Section 521 (g) and Section 519 (b) (c). The respondent filed a brief in this case.

I believe it is clear that if an injured worker's scheduled injuries do not fall within the exact category set forth in Section 11-9-519(b), that a worker is precluded by the language of Section 11-9-521 (g) from receiving a reward for permanent total disability benefits. For a scheduled injury, even if the employee can otherwise prove that he is permanently totally disabled as defined in A.C.A. § 11-9-519 (e) (1), the Arkansas Workers' Compensation Commission has stated that a **claim for permanent and total disability benefits such as that filed by the claimant, is governed by A.C.A. § 11-9-521 (g)**. See: Breed v. Rockline Industries, 2001 AWCC 101 (E802791 & E809897), Full AWCC Opinion filed April 30, 2001.

Since claimant's claim for permanent total disability benefits is governed by A.C.A. § 11-9-521 (g), a reading of that statute clearly indicates that claimant is not entitled to permanent disability benefits in excess of the impairment set forth in the scheduled "except as otherwise provided in § 11-9-519 (b)." **Section 11-9-519 (b) indicates that in the absence of clear and convincing proof to the contrary, the loss of both hands, arms, legs, eyes, or any two shall constitute permanent total disability. In this particular case, the claimant's injury was to one of his feet, and one foot is not specifically listed in subsection (b).**

The claimant may argue that subsection (c) of A.C.A. § 11-9-519 would apply. That subsection states: "In all other cases, permanent total disability shall be determined **in accordance with the facts.**"

However, given the fact that claimant's claim for permanent total disability benefits is governed by A.C.A. § 11-9-521 (g), which states that benefits can only be

awarded pursuant to 11-9-519 (b), it would appear that the legislature did not intend for subsection (c) of A.C.A. § 11-9-519 to apply to scheduled injuries.

The General Assembly has made it clear that the Commission apply Act 796 of 1993 “strictly.” A.C.A. § 11-9-704(c)(3). Furthermore, in A.C.A. § 11-9-1001, the General Assembly stated that the administrative law judges should not liberalize, broaden, or narrow the scope of the workers’ compensation statute.

Therefore, claimant’s claim for permanent total disability benefits for his scheduled injury is governed by A.C.A. § 11-9-521(g). That section states that a claimant is not entitled to benefits over and above the impairment rating, except as provided in A.C.A. § 11-9-519(b). That section indicates that a claimant shall be considered permanently and totally disabled if the individual has lost both hands, both arms, **both legs**, both eyes, or any two thereof, unless there is clear and convincing proof to the contrary. **In this particular case, the claimant’s compensable injury affected his left ankle and foot.** Applying construction as required by A.C.A. § 11-9-704(c)(3), the claimant is not entitled to permanent total disability benefits. Therefore, he is limited to permanent partial disability benefits associated with his permanent physical impairment rating. The claimant’s claim for permanent total disability benefits is denied and dismissed.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC