

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E905523

KENNETH MCDONALD, EMPLOYEE

CLAIMANT

BATESVILLE POULTRY EQUIPMENT, EMPLOYER

RESPONDENT

**FREMONT COMPENSATION INSURANCE, CARRIER
CAMBRIDGE INTEGRATED SERVICES, TPA**

RESPONDENT

OPINION FILED SEPTEMBER 22, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 25, 2003, at El Dorado, Union County, Arkansas.

Claimant represented by the HONORABLE RONALD L. GRIGGS, Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE.

A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On April 29, 2003, a prehearing conference was conducted in this claim from which a prehearing order of the same date was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission's Exhibit #1.

The testimony of Kenneth McDonald, the claimant, and Heather Naylor, coupled with medical reports and other documents comprise the record in this claim. At the conclusion of the hearing respondents presented a hearing brief setting forth their position with respect to the application of Ark. Code Ann. §11-9-521(g) and Ark. Code Ann. §11-9-519(b). Claimant was

allow to present a post-hearing brief on the same provisions. Claimant's brief was received the Commission on July 9, 2003. Both briefs have been blue back for inclusion in the record.

DISCUSSION

Kenneth McDonald, the claimant, with a date of birth of April 26, 1957, commenced his employment with respondent on December 30, 1998, working in the warehouse and yard of respondent. Claimant has a varied work history to include a substantial period of time constructing chicken houses. On May 5, 1999, while preparing to install a ventilation fan in a chicken house, claimant suffered an injury to his left leg which ultimately resulted in several surgical procedures and a residual permanent impairment of 50% to the low left extremity.

There is no evidence in the record to reflect that the claimant experience any physical limitations or restrictions on his employment activity prior to the May 5, 1999, injury in the employment of respondent. While claimant graduated high school in Waldo, Arkansas he is unable to read, has difficulty performing simple math, and his writing is limited to signing his name.

Claimant was in the Army National Guard for a period of two years, however remained at rank of E-1 throughout the period. Claimant acknowledged that his discharge from the Army National Guard was the product of being absent without leave for approximately two months and thereafter receiving a dishonorable discharge. For a period of approximately two years claimant worked on a horse ranch in Texas where he groomed horses. Claimant also worked at a printing shop in Illinois for a period of six months. Claimant noted that he was color blind and on occasions made a mistake with the ink because he could not distinguish red from black. Claimant went to work for a construction company and later secured employment with

respondent.

The testimony reflects that while he performed basic carpenter work in the construction of chicken houses, the same was basically limited to following directions. Specially the evidence the record reflects claimant utilized a hammer, nails, skill saw, and generator in the discharging of employment duties constructing chicken houses. While claimant assisted in placing large ventilation fans in the chicken houses, he did not perform electrical work with respect to the installation of the ventilation fans.

Claimant had been employed by respondent for a period of approximately one and a half months when he suffered the compensable injury to his left leg on May 5, 1999:

I got an injury and everything on a job site when I was pulling a cable, the electric line, through the chicken house, and which they had all kinds - - all the chickens in there. It was a laying house and I fell through a hole, and I didn't even see it, and I was pulling it, and I had chickens all on the ground, and I couldn't find, you know - - (T.9)

In the May 5, 1999, accident claimant's left leg went through a wooden slat in the chicken house. Claimant was performing the job duties to a laborer at the time of the accident.

Following the May 5, 1999, injury claimant underwent surgery under the care of Dr. Greg Massanelli, an El Dorado orthopedic physician, on May 26, 1999. During the initial surgery hardware was placed in the claimant's left lower extremity. Approximately two months later claimant underwent a second surgery on his left knee under the care of Dr. Massanelli, related to the May 5, 1999, compensable injury. Claimant acknowledged that following a period of rehabilitation after the second surgery he reported back to respondent for work, pursuant to the direction of Dr. Massanelli. Claimant continued to experience pain and swelling in the left leg

and in the area around the hardware following the second surgery. The duration of claimant's employment by respondent following his second surgery was approximately one week.

Claimant's testimony reflects that the pain in his leg was so severe that he was unable to continue discharging employment duties.

Claimant later treated with Dr. Jay Lipke, a Little Rock orthopedic physician relative to his left knee injury. Claimant acknowledged that shortly after being seen by Dr. Lipke, on August 29, 2000, he was assessed with a permanent impairment at 50% to the left lower extremity. Claimant's testimony reflects that he did not seek a job following the August 2000, release by Dr. Lipke because he was unable to stand on his feet and walk around on his feet due to the pain he was experiencing as a result of the compensable injury. Claimant noted that he had to alternate between standing and sitting and could not do either for prolonged periods of time. Claimant did seek employment at K-Mart in December 2000. Claimant was transported to the K-Mart facility where he made an application by his niece. Claimant acknowledged at the time he submitted an application at K-Mart he was still using crutches because of residuals of the injury. Claimant was not hired by K-Mart.

In March 2001, claimant was again evaluated by Dr. Lipke, pursuant to a request of Dr. Massanelli. The evidence reflects that in April 2001, claimant underwent a surgical procedure under the care of Dr. Lipke whereby one of the screws previously placed in his leg by Dr. Massanelli, was removed.

Claimant acknowledged that other than the December 2000, application at K-Mart, he has not sought employment since being released by Dr. Lipke. Claimant uses a cane to walk and to assist in his balance. The testimony of the claimant reflects that he is unable to stand for

prolong periods of time or to walk distance greater than fifteen feet before having to stop and sit down due to pain. Claimant is unable to sit for prolonged periods of time before having to stand and to regain circulation in his leg, which becomes numb. Claimant describes the pain experience in the left lower extremity as a stinging sensation, burning, aching, and throbbing. Claimant noted that on occasions his sleep is disturbed due to the pain experienced in his left leg. Claimant is currently taking medication prescribed by Dr. Lipke relative to the left leg.

Ms. Heather Naylor, a certified vocational rehabilitation counselor with Systematic Corporation, testified that she has been a vocational rehabilitation counselor for four and a half years. While employed by Cascade Disability Management Ms. Naylor met with the claimant for a vocational evaluation interview, the duration of which was two hours. At the time of her initial contact with the claimant, Ms. Naylor acknowledged that claimant was still on crutches and had not been released by Dr. Lipke. The initial vocational evaluation interview by Ms. Naylor with the claimant took place on June 2, 2000. Ms. Naylor met with Dr. Lipke during claimant's visit to his office of June 20, 2000. Thereafter, Ms. Naylor relied upon medical reports generated by Dr. Lipke in determining when claimant had reached maximum improvement. Ms. Naylor acknowledged that she did not have any testing performed on the claimant as a part of her vocational evaluation because she was directed to do so by respondent. Ms. Naylor did perform a transferable skill analysis along with a labor market survey relative to the claimant.

After the claimant was assessed with a 50% impairment to the left lower extremity by Dr. Lipke, he received permanent partial disability benefits to correspond with the rating. Claimant last received indemnity workers compensation benefits relative to the 50% impairment to the left lower extremity from respondent in June or July 2002. In August 2002, claimant underwent

evaluation at Hot Spring Rehabilitation Center. In addition to the evaluation claimant participated in a sheltered workshop sitting as a part of the Hot Spring Rehabilitation Center, Abilities Unlimited. Claimant did not complete the program a Hot Spring Rehabilitation Center.

In addition to the testimony of the claimant and Ms. Naylor, the record consist of claimant's medical reports, and documents generated as a result of the vocational rehabilitation assessment by Ms. Naylor. Further the record reflects documents generated as a result of claimant's evaluation and placement in the Hot Springs Rehabilitation Center program, to include testing performed regarding the claimant.

From all of the evidence I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 5, 1999, the relationship of employee-employer-carrier existed among the parties.
3. On May 5, 1999, the claimant earned wages sufficient to entitle him to weekly compensation benefit of \$179.00/\$154.00 for TTD/PPD benefits.
4. On May 5, 1999, the claimant sustained an injury arising out of and in the course of his employment.
5. The claimant was paid appropriate temporary total disability benefits relative to his May 5, 1999, compensable injury.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 5, 1999.
7. The claimant's healing period ended August 29, 2000, and April 17, 2001.

8. The claimant has a permanent physical impairment in the amount of 50% to the left lower extremity.

9. The claimant has been rendered permanently and totally disable within the preview of the Arkansas Workers' Compensation statute when his age, education, permanent restrictions and limitations are considered, as a result of the May 5, 1999, compensable injury.

10. The respondents have controverted the payment of permanent total disability benefits in this claim.

CONCLUSIONS

The compensability of the claimant's May 5, 1999, injury at the employment of respondent is not disputed. Claimant's injury has resulted in a 50% permanent physical impairment to her left lower extremity. Respondents paid temporary total disability benefits to the claimant, and medical benefits on claimant's behalf, as well as indemnity benefits to correspond with the 50% impairment growing out of the May 5, 1999, compensable injury.

Claimant asserts that as a result of the May 5, 1999, compensable injury, he has been rendered permanently and totally disable from engaging in gainful employment and is correspondently entitled to the payment of permanent total disability benefits by respondents. Respondent take the position that claimant suffered a schedule injury while in their employment and that Ark. Code. Ann. §11-9-521(g) precludes the claimant from establishing a claimant for permanent total disability unless the same is established under the specific requirements of Ark. Code Ann. §11-9-519(b). Both parties have submitted briefs on the application of the afore statutory provision to the present claim.

STATUTORY PROVISION

Respondents argue that since the claimant suffered a scheduled injury, in order to establish a claim for permanent total disability he must meet the requirements of Ark. Code Ann. §11-9-519(b) and is precluded from permanent total disability status by the specific limitations of Ark. Code Ann. §11-9-521(g). Further, respondents argues that strict construction of the Act and proper adherence to the rules of statutory interpretation dictate that Ark. Code Ann. §11-9-519(c) does not apply to scheduled injury cases that are outside of the preview of Ark. Code Ann. §11-9-519(b).

It is undisputed that claimant suffered a scheduled injury on May 5, 1999, in his employment with respondent. Respondents reliance on Ark. Code Ann. §11-9-521(g) to preclude the claimant from permanent total disability benefits in the instant claim is misplaced. As appropriately pointed out by claimant, in his brief, Ark. Code Ann. §11-9-521(g) addresses claims for permeant partial disability benefits in excess of the percentage of permanent physical impairment suffered by the claimant as a result of his scheduled injury. In the instant claim, claimant is not seeking permanent partial disability benefits in excess of the anatomical impairment but rather seeking permanent total disability benefits. The reference to Ark. Code Ann. §11-9-519(b) as reflected in Ark. Code Ann. §11-9-521(g) addresses a presumption of permanent total disability benefits as a result of scheduled injuries suffered by a claimant. The presumption set forth in the afore provision maybe overcome by clear and convincing proof to the contrary.

The controlling statutory provision relative to the present claim is lodged under Ark. Code Ann. §11-9-519(c), which provides:

In all other cases, permanent total disability shall be

determine in accordance with the facts.

Where an injured claimant who has suffered a scheduled injury resulting in a permanent physical impairment seeks permanent total disability benefits as a result of the compensable injury the applicable statutory provision is lodged under Ark. Code Ann. §11-9-519(c). Act 796 of 1993 did not make any changes relative to a claimant's entitlement to permanent total disability benefits.

Ark. Code Ann. §11-9-519(e) provides:

- (1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.
- (2) The burden of proof shall be on the employer to prove inability to earn any meaningful wages in the same or other employment.

PERMANENT TOTAL DISABILITY

In the instant claim, claimant, with a date of birth of April 26, 1957, a high school graduate, is functionally illiterate. Claimant is unable to read. Claimant's writing skills is limited to signing his name. Claimant is only able to perform simple mathematic. The evidence in the record reflects that claimant's ability to even utilize a telephone in limited to dialing 911. While claimant has worked unskilled labor positions the entirety of his employment experience or work history, to include carpentry, due to his ability to only perform simple mathematics and write his name skills presumed to have been obtained through employment experience are not present in the instant claim.

Claimant has worked a substantial period of time as a carpenter. The evidence discloses that claimant's performance of carpenter duties was limited to following directions and instructions from other supervisory personnel. Specifically, claimant could cut lumber at angles

and at designated lengths, so long as the material was properly marked by someone else. Claimant utilized hammer, nail, nail bag, skill saw, and generator in the discharge of his employment in the duties in the employment of respondent constructing chicken houses. The evidence disclose that claimant worked for a period of six months at a printing operation in Illinois, however followed directions by supervisory personnel. Claimant candidly acknowledged that his employment was jeopardize when, due to color blindness, he could not distinguish between red and black, with respect to the inks uses in the printing operation. Given claimant's inability to read, his color blindness restricted his ability to follow simple instructions.

Claimant underwent an evaluation at Hot Springs Rehabilitation Center, and as a part of the process underwent a psychological screening. The July 10, 2000, report generated as a result of the psychological screening reflects, in pertinent part:

The client reports he was passed from grade to grade despite his poor reading and spelling skills. He failed the sixth and eighth grades. Test results obtained on this date indicate significantly below average skills Mr. McDonald appears to function in the borderline range with learning disabilities in reading and written expression.

Mr. McDonald said he had not worked in our years because of problems with his left leg. The client states he built chicken houses for twenty years under the auspices of a construction company in Hope, He sustained ligament damage and poor circulation after falling through a chicken house. . .

Besides his leg injury, the client also reports poor eyesight. He takes Vioxx for arthritis. Mr. McDonald appears to have a hearing loss as this examiner had to talk loudly to him and frequently repeat information. The reader is referred to the physician's report for further information in this

regard. (CX. 1)

In addition to noting difficulty following written instructions and requiring assistant to complete job applications as vocational implication assessment dated July 10, 2002, further reflects:

DIFFICULTY LEARNING COMPLEX TASKS
DIFFICULTY MAINTAINING ADEQUATE
PRODUCTION LEVEL IF MORE THAN
SIMPLE ACADEMIC SKILLS ARE REQUIRED
INABILITY TO PERFORM WORK TASKS INVOLVING
EXTENSIVE COMMUNICATION
INABILITY TO PERFORM TASKS WHICH INVOLVE
WRITING
INABILITY TO READ ASSIGNED WRITTEN
COMMUNICATIONS
DIFFICULTY READING ADVANCED TECHNICAL
MATERIALS
DIFFICULTY OBTAINING SATISFACTORY GRADES DUE
TO POOR READING SKILLS
DIFFICULTIES STUDYING INDEPENDENTLY
SPECIAL INSTRUCTIONAL METHODS MAY BE REQUIRED
DIFFICULTY WITH ADVANCED COMPUTATION OR
MATHEMATICS
DIFFICULTY WITH SPELLING TASKS
DIFFICULTY WITH TASKS REQUIRING DETAILED
INSTRUCTIONS
REPETITION OF INSTRUCTIONS MAY BE REQUIRED
SIMPLE INSTRUCTIONS HELPFUL
SLOW TASK PERFORMANCE
POSSIBLE DIFFICULTY ASSESSING CONSEQUENCES OF
DECISION ALTERNATIVES
POSSIBLE DIFFICULTY ASSESSING CONSEQUENCES OF
DECISION ALTERNATIVES
MAY NEED ASSISTANCE TO PLAN STEPS TO ACHIEVE
VOCATIONAL OBJECTIVE
POSSIBLE DIFFICULTY IMPLEMENTING VOCATIONAL
PLAN ON OWN INITIATIVE
PROBABLY SHOW LEARNING OF TRAINING/WORK
TASKS
DIFFICULTY OBTAINING SATISFACTORY GRADES

CONCLUSIONS AND RECOMMENDATIONS

Finding indicates bordering intellectual ability. Mr. McDonald has a significant discrepancy between his verbal and performance WASI scores in favor of the latter. This pattern, along with his academic deficits, suggests the diagnosis of Level III learning disabilities in reading and written expression. Vocational guidance and counseling are recommended. Based on test results and information obtained in this screening, the client may be reasonably expected to sustain functioning by means of semiskilled employment which is medically feasible. (CX.1, EXHIBIT #6)

While the claimant did participate in the Abilities Unlimited Sheltered Workshop Program as a part of the Hot Springs Rehabilitation Center, he did not complete the program. Claimant noted that he experienced difficulty performing the assigned job task because of residuals of his compensable injury. There was also a recommendation that the claimant undergo physical therapy relative to his leg while enrolled in the Hot Springs Rehabilitation Center program.

The medical in the record reflects that on August 29, 2000, Dr. Lipke determined that the claimant had reached the end of his healing period and that his residual injury warranted a 50% impairment to the left lower extremity. The August 29, 2000, report of Dr. Lipke concluded:

I will see him back as needed in the future. I anticipate he will have to use support hose for the remainder of his life. I feel he could return to a sedentary type occupation if such work were available. (RX. 1, p12)

Claimant did undergo a subsequent surgical procedure under the care of Dr. Lipke in terms of hardware removal from the left proximal tibia, on April 2, 2001. Claimant reached maximum medical improvement as a result of the April 2, 2001, surgery, on April 17, 2001, with no change in his anatomical impairment. (RX. 1, p17-18)

Claimant is limited in the amount of walking, standing, and sitting, he can do, as a result of the May 5, 1999, compensable injury. Claimant continues to experience pain and swelling in the left lower extremity and takes prescription medication relative to same.

Claimant's employment efforts since his May 5, 1999, injury in the employment of respondent has consisted of one (1) week of work in the employment of respondent following his second surgery under the care of Dr. Massanelli, which he was unable to continue performing due to residuals of the compensable injury. Claimant also made application for employment with K-Mart in December 2000, however, was not hired. Claimant also performed work in a sheltered workshop sitting with Abilities Unlimited, as a part of the Hot Springs Rehabilitation Center, however was unable to complete the program.

Claimant's employment history prior to his May 5, 1999, compensable injury in the employment of respondent consisted of unskilled manual labor. Claimant is unable to perform any of his pre-injury job duties as a result of the compensable injury. Claimant has been limited to sedentary work as recommended by Dr. Jay Lipke, with respect to future employment activities. In the instant claim, claimant is unable to read or write or to perform other than basic arithmetic, adding and subtraction. Claimant has sustained his burden of proof by a preponderance of the evidence that he has been rendered permanently and totally and totally disable from engaging in gainful employment as a result of his May 5, 1999, compensable injury when his age, education, work history, permanent restriction limitations, are considered. Respondents have controverted the claimant's entitlement to permanent total disability benefits.

AWARD

Respondents are hereby ordered and directed to pay to the claimant permanent total

disability benefits at a weekly compensation benefit rate of \$179.00, commencing with the end of his healing period. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of May 5, 1999..

Maximum attorney fees are herein awarded to the claimant's attorney the Honorable Ronald L. Griggs, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715, and, in accordance with *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W. 2d 345 (1990).

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge