

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001905

SHADE WALKER

CLAIMANT

MERIT ELECTRIC COMPANY

RESPONDENT

CYPRESS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 3, 2003

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

Claimant represented by JEFFREY SLAYTON, Attorney, Springdale, Arkansas.

Respondents represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 21, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on February 25, 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. A copy of this pre-hearing order was made Commission's Exhibit No. I to the hearing.

The following stipulation was submitted by the parties and is hereby accepted:

1. The prior Opinion of February 6, 2000, has become final and is res judicata of all issues raised and addressed therein.

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

1. The claimant's entitlement to his current proposed program of rehabilitation.
2. The claimant's entitlement to permanent "functional" disability benefits, should the proposed program of rehabilitation be denied.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends that all matters in the 2/6/2000 Order found are the law of the case as it was not appealed, more than ninety days have passed and there is no legal basis to modify anything contained therein. Claimant can show how he can finish college with rehabilitation benefits and knows his major, has shown ability to do college level work, has three years of benefits from VA education and with rehabilitation the combined assistance will allow college completion. Alternatively, claimant has suffered wage loss/loss of earning capacity above his medical PPD ratings.

In regard to these issues, the respondents contend that the claimant is not entitled to wage loss disability above his 10% rating to the back nor is he entitled to permanent and total disability to his scheduled injury to his leg. In addition, the claimant is now resubmitting the same plan of rehabilitation that was found not to be reasonable on February 25, 2002. The respondents contend that the doctrine of res judicata applies for this plan of rehabilitation. The claimant did not appeal this decision and the finding of Judge Ellig that this particular plan was not reasonable in light of the disability sustained has become final. Further, the respondents contend that even if the Commission allows the claimant to bring this plan back up, it is still not reasonable in relation to the degree of disability sustained.

DISCUSSION

I. REHABILITATION

The claimant is again seeking rehabilitation benefits under the provisions of Ark. Code Ann. §11-9-505(b). The burden rests upon the claimant to prove his entitlement to such benefits. In order to meet this burden, the claimant must satisfy three specific requirements. First, he must prove that he is entitled to receive compensation benefits for permanent disability. Secondly, he must prove that he has not been offered an opportunity to return to work and/or re-employment assistance. Finally, he must prove that his proposed program of vocational rehabilitation is “reasonable in relation to the disability

sustained”.

The claimant’s current proposed program of rehabilitation is essentially the same as the one he requested at the time of the prior hearing on December 3, 2001. This program was rejected in the prior Opinion of February 25, 2002. At the time of the prior hearing, the claimant’s proposed program of rehabilitation was to obtain a college degree. In furtherance of this program, he requested that the respondents be liable for the expense of tuition and books for seventy-two weeks of college courses, together with maintenance and mileage. At the time of the first hearing, the claimant had little or no information concerning the type of degree he intended to pursue or the expense that it entailed.

At the time of the present hearing, the claimant had decided on the degree he intends to pursue, that being an education degree that would allow him to teach mathematics (presumably in junior high or high school). In order to obtain this degree, the claimant will have to successfully complete approximately one-hundred and twenty-eight semester hours of courses.

The claimant has apparently only completed one semester of schooling toward this degree. During this semester, he took a three hour course in “remedial” Algebra, that does not count towards his degree. He was also only able to obtain a “C” in this course. However, he did complete three other courses, which would count towards his degree. He earned a grade of a “A” in Introduction to Anthropology, a grade of a “C” in American History, and a grade of a “C” in English Composition I. Further, this gives him only nine semester hours toward his degree. The claimant’s relatively low grade in a “remedial” Algebra course would cast some doubt upon his ability to obtain a degree in mathematics.

The claimant testified that during the second or spring semester (which should now be completed), he was taking General Biology, College Algebra, English Composition II, and Human Geography. These courses, if successfully completed, would give him another thirteen hours towards his degree for a total of twenty-two hours. At this rate, the claimant

would obtain sufficient hours for his degree in a little less than six years.

In the previous Opinion of February 25, 2002, I held that a plan strikingly similar to the claimant's current proposed program of rehabilitation had not been proven to be "reasonable in light of the disability sustained". At that time, the claimant had no particular major picked out and had not demonstrated any ability to perform college work. More importantly, there was no evidence that the claimant would be able to complete his schooling and obtain a degree, once the seventy-two weeks of rehabilitation benefits had been exhausted.

The additional evidence presented by the claimant, at the current hearing, still does not satisfy the questions raised concerning his ability to successfully complete his proposed program of rehabilitation. Although the claimant now has a declared major (a Bachelor of Science in Mathematics from the School of Education), his grade of a "C" in remedial College Algebra, raises significant concerns on his ability to successfully obtain a degree in this field.

The evidence presented at the hearing on April 21, 2003, shows that the claimant has now successfully completed some college hours, specifically nine semester hours. At this rate, he would obtain necessary semester hours for his degree in a little over seven years.

Should the claimant continue to obtain twelve credit hours a semester he would still need five more years to obtain his degree. The claimant has also presented evidence concerning the availability of other resources to allow him to financially continue his pursuit of a degree, once the seventy-two week limitation on benefits under Ark. Code Ann. §11-9-505(b) has been reached. However, the claimant's financial ability to continue in his proposed program of rehabilitation is not my only or even greatest concern. If the claimant had even successfully completed sufficient college credits to place him in approximately his junior year, then my opinion concerning the likelihood of his successful completion of

the program in obtaining a degree would likely be different. However, this is not the case. At the time of the hearing, the claimant had not even successfully completed sufficient course to place him in the second semester of his freshman year.

I am also concerned that the claimant has unreasonable expectations concerning the benefits that he would receive under Ark. Code Ann. §11-9-505(b). While this subsection provides for “maintenance”, applicable case law has held that this term does not extend to day to day living expenses, such as rent, utilities, food, et cetera, Gray v. Armour & Company, 268 Ark. 1072, 598 S.W. 2nd 434 (1980); Model Laundry & Dry Cleaning v. Simmons, 26 Ark. 770, 596 S.W. 2nd 337 (1980). It is obvious that the claimant is unaware of this fact and has even indicated in his testimony, that without payment of his living expenses he would be unable to pursue his college studies.

For essentially the same reasons as given in my prior Opinion of February 25, 2002, I find that I must once again hold that the claimant has failed to prove that his proposed program of rehabilitation is “reasonable in light of the disabilities sustained”. Thus, the claimant has again failed to prove his entitlement to this program.

II. PERMANENT “FUNCTIONAL” DISABILITY FOR LOSS OF WAGE EARNING CAPACITY

As the claimant’s proposed program of rehabilitation has been denied, it becomes necessary to determine the existence and extent of any permanent “functional” disability (i.e. loss of wage earning capacity) produced by his compensable injury. The burden again rests upon the claimant to prove the existence and extent of such permanent functional disability.

The evidence reveals that the accident of February 6, 2000, resulted in two permanent injuries to different portions of the claimant’s anatomy. One of these permanent injuries was to the claimant’s foot/ankle. This involves a portion of the claimant’s anatomy which is scheduled under Ark. Code Ann. §11-9-521. Therefore, his entitlement to

permanent disability benefits, absent a finding of permanent total disability, would be limited to that provided by the schedule. The other permanent injury was to multiple levels of the claimant's lumbar spine. This is an "unscheduled" injury that would be controlled by the provisions of Ark. Code Ann. §11-9-522. Absent a showing of permanent total disability, as a result of the combined effects of these two separate injuries, only the claimant's unscheduled injury and only physical limitations it causes can be considered in determining the existence and extent of any permanent functional disability for loss of wage earning capacity, Clark v. Shiloh Tank and Erection Company, 259 Ark. 521, 534 S.W. 2nd 240 (1976). In the present case, the evidence presented is not sufficient to show that the claimant has been rendered permanent totally disabled as a result of the combined effects of his scheduled and unscheduled permanent injuries.

The claimant's unscheduled permanent injury has resulted in a permanent physical impairment of 10% to the body as a whole. As in Clark, the majority of the claimant's physical limitations are the result of the permanent scheduled injury to his right ankle and foot. However, he does have some limitations as a result of his unscheduled permanent injury. These are restrictions against repetitive or prolonged bending or twisting at the waist, heavy lifting, and prolonged standing or walking. These physical restrictions, in and of themselves, would preclude the claimant from engaging in any type of heavy manual labor and many assembly line positions. In light of the claimant's age, current education, and previous work experience, it appears that a significant portion of the employments for which he would otherwise be qualified would involve these types of positions. Thus, I find that the claimant has proven by the greater weight of the credible evidence that he has experienced permanent functional disability as a result of his unscheduled compensable back injury, as well as permanent physical impairment (which has previously been held to be in the amount of 10% to the body as a whole). It is my opinion that the greater weight of the credible evidence establishes that this permanent functional disability is in the

amount of an additional 15% to the body as a whole.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 6, 2000, the relationship of employee-employer-carrier existed between the parties.
3. On February 6, 2000, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$300.00 for total disability and \$225.00 for permanent partial disability.
4. On February 6, 2000, the claimant sustained a compensable injury this back and right lower extremity.
5. There is no dispute, at the present time, over the payment of expenses incurred for medical services.
6. There is no dispute, at the present time, over the payment of temporary disability benefits.
7. The respondents have paid permanent partial disability benefits attributable to a permanent physical impairment of 10% to body as a whole and 43% to the leg below the knee.
8. The claimant has proven that as a result of his compensable lower back injury, he has experienced an additional permanent functional disability of 15% to the body as a whole. Thus, the total extent of the claimant's permanent partial disability is 25% to the body as a whole and 43% to the leg below the knee.
9. The claimant has failed to prove that his proposed program of rehabilitation is reasonable in light of the disability sustained. Thus, he would not be entitled to this proposed program of rehabilitation under Ark. Code Ann. §11-

9-505(b).

10. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits, other than those attributable to permanent physical impairment and his entitlement to his proposed program of rehabilitation.
11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted permanent partial disability benefits for permanent "functional" disability, which are herein awarded.

ORDER

The respondents shall pay to the claimant additional permanent partial disability benefits for permanent "functional" disability, or loss of wage earning capacity, in the amount of 15% to body as a whole.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on these additional permanent partial disability benefits. One-half of this fee shall be the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to 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.

For the reasons heretofore set forth in this Opinion, the claimant's request for his proposed program of rehabilitation, under the authority of Ark. Code Ann. §11-9-505(b), should be and hereby is denied and dismissed.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge