

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209049

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| RICHARD WHITE, EMPLOYEE | CLAIMANT |
| AMFUEL, EMPLOYER | RESPONDENT |
| ZENITH INSURANCE COMPANY, CARRIER | RESPONDENT |

OPINION FILED NOVEMBER 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 20, 2003, at El Dorado, Union County, Arkansas.

Claimant represented by the HONORABLE F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE J. MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

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

On May 27, 2003, a prehearing conference was conducted in this claim from which a prehearing order of May 29, 2003 was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission Exhibit No. 1.

The testimony of Richard White, the claimant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Richard White, the claimant, with a date of birth of March 11, 1942, completed the eleventh grade. The claimant was employed by respondent for a period of approximately fifteen years.

The testimony of the claimant reflects that he completed the eleventh grade at Columbia High School in Magnolia, Arkansas. After dropping out of school the claimant was employed for a period of two years at Atkins Exxon service station where he performed the job duties of washing cars, fixing flats, and assisting customers. Thereafter, the claimant was employed at two other service stations, Mitchell Amoco and a service station in Stephens, Arkansas, performing similar job duties as had been performed at Atkins Exxon service station. The claimant next secured employment at Elk Roofing Company. The claimant's duties with Elk Roofing entailed grading shingles as the same proceeded down an assembly line. The claimant later obtained employment at Southern Extrusion, an aluminum plant, where he worked on an assembly line performing manual labor. Later, the claimant was employed at a steel mill where he also worked on an assembly line performing manual labor. Thereafter, the claimant secured employment with respondent.

The testimony of the claimant reflects that during the majority of the time that he was employed by respondent he discharged the same employment duties as a builder. The claimant's testimony reflects, with respect to his job duties:

I have to pick up about 20 100 pound sacks to fill that big pot up. That's what I mix the plaster in. We have two sprays a day and it be about 20 sacks that I have to get off the stack and pour it in.

* * *

We got a lift that hooks the pot and dumps it but you got to bring it around, that's when it swung around and hit my leg that time. (T. 21-22)

In describing the mechanics of his compensable April 17, 2002 left knee injury, the claimant's testimony reflects:

I'm a sprayer and I work in the spray room. I have to mix plaster and we've got a big pot that we mix it in and we've got a turntable that the thing sits on. The turntable usually just turns real easy but we have problems out of it sometimes when it would be hard to turn. This time it just spin around real quick and hit my leg. (T. 14)

The claimant's testimony reflects that following the April 17, 2002 left knee injury, he continued to discharge employment duties for the balance of the day. The following day, the claimant's testimony reflects, his knee was swollen and painful. As a consequence of the afore, the claimant sought and obtained treatment under the care of Dr. Ivy McGee-Reed, a Magnolia family physician. There is no dispute regarding the reporting of the claimant's April 17, 2002 compensable injury to appropriate supervisory personnel. The injury was accepted as compensable and respondent paid appropriate medical and indemnity to and on behalf of the claimant.

The claimant's testimony reflects that after a period of treatment under the care of Dr. Reed, he was referred by same to Dr. Kenneth Gati, an El Dorado orthopedic physician. The claimant's testimony reflects that he underwent a conservative treatment regiment under the care of both Dr. Reed and Dr. Gati, relative to the left knee injury. The claimant's testimony reflects that Dr. Gati released him to return to work on a trial basis. The claimant returned to the employment of respondent upon the release by Dr. Gati and attempted to perform his job duties. The testimony of the claimant reflects that he was only able to work for a period of ten hours, during which time he

experienced such severe pain in his leg that he was unable to finish his shift. The claimant returned to Dr. Gati following his unsuccessful effort in returning to work.

Upon returning to Dr. Gati, the claimant was taken off work and later underwent surgery under the care of same. Indeed, a review of the medical in the record reflects that on May 2, 2002, an MRI was performed relative to the claimant's left knee. During a May 7, 2002 visit to Dr. Gati, surgery was scheduled for May 21, 2002 for a left knee arthroscopy for a medial meniscal tear. (CX1, p. 1) The claimant was seen in follow-up by Dr. Gati on May 28, 2002 following his May 21, 2002 surgery. The May 28, 2002 report of Dr. Gati noted that the claimant was not in a position to be released to full duty. During a June 28, 2002 follow-up visit Dr. Gati noted that the claimant was not ready to return to work, and that if he was still having symptoms in three weeks he would proceed with Synvise injections. A July 19, 2002 entry in the records of Dr. Gati relative to the claimant reflects, in pertinent part:

PLAN: At this point, we discussed his treatment options with him. Since he is still having some soreness in his knee and it is keeping him from being able to work, I would recommend proceeding with Synvise since he does have osteoarthritis of the medial compartment. This was discussed with him and we will try to get this approved through his insurance carrier. The patient, in the meantime, is unable to return back to his regular duties. He is still going to be on sedentary work for the next six weeks. (CX1, p. 3)

The medical in the record reflects that claimant was prescribed physical therapy by Dr. Gati on October 21, 2002. The treatment period for physical therapy was three times a week for three weeks. Following a November 12, 2002 follow-up visit with Dr. Gati light duty work was recommended with respect to claimant's employment, to include the restrictions of no lifting, pushing, or pulling

over twenty pounds. Finally, during a November 19, 2002 visit Dr. Gati noted of the claimant:

Mr. Whites comes in today to clinic for follow-up of his knee. He reports it is feeling a little bit better with physical therapy. His pain has decreased some. He is still on a regular anti-inflammatory. He denies any numbness or tingling in his leg. He reports that it is stiff in the morning and gets a little bit better after he walks on it some.

* * *

ASSESSMENT: Osteoarthritis of the left knee.

PLAN: At this point, I think that he has reached MMI. He had an aggravation to a pre-existing condition. Based on today's exam, a final impairment rating will be dictated in a separate letter. Also based on his exam, I think that he is going to have permanent restrictions. I would recommend that we limit his lifting, pushing, pulling or carrying to a maximum of 20 pounds. He also needs to avoid doing squatting and kneeling and he also needs to limit his climbing of stairs or ladders to just occasional. His walking and standing for an eight hour day should be limited to occasional with probably just two hours within an eight hour day. (CX1, p. 6)

In a December 9, 2002 report to respondent-carrier Dr. Gati assessed the extent of the claimant's anatomical impairment to 10% to the lower extremity. The December 9, 2002 report further reaffirmed the permanent restrictions outlined by Dr. Gati in his November 19, 2002 office note relative to the claimant. (CX1, p. 7)

The testimony of the claimant reflects that after being released by Dr. Gati he contacted respondent-employer to inform same of his release and permanent restrictions. The claimant maintains that he was informed by personnel of respondent that they did not have light duty work. The claimant noted that he had called and talked with the plant manager at the time he was informed

of the afore.

The claimant acknowledged that he has not sought work with any other employer since he last discharged employment duties for respondent or after having reached maximum medical improvement. The claimant further testified that he does not feel that he is capable of performing any of his previous jobs, to include his employment at the various service stations. The claimant attributes the inability to perform the prior jobs to the fact that they required him to be on his feet and standing for prolonged periods and that he is no longer capable of doing so as a result of the compensable injury.

The testimony of the claimant reflects that he is unable to lift greater than 20 pounds or to stand for more than 10 minutes. The claimant noted that while he can sit for prolonged periods of time, he must keep his left leg extended. The testimony of the claimant reflects that some mornings his knee hurts and some mornings it does not. The claimant further noted that he is unable to walk for long distances due to residuals of the left knee injury. The claimant provides an example of a store being six blocks from his residence and that when he attempted to walk to the store he had to stop three to four times before he got back home.

The claimant's testimony reflects that he is able to read and write without difficulty, although his mathematic skills are not very good. The claimant's testimony reflects that he is able to prepare his own meals, breakfast and lunch and that he is able to wash dishes during the day. Again, the claimant noted that the greatest difficulty he experiences is when he has to stand while preparing the meal. The claimant continues to drive his own vehicle and noticed that the only problem he experiences is getting in and out of the car.

The claimant maintains that when the permanent restrictions and residuals of his

compensable injury are considered along with his age, education, and permanent work restrictions, he has been rendered permanently and totally disabled from engaging in gainful employment. Accordingly, the claimant maintains entitlement to permanent and total disability benefits as a result of the April 17, 2002 compensable injury. The claimant was assessed with a 10% anatomical impairment to the left lower extremity by Dr. Gati and respondents paid permanent partial disability benefits to correspond with the afore.

Respondents deny that the claimant has been rendered permanently totally disabled from engaging in gainful employment and controvert the payment of permanent partial disability benefits in excess of the claimant's anatomical impairment. Further, the respondents maintain that because the claimant has suffered a scheduled injury to the left lower extremity he is not entitled to permanent total disability benefits.

After a thorough consideration of all the evidence in this record, to include the testimony of the claimant, a review of the medical reports, and application of the pertinent statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 17, 2002 the relationship of employee-employer-carrier existed among the parties.
3. On April 17, 2002 the claimant earned wages sufficient to entitle him to weekly compensation benefits, \$237.00/\$178.00 for TTD/PPD benefits.
4. On April 17, 2002 the claimant sustained an injury to his left knee arising out of and in the course of his employment.

5. The claimant's healing period ended November 19, 2002.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of April 17, 2002.
7. The claimant has a permanent partial disability in the amount of 10% to the left knee.
8. The claimant has failed to establish by a preponderance of the evidence that when his age, education, permanent restrictions and limitations are considered that he has been rendered permanently totally disabled pursuant to Ark. Code Ann. §11-9-519.

CONCLUSIONS

It is undisputed that the claimant suffered an injury to his left knee on April 17, 2002, within the course and scope of his employment with respondent. As a result of the afore injury, the claimant has been assessed with a permanent physical impairment in the amount of 10% to the left lower extremity. The respondent paid appropriate medical, and temporary total disability benefits on behalf of and to the claimant following the April 17, 2002 injury. Further, the respondent paid permanent partial disability benefits to correspond with the claimant's assessed 10% permanent physical impairment to the left lower extremity. The claimant asserts he has been rendered permanently and totally disabled from engaging in employment as a result of the April 17, 2002 compensable injury, and seeks corresponding permanent total disability benefits. Respondents deny that the claimant has been rendered permanently and totally disabled as a result of the April 17, 2002 compensable injury. Further, it is the position of the respondents that pursuant to Arkansas Code Annotated §11-9-521(g) and Arkansas Code Annotated §11-9-519(b).

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained

subsequent to the effective date of the afore provision. Accordingly, the claim is not subject to the odd-lot doctrine.

The claimant, with a date of birth of March 3, 1942, was 61 years of age at the time of the hearing in this claim. At the time the claimant suffered his compensable injury to his left knee on April 17, 2002, he was 60 years of age. The claimant completed the eleventh grade before dropping out of school and commencing his employment history. There is no evidence in the record to reflect that the claimant has difficulty reading or writing.

At the time the claimant commenced his employment history the same was working at a service station. The evidence discloses that the claimant worked at several service stations performing similar job duties which included fixing flats and servicing vehicles, before securing employment with Elk Roofing Company. Claimant's duties with Elk Roofing entailed grading shingles from an assembly line. Further, the claimant secured employment with Souther Extrusion, an aluminum plant, also performing assembly line type work. The claimant has also worked at a steel mill on an assembly line performing manual labor.

The claimant's testimony reflects that he had been employed by respondent for a period of approximately fifteen years at the time he suffered the April 17, 2002 injury to his left knee. The claimant denies that he experienced complaints or symptoms regarding the left knee prior to the April 17, 2002 compensable injury. Dr. Gati, the claimant's treating orthopedic physician, characterized the April 17, 2002 compensable injury as an aggravation of the claimant's pre-existing arthritic condition in the left knee.

There is no evidence in the record to reflect that claimant experienced limitations or restrictions on his physical activities relative to the left knee prior to his April 17, 2002 compensable

injury. As a result of the April 17, 2002 compensable injury, the claimant underwent surgery relative to the left knee which resulted in a 10% permanent physical impairment to the left lower extremity. The claimant acknowledged that the April 17, 2002 accident in the employment of respondent was limited to his left knee, and that the same did not impact any other area of his body.

The claimant did return to the employment of the respondent subsequent to the April 17, 2002 compensable injury and worked a period of ten hours before having to cease employment efforts. Thereafter, the claimant returned to his treating physician, Dr. Kenneth Gati, and underwent arthroscopic surgery on May 21, 2002. The claimant reached maximum medical improvement as a result of the injury and subsequent surgery on November 19, 2002. In addition to the 10% anatomical impairment, permanent restrictions were placed on the claimant's employment activity relative to the April 19, 2002 compensable injury to include limited lifting, pushing, or carrying to a maximum of 20 pounds.

While the claimant contacted respondent-employer after reaching maximum medical improvement to inquire about employment and was informed that employment within the permanent restrictions were not available, there is no evidence to reflect that claimant has sought employment elsewhere. Other physical restrictions on the claimant's employment activity included avoiding any squatting or kneeling; limited climbing of stairs and ladders to just occasional; and maximum walking or standing to two hours during an eight hour day.

In the instant claim, the claimant suffered a injury to his left knee, which is characterized as a scheduled injury pursuant to Arkansas Code Annotated §11-9-521. In the instant claim respondents assert that pursuant to Arkansas Code Annotated §11-9-521(g) and Arkansas Code Annotated §11-9-519(b) the claimant is not entitled to permanent total disability benefits relative to

his scheduled left knee injury. Respondents' argument in this regard is not persuasive.

In Minnesota Mining & Manufacturing v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999) the Arkansas Supreme Court noted with respect to statutory interpretation:

As previously noted, statutes relating to the same subject should be read in a harmonious manner, if possible. L.H. v. State, 33 Ark. 613, 973 S.W.2d 477 (1998); City of Fort Smith v. Tate, 311 Ark. 405, 844 S.W.2d 356 (1993). All legislative acts relating to the same subject are said to be in pari materia and must be construed together and made to stand if they are capable of being reconciled. Id. supra 103.

Further, the court noted, with respect to scheduled injuries that compensation for a specified number of weeks is payable without regard to the presence or absence of wage loss during that period and that the affect on earning capacity is a conclusively presumed one. Arkansas Code Annotated §11-9-521(g) provides that an employee suffers a scheduled injury should not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment except as otherwise provided in Arkansas Code Annotated §11-9-519(b). Arkansas Code Annotated §11-9-519 addresses permanent total disability benefits. Further Subsection b of th afore provision sets forth a presumption of permanent total disability with respect to the loss of both hands, both arms, both legs, both eyes, or any combination of the afore. Subsection c of the afore provision notes that in all other cases permanent total disability should be determined in accordance with the facts. Act 796 of 1993 did not result in a material change in the statutes with respect to scheduled injuries. Prior to the enactment of Act 796 of 1993, a claimant suffered a scheduled injury could establish permanent total disability benefits, outside of the odd-lot doctrine. Accordingly, I find it is possible for claimant to establish permanent total disability as a result of a scheduled injury pursuant to Arkansas Code Annotated §11-9-519(e).

Arkansas Code Annotated §11-9-519(e)(1) defines permanent total disability as the inability,

because of a compensable injury or an occupational disease to earn any meaningful wages in the same or other employment. In the instant claim, the claimant has failed to sustain his burden of proof that he is rendered permanently and totally disabled as a result of the April 17, 2002 compensable left knee injury. In this regard, the evidence discloses that the claimant suffered a permanent physical impairment in the amount of 10% to the left lower extremity as a result of the compensable injury. The claimant, was 60 years of age at the time of the injury, completed the eleventh grade and can read and write. The claimant's April 17, 2002 compensable injury did not adversely affect any other part of his body, but was limited to the left knee. The claimant has not sought employment since reaching maximum medical improvement on November 19, 2002, as a result of the compensable injury.

The claimant is physically capable of driving, and in fact continues to operate his personal vehicle. The claimant acknowledges that there are days when he has pain in his knee and there are days when he doesn't have pain in the knee. Further, the testimony of the claimant reflects that on those days when there are noticeable residuals of pain and stiffness in the left knee, it is at the beginning of the day.

It is therefore my opinion, after a thorough search of all the evidence in the record, that the claimant has failed to sustain his burden of proof by a preponderance of the evidence that he has been rendered permanently and totally disabled from engaging in gainful employment as the result of the April 17, 2002 compensable injury. This claim for permanent total disability benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

ANDREW L. BLOOD
Administrative Law Judge