

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F011701

CLYDE O. COX, EMPLOYEE	CLAIMANT
DEQUEEN SAND & GRAVEL CO., EMPLOYER	RESPONDENT
ST. PAUL MERCURY INS. CO., CARRIER	RESPONDENT

OPINION FILED OCTOBER 4, 2004

Hearing before Administrative Law Judge J. Mark White on August 19, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Richard A. Smith, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 19, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on May 24, 2004, and a Prehearing Order was entered that same day. A copy of the May 24, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including September 9, 2000; that on or about September 9, 2000, the claimant sustained a compensable occupational disease in the form of silicosis; that respondents accepted the September 9, 2000, occupational disease as compensable and paid benefits; and that the claimant earned an average weekly wage of \$326.50, entitling him to a compensation rate of \$218 for total disability benefits and \$164 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to permanent partial disability benefits; whether the claimant has sustained wage loss in excess of his assigned anatomical impairment rating; and controversy and attorney's fees.

The claimant contends that he has sustained a 50% permanent impairment rating to the body as a whole associated with his compensable silicosis injuries; that he is entitled to wage-loss disability benefits in excess of his permanent impairment rating; and that he is entitled to attorney's fees as permitted by law.

Respondents contend that the claimant is not disabled as a result of his silicosis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has reached the end of the healing period for his compensable injury and his condition is now permanent.
4. The claimant has proven by a preponderance of the evidence that he has sustained permanent impairment of 30% to the body as a whole.
5. The claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his disability or impairment.
6. The claimant has proven by a preponderance of the evidence that the existence and extent of his permanent impairment is supported by objective and measurable physical findings.

7. The claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 30% to the body as a whole.
8. The claimant has failed to prove by a preponderance of the evidence that he has sustained wage loss in excess of his permanent anatomical impairment rating of 30%.
9. The respondents have controverted the claimant's entitlement to all permanent partial disability benefits and wage-loss benefits.

DISCUSSION

I. History

The claimant began work for the respondent-employer, a concrete and asphalt plant, in 1983. In the course of his job he was frequently exposed to large quantities of dust, and as a result he developed silicosis. *Dorland's Illustrated Medical Dictionary*, 26th Ed., defines silicosis as the deposition of particulate matter in the lungs "due to the inhalation of the dust of stone, sand, or flint containing silicon dioxide, with formation of generalized nodular fibrotic changes in both lungs." The respondents accepted the silicosis as a compensable occupational disease and paid benefits.

After first seeing his family physician, the claimant saw a pulmonary specialist, Dr. Lowell Vereen, who referred him to Dr. F. Charles Hiller. Dr. Hiller diagnosed the claimant with silicosis on October 19, 2000, and said that the supporting evidence was “overwhelming.” Dr. Hiller noted bilateral upper zone infiltrates in the claimant’s lung on x-ray. Pulmonary function tests (spirometry) showed the claimant’s FVC, or forced vital capacity – his ability to move air through his lungs – to be 89% of the predicted normal level. His FEV₁, or forced expiratory volume in the first second – his ability to move air through his lungs in one second – was 69% of the predicted normal level. Dr. Hiller recommended that the claimant “get away from silica exposure.” On February 22, 2001, Dr. Hiller repeated his diagnosis and opined that the silicosis was due to the claimant’s work.

The claimant began to treat with Dr. Robert Johnson on July 18, 2001. Dr. Johnson concurred with the diagnosis of silicosis, but added a diagnosis of chronic bronchitis. He recommended medication for the bronchitic component, and recommended that the claimant stay away from silica dust. The claimant returned on May 30, 2002, and Dr. Johnson noted a “deterioration in lung function.” On August 29, Dr. Johnson wrote the claimant’s attorney that the claimant would die within twenty years from silicosis if he did not cease his exposure to silica dust.

In the fall of 2000, the claimant switched job duties and began working in the

respondent-employer's shop as a mechanic's helper, apparently in an effort to reduce his exposure to silica dust. Nonetheless, on September 2, 2003, Dr. Johnson explicitly ordered the claimant to quit his job. The claimant through his attorney requested rehabilitation and job-placement assistance from the respondents a week later, but none was provided.

The claimant continued to treat with Dr. Johnson, and on August 16, 2004, at the respondents' request he saw Dr. Peter White for an independent evaluation. Dr. White agreed with the diagnosis of silicosis, opined that the claimant should not work in dusty areas, and assigned a permanent impairment rating of 30 to 45%.

II. Adjudication

A. Permanent Partial Disability Benefits

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any finding of permanent impairment must be supported by objective and measurable physical or

mental findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Objective findings are “those findings which cannot come under the voluntary control of the patient.” ARK. CODE ANN. § 11-9-102(16)(A)(i). Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a). The Commission has adopted the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), for use in assessing the extent of permanent anatomical impairment. A.W.C.C. Rule 34 (July 1, 1995).

Dr. Johnson opined in his deposition that the claimant’s condition has become “stable.” No doctor has recommended any significant treatment for the claimant’s condition; as Dr. Johnson noted, “there is no cure” for silicosis. Given this evidence, I find that the claimant has reached the end of the healing period for his compensable injury and his condition is now permanent.

The *AMA Guides* set forth several classes of respiratory impairment, located in Table 8 of Chapter 5. Dr. Johnson has opined that as a result of the compensable injury, the claimant is within Class 3, “moderate impairment of the whole person.” Class 3 of Table 8 provides for an impairment between 26% and 50% to the body as a whole. *AMA Guides* § 5.3, Table 8. Dr. White, who also cited Class 3, narrowed the numbers slightly, opining that the claimant has sustained permanent impairment

of between 30% and 45%.

The *Guides* provide that this impairment classification is determined by spirometry, *AMA Guides* § 5.3, and Dr. Johnson specifically testified that he reached his conclusions on the basis of spirometry tests performed on the claimant. In particular, an individual can be categorized in Class 3 if their FEV₁ – the amount of air the individual can blow out in the first second of blowing – is between 41% and 59% of the predicted rate. *AMA Guides* § 5.3, Table 8. A higher FEV₁ indicates a better lung capacity, while a lower number indicates an impaired lung capacity. All of the spirometry tests performed on the claimant since 2001 – well before he was advised by his doctors to quit his job – have shown his FEV₁ to be within this range of 41% to 59%. The most recent test, performed by Dr. White, showed the FEV₁ to be 59%.

It is true that the most recent spirometry showed the claimant to be at the top edge of the criteria for Class 3. It is also true that Dr. White noted poor effort by the claimant in that spirometry test. Nonetheless, Dr. White – chosen by the respondents to perform an independent evaluation – still opined that the claimant had sustained permanent impairment of at least 30%, and I am not inclined to second-guess his opinion. Therefore, I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent impairment of 30% to the body as a

whole.

Nothing in the record directly identifies any other cause for this impairment, other than the claimant's compensable occupational disease. It is possible that his employment as a rock crusher with a different employer might have contributed to his silicosis, but this other employment was more than twenty years ago. A conclusion that some other cause is involved can be made only by speculation and conjecture, and such can never substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Therefore, I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his disability or impairment.

Finally, I find that the claimant has proven by a preponderance of the evidence that the existence and extent of his permanent impairment is supported by objective and measurable physical findings. Both the *AMA Guides* and the testimony of Dr. Johnson make clear that the claimant's impairment rating is based solely on the results of spirometry tests. Spirometry is defined by *Dorland's Illustrated Medical Dictionary*, 26th Ed., as "the measurement of the breathing capacity of the lungs." Spirometry is, by definition, measurable. Whether it is objective is not as obvious, but I conclude that it is.

It is admitted that spirometry tests do rely at least in part on the claimant's

voluntary effort. Nonetheless, the Court of Appeals has previously found that similar pulmonary function tests may constitute objective findings for the purpose of determining permanent impairment. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). It is evident that the quality of the claimant's effort in these tests could be judged, for both Dr. White and Dr. Johnson gave opinions as to how good of an effort the claimant gave on various spirometry tests. I also note that the existence of the claimant's impairment is further supported by chest x-rays, as Dr. Johnson explained in his deposition. X-rays are unquestionably objective and measurable physical findings.

The claimant has proven by a preponderance of the evidence that his condition is now permanent; that he has sustained permanent impairment of 30% to the body as a whole; that his compensable injury is the major cause of his impairment or disability; and that the existence and extent of his permanent impairment is supported by objective and measurable physical findings. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 30% to the body as a whole.

B. Wage-Loss Benefits

In considering permanent disability benefits in excess of a claimant's anatomical impairment, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

As of the hearing, the claimant was 45 years old. He has an eighth-grade education; he testified that he can read and write only with difficulty. He worked for the respondent-employer for nearly twenty years, performing a variety of tasks – operating a rock crusher, maintenance, flagging traffic, and cleaning cement mixers. After he was diagnosed with silicosis, he moved to the shop area where he worked as a mechanic's helper. In short, most of his work experience is in heavy unskilled labor. He has no specialized vocational training.

According to his doctors he is able to work a light- or moderate-duty job so long as he avoids dust or chemical fumes. He described his present symptoms as

chest pain, back pain, shortness of breath, coughing, and lack of energy. He testified that he is willing to work, but he thinks he would have trouble completing an eight-hour day because he tires too easily. He admitted that he is still able to hunt, mow his lawn, and work in his garden.

The claimant has applied for a number of jobs, though he admittedly did not fully complete the applications. In September, 2003, the claimant requested rehabilitation and job-placement assistance from the respondents, but as of the hearing the respondents had offered no help. He testified that he intends to pursue a GED, though he has made little effort thus far in doing so. Given all this evidence, I find that the claimant is motivated to return to work.

The claimant was evaluated by vocational consultant Bob White, who concluded that the claimant's work prospects were "extremely poor." Yet it appears that Mr. White's conclusion is based not so much on the claimant's capabilities, as on the nature of the job market in his area. Therefore, I do not attach great weight to Mr. White's conclusions.

At the time of his accident the claimant was making only \$8 per hour, and as found above he has a rather high anatomical impairment rating. Given the claimant's work experience, his physical capabilities, his permanent impairment, and his motivation to return to work, I find that the claimant has failed to prove by a

preponderance of the evidence that he has sustained wage loss in excess of his permanent anatomical impairment rating of 30%.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 30% to the body as a whole. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge