

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308353

RICHARD A. DEER, EMPLOYEE	CLAIMANT
CITY OF PRESCOTT, EMPLOYER	RESPONDENT
MUNICIPAL LEAGUE WC TRUST, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 17, 2004

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in Hope, Hempstead County, Arkansas.

The claimant was represented by GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

The respondents were represented by J. CHRIS BRADLEY, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

A hearing was held in this matter on January 9, 2004. A prehearing conference was conducted on November 25, 2003, and a prehearing order was filed on December 1, 2003. A copy of the prehearing order has been marked as Commission Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following stipulations:

1. The employer/employee/carrier relationship existed on July 25, 2003.
2. Claimant sustained a compensable injury on July 25, 2003.

3. The claimant was earning sufficient wages to entitle him to a temporary disability compensation rate of \$223.00, and a permanent compensation rate of \$167.00.

During the prehearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following:

1. Whether the claimant is entitled to enhanced benefits under A.C.A. §11-9-505(a) due to the respondents unreasonable failure to return him to suitable employment.

From a review of the record as a whole, to include the testimony of the claimant, Larry Stockton, Dana Marlar and Howard Taylor, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

FINDINGS AND CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
3. The respondents controverted this claim in its entirety.
4. The claimant failed to prove by a preponderance of the evidence that suitable employment was available with the City of Prescott.
5. I find that the claimant failed to prove by a preponderance of the evidence the elements necessary to establish his entitlement to enhanced benefits under Ark. Code Anno. §11-9-505(a).

6. The respondents have controverted the claimant's entitlement to enhanced benefits under Ark. Code Anno. §11-9-505(a).

DISCUSSION

Claimant was employed by the city of Prescott for approximately three years as a meter reader. In this capacity he was required to walk from house to house and raise manhole covers so that he could read water meters. Claimant sustained an admittedly compensable injury on July 25, 2003, when he stepped in a hole and injured his left foot. According to the claimant's testimony, as well as the medical records, he experienced swelling and pain as a result of this incident. The claimant has multiple congenital deformities that effect all extremities. His right arm extends to approximately the wrist area and he wears a prosthesis in place of a hand so that he can grasp and pick up things. His right hand is missing all but the thumb and fifth digit. He testified that he has undergone several surgeries which allow him to grasp and pick up things with that hand. In addition, he was born with a club foot on the right extremity and he is missing the first and second toes on that foot. Likewise, he is missing the first and second toes on his left foot. The claimant testified that these congenital limb deformities have not imposed any limitations on him.

After the January 25, 2003 injury the claimant was initially treated at the emergency room. However, he ultimately came under the care of Dr. Michael Young, a general practitioner. Dr. Young caused x-rays to be taken; however, no abnormality other than the pre-existing congenital and surgical abnormalities were revealed. When the claimant's complaints continued, Dr. Young caused a bone scan to be performed. However, this study did not reveal any abnormality other than the pre-existing conditions. In addition, Dr. Young caused a MRI to be performed which, likewise, did not reveal any new abnormality to explain the claimant's continued complaints. On August 20, 2003 the claimant was examined by Dr. C. E. Soeller. Dr. Soeller determined that the claimant suffered from degenerative arthritis of the medial column of the foot secondary to foot malformation with an overuse injury to the foot. He further opined that the claimant aggravated his underlying osteoarthritis when he fell in the hole. Dr. Soeller also opined that the claimant "really needs to get out of being a meter reader and get into a less demanding job where he does not require as much walking."

Dr. Soeller released the claimant to return to work. The claimant did inquire about the availability of other work that involved less walking and he was advised that no other work was available. Consequently, he returned to his previous job as a meter reader. He continued at this position for three

RICHARD A. DEER-F308353

days but was unable to continue due to pain. The claimant's employment was terminated at that time. According to the claimant's testimony he inquired about other work but was advised that there was no other work available that he could do.

The claimant now contends that he is entitled to enhanced benefits under Ark. Code Anno. §11-9-505(a).

In this regard, Ark. Code Ann. §11-9-505(a) provides the following:

- (1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Commission and in addition to other benefits, such employer shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one year.
- (2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

The Arkansas Court of Appeals has found that several requirements must be met before Ark. Code Anno. §11-9-505(a) is applicable. These

requirement are as follows:

1. The claimant must prove by a preponderance of the evidence that he has sustained a compensable injury.
2. The claimant must prove by a preponderance of the evidence that suitable employment which was within his physical and mental limitations is available with the employer.
3. The claimant must prove by a preponderance of the evidence that the employer refused to return him to work.
4. The claimant must prove by a preponderance of the evidence that the employer's refusal to return him to work was without reasonable cause.

Clayton Kidd Logging Co. v. McGee, 77 Ark. App. 226, 72 SW 3d 557 (2002)

In the present claim the parties agree that the claimant sustained a compensable injury, however, they disagree with regard to whether suitable employment within the claimant's physical limitations was available with the employer. In this regard, the claimant contends that there was a job available in the street department that was within his physical limitations. In this regards, the evidence establishes that an employee was moved from the street department to the electric department and the claimant testified that the supervisor of the street department indicated that he would like to have that position filled. However, as of the time of the hearing conducted in this matter, the position with the street department had not been filled and the testimony of Mayor Howard Taylor suggested that a determination had been made that the

position would not be filled. The testimony indicates that Mayor Taylor is responsible for hiring for the City. In addition, the testimony establishes that Mayor Taylor has the discretion to create positions as needs arise and the evidence establishes that Mayor Taylor has the discretion to eliminate positions by transferring employees to different departments where circumstances makes such allocation of employee resources feasible. The claimant acknowledged that the work required in the electric department or the water department was not within his physical limitations.

Considering all of the evidence in the record and giving that evidence the weight that it is entitled to receive, I find that the claimant failed to prove by a preponderance of the evidence that suitable employment within his physical limitations was available with the city of Prescott. Although the claimant contends that a job was available with the street department, his contention is based upon the fact that an employee was moved from that department and that this position was not filled. His contention is also based upon the fact that the supervisor of the street department indicated to him that he would like to have the additional manpower. However, other testimony indicates that the city did not intend to fill this position, but instead that the position was to remain unfilled as manpower was reallocated pursuant to the needs of the city. Consequently, I find that the claimant failed to prove by a preponderance

RICHARD A. DEER-F308353

of the evidence the elements necessary to establish his entitlement to enhanced benefits under Ark. Code Anno. §11-9-505(a).

ORDER

_____Accordingly, based on my review of the entire record and for the reasons discussed herein, I find that this claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. C. MICHAEL WHITE
Administrative Law Judge