

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302842

PHILLIP MICHAEL	CLAIMANT
TODAY'S KIDS, INC.	RESPONDENT
FRANK GATES SERVICES CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 5, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by WILLIAM WIGGINS, Attorney, Fort Smith, Arkansas.

Respondents represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 11, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 3, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On June 10, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his neck on June 10, 2002.

4. Medical expenses have been paid to date.

5. The claimant is entitled to a weekly compensation rate of \$295.00 for temporary total disability and \$221.00 for permanent partial disability.

6. An impairment rating of 11 percent was accepted and paid by the respondents.

By agreement of the parties the issues to litigate are limited to the following:

1. Wage loss over the 11 percent impairment rating.
2. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained a compensable injury to his neck on June 10, 2002, said injury arising out of and in the scope and course of his employment for the respondent employer. Claimant was earning wages at the time of said injury sufficient to entitle him to permanent disability benefits at the rate of \$221 per week. A permanent anatomical impairment rating was rendered by Dr. James Blankenship, claimant's attending neurosurgeon, on July 29, 2003, for 11 percent to the body as a whole. Claimant is permanently and totally disabled as a result of his compensable injury, or in the alternative, has sustained permanent disability in excess of the permanent anatomical impairment rating of 11 percent. Claimant is seeking weekly permanent disability benefits and attorney fees accordingly.

In regard to the foregoing issues the respondents contend that the claimant has been paid all appropriate benefits to which he is entitled. Specifically, the respondents have paid the claimant appropriate periods of temporary total disability benefits and have

accepted and are currently paying the 11 percent impairment rating the claimant received from Dr. James Blankenship. It is the respondents' position that the claimant does not have wage loss disability beyond the 11 percent impairment rating. The reason the claimant did not return back to work at Today's Kids is because the plant closed and the claimant was part of a general layoff on June 2, 2003. Respondents reserve the right to assert additional contentions as may become known through discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and the respondent submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was thirty-six years old, had a high school education and that while he was working for the respondent he went to the Arkansas Valley Vo-Tech and received 162 hours of industrial electricity. The claimant explained that he did this extra training in order to hopefully get a better job with the respondent. The claimant testified that he began working for the respondent in June 1986 and has done a variety of jobs. The claimant explained that he has been in production, a material handler, a general handler for AMP in shipping and in plastics as well as a roto operator, set up man. The claimant explained that as a material handler he would drive a forklift. The claimant

testified that it was while he was working roto set up that he sustained his compensable injury. The claimant testified that after he sustained his compensable injury on June 10, 2002, he worked light duty for the respondent up until his neck surgery. The claimant testified that while he was off for his neck surgery the plant completely closed down. The claimant testified that based on his understanding of his physical limitations as identified in the functional capacity evaluation, he is not capable of returning to any of the former jobs which he had had for the respondent.

The claimant testified that he has made efforts to find employment since the closing down of the plant and recuperating from his surgery. The claimant testified that these efforts have been unsuccessful to date. The claimant agreed that he has made himself available to Heather Naylor and followed her suggestions as to contacting various employers. The claimant testified that he contacted all but two of the employers on Ms. Naylor's list and none of these employers offered him any employment. The claimant explained that two of the employers he was unable to get in touch with.

The claimant testified that he was released by his surgeon, Dr. Blankenship, and referred on to his family doctor who is Dr. Bill Daniel. The claimant testified that Dr. Daniel prescribes his medication and remembers that he takes Tylenol III twice a day to help alleviate the pain in his neck and down his left shoulder and arm area.

The claimant testified that prior to his injury he was very active at home and helped with all the general maintenance at home indicating that he would mow the lawn, paint, clean, dust, make beds, fix water leaks and just take care of whatever needed to be done but since his release by Dr. Blankenship, his activities have definitely changed. The claimant testified that he still tries to do as much as he can each day but it is nothing like he was able to perform prior to his injury. The claimant testified that before his injury he was earning \$12.87 per hour and worked about 42 hours per week.

On cross examination, the claimant went through a description of the various tasks which he performed at the different jobs which he did for the respondent. The claimant testified that he operated several small hand held tools and as a material handler he primarily drove a forklift. The claimant testified that when he worked in the roto set up he was a machine operator. The claimant described the roto job as going up on an eight-foot man lift and reaching out with an impact wrench to loosen bolts off the mold, brought a hoist down, picked it up, raised half the mold up and then pulled the parts out and then put powder back into the mold. The claimant testified that if there were any parts stuck to the top he had to spin the mold around and get the parts out, set it back down and bolt the mold up. The claimant testified that in his various jobs he has had to lift up to eighty to a hundred pounds but this was only occasionally. The claimant testified that regularly he was required to lift thirty to thirty-five pounds.

The claimant agreed that after his injury in June 2002 the respondent did make light duty available to him and they worked with him within his restrictions to allow him to continue to work up until he went for his surgery. The claimant testified that his surgery was sometime around April 11, 2003, but definitely agreed that while he was out for his surgery the plant shut down permanently. The claimant agreed that when he approached employers for possible work he made them aware of his limitations and restrictions. The claimant testified that he has applied for social security disability but has not received a determination as of the date of the hearing. The claimant testified that he is able to drive and that he does shopping as well as he is able to ride a lawn mower and mow his lawn. The claimant testified that he is able to read, write and do math and he was a group leader for the respondent. The claimant testified that he also was the vice president of the union at the respondent's business.

The claimant's wife, Linda Michael, was called to testify on her husband's behalf. Ms. Michael testified that she and the claimant had been married for fourteen years. Ms. Michael corroborated the claimant's testimony as to his activities before and after his June 10, 2002, injury.

The claimant called Jim Gaddis to testify on his behalf. Mr. Gaddis testified that he currently was retired but prior to his retirement he was an international union representative for PACE, the union at the respondent's business. This witness testified that he knew and had worked with the claimant on Union business.

Mr. Gaddis testified that in his opinion based on his knowledge of working with various plants through his union activities and being aware of the claimant's physical limitations subsequent to his injury he is not aware of any factory type jobs this claimant can do.

On cross examination, Mr. Gaddis testified that he has worked with the claimant in negotiating a union contract with the respondent and he was pleased with the claimant's participation.

The respondents called Heather Naylor who testified that she was a vocational rehabilitation counselor and at the respondents' request had made contact with the claimant. Ms. Naylor testified that she contacted the claimant and gathered information as to his medical history as it pertained to his injury as well as his hobbies, interests, work history and education. Ms. Naylor testified that her assessment of the claimant, based on his previous work history, education, transferrable job skills, training as well as his physical perimeters based on his FCE, it was her opinion that there were jobs he could do. This witness testified that based on the claimant's functional capacity evaluation, it was her understanding that the claimant could function doing jobs in the light and some medium category. This witness testified that she also did a labor market survey in the area in light of the type work which the claimant might be physically able to perform and she sent him a letter setting forth at least ten to twelve jobs currently open within these perimeters. On cross examination, Ms. Naylor agreed that the bulk of the jobs

which she had listed in her letter paid much less than what the claimant had previously been earning and that a few of the jobs the requirements were questionable as to whether he would qualify.

The respondents called Eileen Campbell who testified that she had worked with the claimant while she was employed by the respondent but currently she is employed with another factory in the Booneville area. Ms. Campbell testified that on November 21, 2003, the claimant contacted her seeking employment. Ms. Campbell stated that the claimant said, "This is Phillip. I was hurt at Today's Plastics. I have an 11 percent impairment rating and do you have a job for me?" Ms. Campbell testified that she invited the claimant to fill out an application and that currently his application is pending with no determination made at this time. This witness testified that this approach was somewhat unusual because the employer cannot inquire about health issues until an offer of employment has been made at which time a medical form is filled out to determine if they are physically capable to do the job or any job in the plant.

The medical records set forth a very thorough history of this claimant's admitted compensable injury to his neck. An MRI performed on July 18, 2002, sets forth that the claimant has a right para central focal disc herniation at the C6-C7 level causing mild right neuroforaminal narrowing as well as a small central disc protrusion at the C5-C6 level. The medical records set forth that the claimant was treated conservatively up until he underwent neck surgery by Dr. James Blankenship on April 9, 2003. Dr. Blankenship

performed an anterior cervical diskectomy for spinal cord and nerve root decompression at C5-6, anterior cervical fusion and arthrodesis at C5-6, anterior plating at C5 to C7, interbody implants at C5-6 and at C6-7, anterior cervical arthrodesis at additional level, C6-7, additional level anterior diskectomy for decompression at C6-7 as well as a local bone graft harvest. The medical records set forth that the claimant was followed up after his surgery and that on July 29, 2003, Dr. Blankenship writes that the claimant has reached maximum medical improvement and assessed the claimant with an 11 percent impairment rating to the whole body as a result of his spinal fusion. Dr. Blankenship referred the claimant back to his family doctor, Dr. Daniel, to monitor and prescribe his medications. At this last visit, Dr. Blankenship notes that the claimant stated that he is not any better than he was since the initial treatment began including his post operative care. Dr. Blankenship notes that the claimant, after his work conditioning program, actually began to have complaints of lower back and intermittent pain in his legs, noting that he had gained a considerable amount of weight due to his inactivity and over eating for which the doctor cautioned him.

The claimant underwent a functional capacity evaluation on July 24, 2003. The tester for this evaluation questioned the physical effort at times of the claimant's testing process, noting that he felt the claimant could do more physically at times than was demonstrated during the testing day. It was also found that the overall test finding suggest some minor inconsistencies in the

reliability and accuracy of the claimant's subjective reports of pain limitations. It is noted, however, that overall inconsistencies were considered minor with his subjective reports generally matching well with distraction based clinical observations. The recommendations of the tester were that the claimant would not be able to return to his pre-injury job at this time since it required a heavy level of demand. The tester did recommend that the claimant was capable of performing only at a light to medium physical demands level and it is noted that he has a decreased level of endurance and shows signs of fatigue after three hours of consistent testing.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to an 8 percent wage loss over and above his 11 percent impairment rating. This would give the claimant a total disability rating of 19 percent to the body as a whole. This determination is based upon the claimant's obvious level of intelligence as well as abilities, his transferrable job skills, education, age and the physical limitations as set forth in the functional capacity evaluation.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On June 10, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his neck on June 10, 2002.

4. Medical expenses have been paid to date.

5. The claimant is entitled to a weekly compensation rate of \$295.00 for temporary total disability and \$221.00 for permanent partial disability.

6. An impairment rating of 11 percent was accepted and paid by the respondents.

7. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss over his 11 percent impairment rating in the amount of 8 percent giving him a total disability rating of 19 percent to the body as a whole. See discussion above.

8. The respondents have controverted this claimant's entitlement to wage loss.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to wage loss over and above his 11 percent impairment rating in the amount of 8 percent giving him a permanent partial disability rating in the amount of 19 percent to the body as a whole which the respondents should pay.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee 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.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE