

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107026

CHARLES MOUNT, EMPLOYEE	CLAIMANT
RAM FAB, INC., EMPLOYER	RESPONDENT #1
VALLEY FORGE INSURANCE CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED OCTOBER 7, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on July 9, 2004, at Monticello, Drew County, Arkansas.

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

Respondents No. 1 represented by the HONORABLE FRANK NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of permanent partial disability benefits and attorney's fees.

At issue is whether or not the impairment rating is supported by objective medical evidence pursuant to Ark. Code Ann. §11-9-704; the extent of wage loss as defined by Ark. Code Ann. §11-9-522, and Second Injury Fund liability. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the claimant is permanently and totally disabled and respondent No. 1 is solely liable to the claimant for payment of benefits.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship during 1999 and 2000, at which time the claimant sustained a compensable injury at a compensation rate of \$394.00/\$296.00. Medical expenses, temporary total disability benefits, and a 10% rating to the body as a whole have been paid. The claimant receives Social Security Disability.

The claimant contends he is permanently and totally disabled as a result of his compensable back injury. He contends that due to his age, 65 (D.O.B. December 10, 1938) and health problems (back, stroke, memory loss), he is not a good candidate for vocational rehabilitation.

Respondent No. 1 contends all appropriate benefits have been paid. Alternatively, in the event of an Award, the respondents seek credit for an overpayment of the impairment rating equivalent to 5% or \$____.00. Respondents further contend that the claimant's Award is limited to 260 weeks pursuant to Ark. Code Ann. §11-9-522(f)(1). The primary cause of any disability is the claimant's preexisting degenerative condition. The Second Injury Fund is liable for any wage loss disability.

Respondent No. 2, Second Injury Fund, contends the claimant is not entitled to an anatomical impairment rating. There is no objective medical evidence causally connecting the impairment to his compensable injury pursuant to Ark. Code Ann. §11-9-704. Alternatively, respondent No. 2 contends the claimant is not permanently totally disabled and is not entitled to permanent partial disability in excess of the anatomical impairment rating pursuant to Ark. Code Ann. §11-9-522. The respondents also contend there is no combination of impairments or disabilities greater than the last injury necessary to prove Second Injury Fund liability pursuant to Midstate Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). However, in the event of an Award respondent No. 2 contends the claimant is limited to 260 weeks.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant, who uses a cane, was the only witness to testify at the hearing. Mr. Mount is a vague historian and there was a great deal of confusion regarding the chronology of events and date of injury.

The claimant, age 66 (D.O.B. December 10, 1938), has a third grade education and varied work history as a bus boy, grinder operator at an oil field, flooring installer, and ice cream truck driver. At Ram Fab, the claimant worked as a crane operator and assembler. His job duties required

him to carry heavy pipes and phlanges. The claimant's health history includes a 1993 heat stroke, a heart attack and memory loss. The claimant is a former cigarette smoker. He has hearing loss in his left ear and varicose veins in his right leg. The claimant receives \$1,075.00 per month in Social Security benefits which began in September 2001.

The claimant testified he tripped at work twice in late 1999. The first incident happened in the carbon bay, but he was not injured. The second incident happened in the stainless bay. He slipped on a pipe and hurt his back.

Initially, the claimant used his group insurance to see a doctor but later Ram Fab accepted the claim as of February 20, 2000. He received conservative treatment for back and right leg pain, with medication, physical therapy, a stocking and back brace. He worked through August, 2001.

The claimant looked for work elsewhere (night watchman, Wal-Mart) unsuccessfully. His medication leaves him drowsy and exercise (walking 2 miles) aggravates his condition.

On cross-examination by Attorney Newell, the claimant testified he was having right leg and hip problems and using a cane during the same time he developed forgetfulness and suffered a heat stroke.

Attorney Rudd emphasized that any back problems prior to 1999, were minor back strains with no permanent impairment ratings. She also noted that the heat stroke did not prevent the claimant from returning to work, performing heavy physical labor and working overtime. The heat stroke did not warrant an impairment rating, work restrictions, or continuing medical treatment.

OVERPAYMENT

Respondent No. 1 has asked for a credit for an overpayment of benefits.

Apparently, the claimant continued to receive benefits after he returned to work but the carrier's payment records are miscoded and no adjuster was available to explain them.

Attorney Newell contends \$2,688.00 were paid in temporary total disability benefits and \$18,312.00 in permanent partial disability benefits. He is seeking a credit equivalent to 15.3%.

The parties did not stipulate to the amount in question and respondents have not provided sufficient information for me to make a finding of fact on this issue.

MEDICAL EVIDENCE

The claimant has been examined for complaints of heat exhaustion, chest pain, headaches, memory loss, pain in his back, neck, knees, and hips. He has been treated conservatively for degenerative changes and osteoarthritis.

- 7-93- claimant treated for heat exhaustion at work symptoms of cramps in his right leg and weakness. X-ray testing revealed degenerative changes in both hips.
- 8-93- complained of weight loss and shortness of breath which the claimant attributed to heat stroke.
- 1-19-94- complained of lethargy, sleep changes, forgetfulness – referred to Dr. Sue Freigon for a neurological exam. She described the claimant as suspicious, guarded and commented that it was difficult to assess his mental condition. Etiology of his symptoms was unclear. Claimant was instructed to stop using alcohol (two beers per night, sometimes with whiskey). Diagnostic testing EEG/MRI of the brain was normal.
- 3-11-94- Dr. Rutherford stated additional testing was needed to confirm diagnosis of heat stroke. He felt the claimant was depressed and mislabeled as an alcoholic. Dr. Rutherford opined the claimant was able to work and assessed a 0% rating.
- 3-31-94- Dr. Doyle psychologist, assessed pain associated with anxiety. He recommended anti-depressants and no alcohol. Brain scan was normal. No evidence of an aneurysm.
- 5-21-94- released by Dr. Rutherford with no restrictions. Claimant admitted he was not taking the prescribed medication.
- 7-98/1-99- complains of atypical chest pain. Doctor refers to earlier study of 10-94.
- 11-23-99- fell on the job, complained of back and bilateral leg and hip pain. X-rays showed degenerative changes.

- 2-25-00- treated for neck strain (which the claimant thought was a stroke) after lifting coffee maker at work. Released 3-9-00 with no impairment.
- 4-3-00- complained of both hips aching and clicking when he walked, knees sore, and chest pain. He was diagnosed with degenerative disc disease of the lumbar and cervical spine with scoliosis and osteoarthritis of the hips.
- 4-10-00- claimant complained of back pain and weakness in his right leg. X-rays of hips unremarkable. Lumbar x-rays showed degenerative changes and osteoporosis.
- 4-12-00- MRI showed multilevel degenerative disc disease with bulging at L2-3, L3-4 on the right and stenosis at L2-3. Claimant took physical therapy.
- 2-28-01- report mentions an injury at work one year ago. Claimant able to work as foreman, no longer performing heavy manual labor.
- 3-1-01- claimant went to ER for back pain
- 3-26-01- claimant gave a history of falling twice at work over one year ago. Stated his back and right leg started hurting about 6 months ago and grew progressively worse until he started using a cane. Also gave a history of a heart attack and headaches.
- 4-2-01- enrolled in physical therapy
EMG/NCV studies show entrapment syndrome (see also Dr. Horne's report 7-6-01)
- 4-11-01- history of one year of back and leg pain. MRI shows multilevel degenerative disc disease with stenosis at L2-3
- 5-2-01- body scan shows arthritis in right knee and sacroiliac joints
- 5-21-01- myelogram/CT scan show bulging at L2-L3 and L4-5 with small facet osteophytes at L5.
- 6-13-01- Dr. Horne's report shows 2 tripping incidents at work. The second incident resulted in an injury and was reported to the supervisor in April, 2000. It became a workers' compensation claim in February, 2001. Dr. Horne recommended a work-hardening program.
- 7-6-01- Dr. Horne rated the claimant at 10% and indicated he was not a surgical candidate. He referred to

- “inconclusive” tests and recommended pain management.
- 7-27-01- Right rib pain after a work-related injury last week when he was hit with a pipe. X-rays were normal.
- 8-2-01- treated with Dr. Ellis for steroid injections which were not helpful. Dr. Horne mentioned that Dr. Ellis felt the claimant was depressed and showed symptom magnification. The use of a cane and his medications were making it difficult for the claimant to continue working. Dr. Horne advised the claimant to stop working and apply for Social Security.
- 4-11-03- reference to an injury at work one month ago. Tripped twice, hurt knees, hips, legs.
- 6-10-03- treatment for chronic back pain
- 8-03- treatment for chronic back pain
- 10-03- treatment for chronic back pain
- 11-03- treatment for chronic back pain
- 1-04- treatment for chronic back pain
- 1-30-04- SAMA report. Claimant stated he hurt his back in 1999 and it progressively worsened and he developed right leg pain. The claimant was diagnosed with varicose veins in the right leg.
- 1-30-04- Dr. Hatley ordered an MRI scan which showed multilevel degenerative disc disease with osteophytes and herniated discs at T6-T7/T11-T12 with mild pressure on the spinal cord.

FINDINGS AND CONCLUSIONS

The American Medical Association’s Guides To Evaluation Of Permanent Impairment (4th Ed.)(1993), were adopted by the Commission pursuant to Rule 34, exclusive of those sections which refer to pain, straight leg raising tests or range of motion tests which are barred by Ark. Code Ann. §11-9-102(16), in assessing anatomical impairment.

Dr. Horne assessed the claimant’s rating in accordance with the 4th Edition of the AMA Guidelines based on a DRE lumbosacral category II impairment. I am not familiar with Dr. Horne and his curriculum vitae was not provided. His letterhead indicates he specializes in Occupational

Medicine and Rehabilitation.

In reviewing the AMA Guidelines at page 102, a lumbosacral category II impairment is 5%. It is unclear to me how Dr. Horne arrived at 10%. Additionally, this category concerns compression fractures which do not apply to this case. However, respondent No. 1 stipulated to the acceptance and payment of a 10% rating and they are bound by that stipulation. Ozark Rustic Homes v. Albright, 269 Ark. 696, 600 S.W.2d 420 (Ark. App. 1980), Arkansas Louisiana Gas Co. v. Grooms, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

The claimant's diagnostic testing has consistently shown degenerative disc disease and stenosis with two bulging discs, and abnormalities of the EMG/NCV test on the right lower extremity. Accordingly, I find the claimant's rating is based on objective medical findings.

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bona fide job offers, credibility, or voluntary termination. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

After considering the claimant's age, education, work experience, permanent impairment and continuing need for pain medication, I find the claimant is permanently and totally disabled as a result of his compensable back injury which is the major cause of his disability. The claimant's benefits are limited to 260 weeks.

The Second Injury Fund was joined because of the claimant's prior heat stroke. However, there is no evidence that his stroke combined with the compensable back injury to invoke Second Injury Fund liability. The claimant was able to work for several years after the incident, diagnostic

testing found no evidence of permanent injury, and he was assessed no rating or work restrictions as a result of the stroke.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during 1999 and 2000 when the claimant suffered a compensable back injury at a compensation rate of \$394.00/\$296.00. Medical expenses, temporary total disability benefits and a 10% rating have been paid.
2. The claimant had a longstanding history of degenerative disc disease but was able to work with this condition until the compensable injury aggravated his condition, forcing him to take time off from work and requiring him to seek medical treatment. Therefore his compensable injury is the major cause of his disability.
3. The claimant has proven by a preponderance of the evidence of record that he is permanently and totally disabled based on his age, education and work experience. These benefits are limited to 260 weeks pursuant to Ark. Code Ann. §11-9-522(f)(1).
4. There is no combination of impairments or disabilities greater than the last injury necessary to invoke Second Injury Fund liability. The claimant was able to continue working after a heat stroke and with degenerative disc disease with no impairment rating until his compensable injury. Respondent No. 1, Valley Forge, is solely liable for benefits awarded to the claimant.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

6. Respondents No 1 is directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge