

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105144

WILLIAM F. ALDERSON, EMPLOYEE	CLAIMANT
CONAGRA POULTRY, SELF-INSURED EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, TPA	RESPONDENT

OPINION FILED APRIL 21, 2005

Hearing held January 24, 2005, before the Honorable S. Dale Douthit, Administrative Law Judge, in El Dorado, Union County, Arkansas.

Claimant was represented by Hon. F. Mattison Thomas, III, Attorney at Law, of El Dorado, Arkansas.

Respondents were represented by Hon. Norwood Phillips, Attorney at Law, of El Dorado, Arkansas.

STATEMENT OF THE CASE

On January 24, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on September 1, 2004, and a prehearing order was entered that same day. A copy of the September 1, 2004 prehearing order has been marked as Commission's Exhibit #1 and made a part of the record herein without objection. At the hearing the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order subject to additional stipulations, contentions and issues agreed to at the hearing.

The parties stipulated that the employee/employer/carrier relationship existed at all relevant times, including October 11, 2000. That the claimant sustained compensable injuries on

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October 11, 2000. That the respondents controverted any claim for benefits beyond what they have already paid. The parties stipulated the claimant's applicable TTD and PPD rates are \$267.50 and \$214.00 respectively.

The parties agreed the issues to be presented were whether the claimant is entitled to additional temporary total disability compensation; whether the claimant has sustained any impairment to his wage earning capacity in excess of this permanent physical impairment established by the medical records; whether the claimant is entitled to additional compensation for permanent physical impairment and; whether this claim is barred by the Statute of Limitations.

The claimant contends he was injured on October 11, 2000, when he slipped and fell while working for the respondent. Further, claimant contends the respondents have previously paid some benefits; however, that he is still entitled to additional TTD, additional compensation for permanent physical impairment, for wage-loss benefits in excess of his permanent impairment and attorney fees.

The respondents contend this claim is barred by the Statute of Limitation. However, in the event that it is found the claim is not barred by the Statute of Limitations, respondents contend claimant has received all benefits to which he is entitled.

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 n accordance with A.C.A.§11-9-704.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The respondents have not proven their affirmative defense regarding the Statute of Limitations and, as such, this claim is not barred by the Statutes of Limitations.
- 3) The claimant has proven by a preponderance of the evidence that he is entitled to additional PPD benefits; specifically, the claimant is entitled to an additional \$6,233.96 in PPD benefits for his 15% whole body impairment.
- 4) The claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional TTD benefits.
- 5) The claimant has filed to prove by a preponderance of the evidence that he is entitled to wage-loss disability benefits in excess of his impairment ratings.
- 6) I find the respondents did pay the correct amount of PPD for the claimant's 10% lower extremity impairment in the amount of \$3,936.31.
- 7) The respondents have controverted all benefits sought herein.

DISCUSSION

A. History

The claimant sustained injuries to his hip, knee and shoulder while employed by the respondents on October 11, 2000. The claimant then filed an ARC on May 21, 2001 asking for temporary total disability benefits, medical expenses and attorney fees according to claimant's attorney.

MR. THOMAS: Yes, sir, the Workers (sic) Comp Commission file will show the original ARC of 5-21-01 asking for temporary total disability benefits and attorneys (sic) fees, medical expenses and other things, signed by Mr. Alderson and my father, Floyd Thomas, Jr. on May 21, 2001 and those have never been paid. (T. pg. 37, lines 16-21)

Subsequent to the ARC filing, the respondent accepted compensability and paid some benefits. (See Exhibit B to Respondents Exhibit 1.)

As a result of his injuries, the claimant testified he required a total hip replacement, right knee surgery, and right shoulder surgery. (See CX 1, pg. 6, CX 1, pg. 18 & CX 1, pg. 27, respectively.) The claimant received a 10% permanent impairment rating to his lower extremity by Dr. D'Orsey D. Bryant on July 22, 2002. (CX 1, pg. 16) The respondents accepted the rating on the lower extremity and paid the claimant \$3,926.31, according to the respondents' senior claims representative, Mitch Blakely.

Q. Now, then, was a check sent to Mr. Alderson in August of 2002?

A. I am showing August 15, 2002.

Q. And how much was that check?

A. It was in the amount of \$3,926.31.

Q. Was that in payment of a ten percent permanent partial disability to his leg?

A. That was, yes, sir. (T. pg. 28, lines 9-16)

Mr. Blakely also testified the respondents paid the claimant \$8,211.04 for the 15% whole body impairment (hip) on February 11, 2003.

Q. Now, did you make a payment, another payment to the claimant in February of 2003, specifically February 11th?

A. Yes, sir.

Q. And how much did you pay him then?

A. \$8,211.04.

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Q. Was that on account of the fifteen percent permanent partial whole body rating?

A. Yes. (T. pg. 29, lines 4-12)

Mr. Blakely also testified the last date any medical expenses were paid on behalf of the claimant was on January 21, 2003.

Q. Now, then, when did you make your last payment of any medical expenses on his behalf?

A. The last payment of medical expenses paid in this particular case was on January 21, 2003.

Q. There was a payment to Baptist Hospital?

A. To Baptist Hospital.

After the claimant's surgeries for his October 11, 2000 injuries, the record is vague as to the medical treatment the claimant continued to receive. The claimant testified he did not know of any work restrictions placed on him at the time of the hearing.

Q. Do you know whether you are under any restrictions from doing any type of work, not what you were told, but do you understand that you are now under any type of restrictions.

A. No. (T. pg. 19, lines 18-22)

Q. Do you know whether you are released to go to work for some type of limited duty?

A. No. (T. pg. 17, lines 16-18)

The claimant acknowledged that he never went back to the respondent to present for

work.

Q. Did you ever report back to Pilgrims Pride or Conagra presenting yourself ready, willing and able to go back to work?

A. No, I didn't. (T. pg. 17, lines 19-22)

No one could testify at the hearing as to the dates TTD benefits were paid to the claimant. No one could testify to any degree of certainty whether all medical benefits had ever been paid with regard to these injuries.

No one testified to a date the healing period ended, and no one requested that be an issue for my determination.

Adjudication

I. Statutes of Limitations Defense and Additional Permanent Impairment Compensability

The respondents have affirmatively raised the Statute of limitations defenses. Their argument is that more than one year elapsed between the last date of compensation and the request for additional compensation pursuant to A.C.A. §11-9-702(b). The claimant contended the original ARC filing of May 21, 2001 tolled the Statute because the initial claim was never heard. I agree with the respondents with regard to this claim being for additional compensation. All parties acknowledged the respondents paid the claimant several thousand dollars in PPD benefits and even \$4,595.30 in attorney fees.

The respondents made a strong argument that no compensation was paid or requested after February 11, 2003, and that it wasn't until May 27, 2004 that additional remedies were being sought by the claimant. (See Exhibit "A" to Respondents Exhibit 1.)

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However, as is the case with most aspects of this claim, insufficient evidence was submitted in order for the respondents to prove their affirmative defense. The record is void of the anatomical whole body rating (hip) from the claimant's physician. In a claim for additional compensation, the statute of limitations only commences at the date the last payment would have been due if the compensation had been paid in installments instead of a lump sum settlement.

Southern Cotton Oil Co. v. Friar, 247 Ark. 98, 444 S.W. 2d 556 (1969).

In the case at hand, both parties failed to get the rating introduced into the record. Although both parties agreed it was a 15% impairment to the whole body, this examiner does not have enough proof to calculate when the next payment should have been paid. The burden was the respondents to prove the defense and they have fallen short.

Further, I find that based upon the stipulations, the claimant should have received 67.5 weeks of PPD (\$214.00) for a total of \$14,445.00, for the whole body impairment. The respondents testified they only paid \$8,211.04. Therefore, I find the respondents never paid the 15% whole body impairment and still owe the claimant \$6,233.96 in PPD benefits, and that the claim is not barred by the Statute of Limitations.

II. Additional Temporary Total Disability

An employee who suffers a compensable injury is entitled to TTD compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas Highway & Transportation Dept. v. Breashears*, 272 Ark. 244, 613 S.W. 2d 582 (1982).

Once again, the record is void of essential facts necessary for the determination of TTD. First, neither the claimant nor the respondents could testify to the dates TTD had been paid. The

claimant herein is requesting additional TTD, but gave no dates for which the request is being made. In addition, the healing period was never stipulated, testified to or requested to be an issue for determination.

The burden is on the claimant to prove the entitlement to TTD by a preponderance of the evidence, and he has failed to do so.

III. 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 earning capacity. (A.C.A. §11-9-522(b)(i). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corp*, 72 Ark. App., 148, 35 S.W. 3d 328 (2000).

The claimant is 59 years of age. Prior to working for Pilgrims Pride he worked primarily as a painter and was a member of the Painters Union.

The claimant testified he never returned to Pilgrims Pride after the October 11, 2000 incident to see about work. He also testified he knew of no work restrictions placed on him by any physicians. The record is void of any medical reports after the claimant's hip replacement that addresses his future ability to work. There was no FCE. The claimant testified as follows regarding his physical abilities now:

Q. Physically now, what are your abilities? Are you able to work?

A. Not really. Sometimes I am all right and then sometimes my leg gets irritated, if I sit down too long it will irritate me and then I have to get up and stretch.

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Without the benefit of a FCE or even a single report from any physician post-op; and taking into account the claimant's lack of motivation to return to work, or to even go back to his original employer to inquire about light duty; I find the claimant has failed to prove by a preponderance of evidence that he is entitled to wage loss disability benefits in excess of his anatomical rating.

AWARD

The claimant has proven by a preponderance of the evidence that the respondents failed to fully compensate him for his 15% whole body impairment rating. As such, and taking into account the respondents previously paid \$8,211.04, the respondents are ordered to pay the claimant another \$6,233.96 for the 15% whole body impairment.

The claimant's attorney, Mr. Matt Thomas, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits awarded herein pursuant to A.C.A. §11-9-715.

All accrued sums shall be paid in a lump sum, without discount, and the award shall bear interest at the legal rate until paid pursuant to A.C.A. §11-9-809.

IT IS SO ORDERED.

DALE DOUTHIT
ADMINISTRATIVE LAW JUDGE

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