

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D909205

BILLY H. HENDRICKS, EMPLOYEE

CLAIMANT

CROWN CONTRACTORS
(EL DORADO), EMPLOYER

RESPONDENT NO. 1

LIBERTY MUTUAL INSURANCE
COMPANY, CARRIER

RESPONDENT NO.1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 3, 2005

Hearing held on May 10, 2005, at El Dorado, Union County, Arkansas, before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas, having no issues at this time, did not appear at the hearing.

STATEMENT OF THE CASE

The above claim came on for a hearing in El Dorado, Arkansas, on May 10, 2005. A prehearing conference was held on January 26, 2005, and a Prehearing Order was filed on

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January 27, 2005. A copy of the Prehearing Order was marked as Commission Exhibit #1 and made a part of the record, without objection.

At the hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times, including February 26, 1989.
- 3) The applicable compensation rates are \$209.00 and \$156.00, for temporary total disability and permanent partial disability, respectively.
- 4) The claimant sustained a compensable back injury on February 26, 1989, and received a ten percent (10%) impairment rating, which was paid by the respondents.
- 5) The claimant reached MMI on January 13, 1990.

The parties agreed the following issues would be presented for determination:

- 1) Whether the claimant is totally and permanently disabled, or in the alternative, whether he is entitled to wage-loss disability in excess of his ten percent (10%) permanent impairment.
- 2) Whether the claimant is entitled to additional medical treatment, specifically, whether the claimant is entitled to continue seeing Dr. Davis and receiving Celebrex as prescribed by Dr. Davis.
- 3) Attorney fees.

It should be noted that the Death & Permanent Total Disability Trust Fund (Respondent #2) initially wanted issues three and four, outlined in the Prehearing Order (CX-1), to be heard; however, by letter dated May 4, 2005 from Judy Rudd, its counsel, the Fund

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withdrew those issues, (CX-2) and therefore, Ms. Rudd did not appear at the Full Hearing.

The claimant contended at the hearing that he is entitled to additional medical treatment from Dr. Davis, and Celebrex as prescribed by Dr. Davis. The claimant further contended that he is now totally and permanently disabled, or in the alternative, that he is entitled to wage-loss disability in excess of the ten percent (10%) impairment rating, and attorney fees.

Respondents No. 1 contended the claimant had a minor low back injury in 1989, and that there were no objective medical findings. That the claimant's injury was prior to 1993, and that he was treated since the alleged accident and is currently taking medication that is not related to his 1989 event. Respondents further contended that if the claimant is disabled it is due to problems that have nothing to do with his back injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From a review of 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 witness and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §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 failed to prove by a preponderance of the evidence that he is

totally and permanently disabled.

- 4) The claimant has failed to prove by a preponderance of the evidence that he has sustained a diminished earning capacity in excess of his ten percent (10%) permanent impairment and, therefore, is not entitled to wage loss disability benefits.
- 5) The claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits in the form of continued treatment from Dr. Davis, and Celebrex as prescribed by Dr. Davis, plus attorney fees associated therewith.

DISCUSSION

1. HISTORY.

The claimant, who is fifty-seven (57) years old, began working for Respondent No. 1, (Crown Contractors), approximately one year prior to his admittedly compensable back injury as an electrician. By the time of his compensable injury, he had worked up to Electrical Foreman. Claimant testified that on February 28, 1989 he stepped on a piece of pipe and twisted his back. (T. pg. 14, lines 7-9). The claimant testified he continued to work through the following Monday after the accident, but wound up having to go to the emergency room. He treated with Drs. Warren and Davis with an anti-inflammatory and muscle relaxants.

The claimant testified he experienced back pain and spasms continuously, but did eventually go back to work on light duty and then ultimately full duty. However, the claimant testified he was only able to stay on full duty for a few months and then had to stop due to the spasms. Subsequently, the claimant was referred to Dr. Morrison Henry, a neurosurgeon, for a MRI and nerve conduction studies. The records introduced by both parties indicated that the

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first MRI was performed by Dr. Henry on July 3, 1989, and showed minimal degenerative disc disease at L4-5 with no evidence of a disc herniation. Also, the EMG and nerve conduction studies of the lower extremities were normal at that time. Dr. Henry repeated nerve conduction studies and MRI scan in November of 1989, but no new findings were noted. Dr. Henry then found the claimant to have a ten percent (10%) permanent impairment and recommended vocational rehabilitation. No physician who treated the claimant since the 1989 injury recommended surgery. The claimant did not return to the work place and sometime in 1990 began receiving social security disability. Since the injury, the claimant has continued treating with Dr. Davis to the present, with Dr. Davis prescribing Celebrex, Prednisone, Elavil and Prevacid. At the full hearing it was agreed that Celebrex was the only medication in controversy and the claimant reserved the issue of other prescribed drugs for additional medical treatment.

B. ADJUDICATION.

This case is not governed by Act 796 of 1993, due to the February 28 , 1989 date of the injury.

The claimant contends he is now permanently and totally disabled. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent total disability. Minor v. Poinsett Lumber and Manufacturing Co., 235 Ark. 195, 357 S.W. 2d 504 (1962). In the instant case, I find the claimant is not totally incapacitated from

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earning a livelihood at this time. On February 14, 2005, Dr. Barry Baskin conducted an independent medical evaluation on the claimant and found the claimant's ten percent (10%) permanent impairment rating given in 1989 to be too high. Dr. Baskin found the claimant to have a five percent (5%) permanent impairment rating based on the AMA Guide. (JX-1, pg. 48). Dr. Baskin specifically noted that a ten percent (10%) rating, under the AMA Guidelines Fourth Edition, would be for someone that had had surgery for a lumbar disc lesion. (JX-1, pg. 48). Dr. Baskin specifically stated "It would appear that this gentleman is capable of some work. I don't think that he is totally disabled from any work." (JX-1, pg. 48).

Based on the medical records showing no evidence of frank radiculopathy, muscle atrophy, or gait abnormalities; coupled with normal reflexes and EMG studies, I also find the claimant is not totally disabled under the odd-lot doctrine. Although not specifically argued, or mentioned by the claimant, the odd-lot doctrine must be addressed, as the injury took place in 1989. An employee who is injured to the extent that he can perform services that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist, may be classified as totally disabled under the odd-lot doctrine. Lewis v. Camelot Hotel, 35 Ark. App. 212, 816 S.W. 2d 632 (1991). The odd-lot doctrine recognizes that the obvious severity of some injuries may combine with other factors to preclude the employee from obtaining employment in any reasonably stable market, although the employee is not altogether incapacitated to work. The factors which may combine with the obvious severity of

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an employee's injury to place him in the odd-lot category, are the employee's mental capacity, education, training and age. In the case at hand, this examiner does not see the "obvious severity" in the claimant's injury, and finds that the claimant has not made a prima facie showing that he falls into the odd-lot category.

In the alternative, the claimant argues he is entitled to wage-loss disability benefits in excess of his ten percent (10%) permanent impairment. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning capacity is impaired. In addition to evidence demonstrating the degree to which the worker's anatomical disability impairs his earning capacity, the Commission must also look to other factors, such as the worker's age, education, work experience, and any other matter which may effect the Worker's future earning capacity, including the degree of pain experienced by the workers. A.C.A. §11-9-522 (1987); Tiller v. Sears, 27 Ark. App. 159, 767 S.W. 2d 544 (1989).

In considering the factors which may effect an employee's future earning capacity, we may consider the employee's motivation to return to work, since a lack of interest and a negative attitude impedes our assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 SW. 2d 946 (1984).

In the present matter, the claimant admittedly met with a representative from the insurance company about rehab and a GED; however, the claimant didn't feel the need to get a

GED:

Q. You met with this lady a couple of times, and then you never did hear back from her, but she encouraged you, she wanted you, encouraged you to try to get your GED, right?

A. Yes.

Q. Why did you not ever try and get the GED?

A. I just didn't see that I needed a GED. I didn't have, one, I never had a problem getting a job before. (T. pg. 23 - lines 15-23).

Additionally, Dr. Henry recommended vocational rehabilitation as far back as November, 1989; however, that was never requested by the claimant. Then in Dr. Baskin's February 14, 2005 report he once again recommended vocational rehabilitation and a functional capacity evaluation; however, neither were requested by the claimant at the hearing. These factors showed me the claimant has a lack of interest in returning to work. Also, once again, the medical records themselves are factors in my denial of wage loss disability benefits. The MRIs, Nerve Conduction Studies, and other reports offered into evidence gave doubt in this examiners mind about the ten percent (10%) impairment that was accepted and paid by the respondents. I find the claimant is not entitled to wage loss disability benefits in excess of the ten percent (10%) impairment rating that was accepted and paid by the respondents over fourteen (14) years ago.

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The claimant argues he is entitled to continued medical care from Dr. Davis and Celebrex as prescribed by Dr. Davis.

Employer's must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. A.C.A. §11-9-508 (a) (Michie 1987). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norman Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion, February 17, 1989 (Claim No. D612291). Whether the medical treatment is reasonably necessary for treatment of the compensable injury is a question of fact for the Commission to determine. Ark. Dept. of Correction v. Holybee, 46 Ark. App. 232, 878 SW. 2d 420 (1994); Wright Contracting Co., v. Randall, 12 Ark. App. 358, 676 SW. 2d 750 (1984). Dr. Richard Davis, the claimant's physician since the injury, concluded that the claimant needs Celebrex due to his compensable injury in a letter dated September 8, 2004. (JX-1 pg. 42) Even though subsequent independent assessments from Drs. Baskin & Agana question the use of Celebrex, Dr. Baskin still concluded the following in his February 14, 2005 Independent Medical Evaluation:

"It is my impression based on the evaluation of this gentleman and review of his record, that he has had chronic low back pain stemming from his work related injury of February, 1989."

Even though the claimant reached MMI over a decade ago, the respondent is still responsible for pain management, which it appears is what Dr. Davis has been doing for some

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time. This Administrative Law Judge does not totally discount the recommendations from Drs. Agana and Baskin concerning the continued use of Celebrex; however, Drs. Agana and Baskin have both seen the claimant a total of one time. I give more weight to the fourteen (14) years Dr. Davis has treated this claimant, and find his recommendation of Celebrex to be reasonably necessary in relation to the claimant's compensable injury. Therefore, I find continued treatment with Dr. Davis and his prescription for Celebrex to be the continued responsibility of Respondents No. 1.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to continued medical treatment from Dr. Davis, and Celebrex as prescribed by Dr. Davis for his 1989 compensable injury. Respondents No. 1 are hereby ordered to provide the continued medical treatment as outlined herein in the Findings of Fact and Conclusions of Law.

Respondents No. 1 controverted the additional medical treatment awarded herein:

THE COURT: Okay, well, I will modify the additional medical treatment to be, to continue treatment with Dr. Davis and the continued prescription for Celebrex. Is that fair, Gentlemen?

MR. RYBURN: Yes.

MR. GILES: Yes, (T. pg. 56., lines 16-21)

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As such, Respondents No. 1 are ordered to pay to claimant's counsel, Gregory R. Giles, an attorney's fee associated with the additional medical care awarded herein pursuant to A.C.A. §11-9-715, as it appeared prior to Act 796.

All sums herein accrued are payable in lump sum, without discount, and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

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