

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E909253

RICHARD HENDRIX

CLAIMANT

BESHEARS CONSTRUCTION, INC.

RESPONDENT

VALLEY FORGE INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 29, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 22, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on October 28, 2004. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they were in agreement on a change in the stipulation concerning the appropriate weekly compensation rates. These compensation rates were changed from \$317.00 for total disability to \$323.00 and from \$238.00 for permanent partial disability to \$242.00. By agreement of the parties an additional issue was added. This new issue was the effect of Ark. Code Ann. §11-9-505(b)(c). A copy of the pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On August 2, 1999, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$323.00 for total

disability and \$242.00 for permanent partial disability.

3. On August 2, 1999, the claimant sustained a compensable injury to his left knee.
4. The claimant subsequently sustained a compensable injury to his lumbar spine which was a compensable consequence of his compensable left knee injury.
5. There is no dispute, at present, over the payment of medical expenses.
6. There is no dispute over the payment of temporary total disability benefits through October 20, 2003.
7. The claimant has sustained a permanent physical impairment of 17% to the left leg below the hip and 14% to the body as a whole (for this compensable back injuries).

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional temporary total disability benefits from October 21, 2003 through July 27, 2004.
2. The claimant's entitlement to permanent partial disability benefits for loss of wage earning capacity.
3. Appropriate attorney's fees.
4. Whether the claimant is barred from receiving benefits or permanent functional disability under Ark. Code Ann. §11-9-505(b)(3).

In regard to these issues, the claimant contends:

- a. The claimant contends that he is entitled to permanent disability benefits greatly in excess of his impairment ratings.
- b. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

- a. Respondent carrier has accepted liability for claimant's injuries and have paid temporary total disability and permanent physical impairment benefits.
- b. On March 20, 2003, Dr. Anthony Capocelli assigned a 14% rating to the body as a whole for the claimant's back injury.
- c. On May 20, 2003, Dr. Jeffrey Evans assigned a 17% rating to the lower extremity for claimant's knee injury.
- d. These ratings will pay out in mid-November.
- e. Claimant reached MMI no later than May 20, 2003, the date of assignment of the second permanent physical rating.
- f. Claimant is entitled to an award of temporary total disability benefits after May 20, 2003.
- g. Respondents will bring claimant up to date on TTD benefits and PPI benefits by paying the arrearage caused by previous payments at incorrect compensation rates."

At the hearing, the respondents objected to any testimony from the claimant, based upon his failure to comply with the respondent's discovery. The record revealed that the claimant has previously submitted to a deposition requested by the respondents. The Commission's file further reflects that the respondents made no attempt to force the claimant to comply with their written discovery, until immediately prior to the scheduled hearing. It is my opinion that the respondents failed to use due diligence to obtain the information they now contend to be vital to their defense, By this failure, the respondents have waived responses to their written discovery. Although discovery is certainly permitted in workers' compensation cases, it cannot be allowed to be used as a technical trap for the unwary. For the foregoing reasons, the respondent's objection to the claimant's testimony is overruled and the claimant may testify. _____

DISCUSSION

I. TEMPORARY TOTAL DISABILITY BENEFITS

The first issue concerns the claimant's entitlement to additional temporary total disability benefits for the period of October 21, 2003 through July 27, 2004. The burden rests upon the claimant to prove his entitlement to these additional benefits.

As the compensable injury sustained by the claimant was to a portion of his body that this scheduled under Ark. Code Ann. §11-9-521, his entitlement to temporary total disability benefits is controlled by the law as announced in International Paper Company v. McGoogan, 255 Ark. 1025, 504 S.W. 2nd 739 (1974). The claimant must prove that during the period in question he had not reached the end of his healing period and had not returned to work. After consideration of all the evidence presented, it is my opinion that the claimant has proven that he had not returned to work during this period, but has failed to prove that he continued within his healing period from the effects of his compensable injury or its compensable consequences.

The duration of the healing period is essentially a medical question, which must be resolved upon the basis of the greater weight of the credible medical evidence presented. Applicable case law provides that the healing period continues so long as the claimant has not achieved the maximum benefit of time and medical treatment in regard to the healing or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage resolves or at least stabilizes, at a point where nothing further offers an expectation of improvement, then the healing period has ended. The mere persistence of chronic symptoms, and the continued medical treatment of these symptoms, is not sufficient to extend the healing period, Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W. 2nd 582 (1982).

The medical record reveals that the claimant has received medical services from primarily three separate physicians. Dr. Jeffrey K. Evans, an orthopaedic surgeon, treated the claimant for the initial compensable injury to his knee. Dr. Anthony Capocelli, a neurosurgeon treated the claimant for the compensable consequence involving his lumbar spine. Dr. Bradley Short, a physical medicine and rehabilitation specialist, has provided the claimant with medical services for his chronic symptoms, primarily in the form of pain in his low back and left leg.

For the compensable consequence involving his lumbar spine, Dr. Capocelli initially performed a discectomy on the left of L5-S1, on December 5, 2001. He subsequently performed a bilateral L5-S1 laminectomy and discectomy with an interbody arthrodesis and posterior lumbar fusion at L5-S1 on September 23, 2002. Following this second procedure, Dr. Capocelli provided the claimant with the usual follow up treatment in the form of monitoring, prescription medication, and physical therapy. In his report of March 20, 2003, Dr. Capocelli states:

"At this point, his (the claimant's) current x-rays looked quite good and it is my opinion at this point that there is nothing further for me to do from a neurosurgical perspective. He has had a recent Functional Capacity Exam which demonstrates that he is capable of working at a medium work level exerting 20 -50 pounds occasionally and 10-25 pounds frequently. He does have difficulty with squatting given both his knee and back problems and certainly would have difficulty climbing matters, etc. I am going to enclose the Functional Capacity Examination to Workman's Comp for further details of his restrictions. Based upon the AMA Guides for the Functional Impairment, I am going to go ahead and issue a 14% impairment rating for the lumbar spine. This is percent to the whole person. This does not include any impairment he might have from his knee. It is my thought that Mr. Hendrix is going to likely require ongoing treatment with PM&R (pain management and rehabilitation) and this may be a life long pain management issue for him. I think that the surgery has improved him maximally and with ongoing treatment from Dr. Short, he should be able to reach a fairly functional level."

At that time, Dr. Capocelli released the claimant from his further care.

Dr. Evans began treating the claimant shortly after the compensable injury to his left knee on August 2, 1999. He initially performed a left anterior cruciate reconstruction and left medial and lateral partial meniscectomy on January 9, 1999. On January 31, 2001, Dr. Evans performed a surgical reconstruction of the claimant's left anterior cruciate ligament using a graft from a cadaver. Following this procedure, the claimant contracted a staph infection in his knee that required two additional surgeries on February 14, 2001 and March 22, 2001. In the latter surgery, the previous graft was entirely removed and the infected knee was debrided and irrigated. The final surgery was performed by Dr. Evans on May 15, 2002. This surgical procedure consisted of a left anterior cruciate ligament reconstruction using the claimant's existing ligaments and tendons. In a letter to the claimant dated May 20, 2003, Dr. Evans states:

"It was a pleasure to see you in the clinic on May 20, 2003, for your left knee. As you know, you are now a year out from your extracapsular anterior cruciate ligament construction. I am proud of your improvement and your quadriceps strengthening since the last visit. I have looked in the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, and have generated an impairment rating for you. Due to your residual laxity in the knee, you are entitled to a 17% left lower extremity impairment rating. We will go ahead and release you from this workers' compensation claim, but reserve the right to reopen it, should you develop degenerative joint disease, secondary to your septic arthritis and anterior cruciate ligament deficiency. As I have told you, you may need a knee replacement in that knee at some point in the future and we will reserve the right to reopen your workers' compensation case at that time.

I would like to continue to see you on a twice yearly basis for the foreseeable future, just to re-evaluate you on a periodic basis."

The claimant was first seen by Dr. Bradley Short on February 18, 2003. At the time of this initial evaluation, Dr. Short states:

"Today (he) the claimant reports with continued complaints of pain primarily in his back. He reports that his use of pain medicine and the authorization from his doctor for pain medication is inadequate for his needs. He has been referred for an evaluation." (Emphasis mine)

At the time of this initial evaluation, Dr. Short diagnoses the claimant's difficulties as:

- "(1) Failed back surgery syndrome.
- (2) Chronic pain.
- (3) Arachnoiditis/scar tissue formation.
- (4) Status post surgery for his left ACL disruption.
- (5) Chronic back pain and muscle tightness."

Dr. Short's diagnosis of a right arachnoiditis/scar tissue formation does not appear to be supported by any of the objective testing performed on the claimant. Neither, does the evidence show that this diagnosis was ever made by Dr. Capocelli, who has far greater expertise in the area of medicine associated with these difficulties.

Finally, Dr. Short gives the following recommendations:

- (1) At this time I have referred him (the claimant) to physical therapy at Total Rehab. At this late date, I am uncertain how effective repeat physical therapy program will be for him. He is only taking and only being allowed a few Norco a day. Because of his chronic pain state, it appears to me that his pain is being under treated and this may need to be readdressed also. I do agree with a functional capacity evaluation; however, I would like to defer this until he has completed at least some physical therapy and possibly his pain medication has adjusted."

The claimant was directed to return to Dr. Short in approximately two to three

weeks.

The claimant next saw Dr. Short on March 4, 2003,. At that time, Dr. Short states:

"Discussion about his (the claimant's) overall situation. Lengthy discussion about his situation and his pain. I do believe he is in a chronic pain state." (Emphasis mine)

Dr. Short prescribed extensive pain medications and directed the claimant to return in one month or as needed.

The claimant was then seen by Dr. Short on April 1, 2003. At that time, Dr. Short states:

"We had a lengthy discussion about his (the claimant's) overall situation, his pain and pain medicine use. He reports that the methadone has been helpful for him, I have adjusted is (sic) medicines. He ran out early. I indicated the last time I saw him that this was okay and we would adjust this, as I did give him a smaller dose previously. I gave him a pain contract to sign. He will send this back to me. I adjusted his medicines. Ambien is not helping him sleep. He ran out of Robaxin. I have restarted his Robaxin, gave him a prescription for his medicines, and they are noted in his chart. We have discussed with him and his wife about his pain medicine, his pain medicine use, and each agreed that without his pain medicine, he is essentially bed-ridden, so I opted to adjust his pain medicines."

In his next report of May 27, 2003, Dr. Short states:

"We discussed his overall situation. He would like to see a psychologist or psychiatrist. We will make recommendations for this. I am reluctant to press his methadone any higher or his pain medicines any higher. I do believe that he does have chronic pain and will need chronic pain medicine. He has not been released from his orthopaedic surgeon for his knee. (However, this is to be contrary to Dr. Evans' report of May 20, 2003).

In a response to the respondents' claims manager, Dr. Short authors a letter dated May 29, 2003. In this letter he states:

"In regard to if he is 'currently at maximum medical

improvement for the treatment rendered to him for pain management?'

In regard to maximum medical improvement, his injury and surgery is greater than one year old, so from that standpoint he is at maximum medical improvement. In regard to pain management, he continues to experience pain which is probably going to be an ongoing problem with him. I continued to titrate his medicines. I believe that from stabilization of his medicine standpoint, he is not stabilized from his medicines. There are no other treatment that I am offering at this time in regard to his subjective complaints of pain.

In regard to any other pain management issues that need to be addressed for his workers' comp injury, there are no further pain management issues. I suspect that because of his chronic pain problem, his duration of treatment is open to discussion. In regard to the cost of treatment, I cannot render an opinion, I suspect that he could be managed by pain medicine. In regard to the duration of treatment, because it has been greater than one year and he continues to have pain, I suspect that his pain will continue and he will need ongoing medical treatment for the foreseeable future." (Emphasis mine)

The records of Dr. Short show that he continued to provide the claimant with various types and dosages of pain and medication, including trigger point injections, for the claimant's chronic complaints.

In a report dated July 27, 2004, Dr. Short states:

"In regard to his overall situation and maximum medical improvement, I do believe he has reached maximum medical improvement and no further improvement is expected.

In regard to his medical status and prognosis as it relates to his work injury, there is improvement in the overall condition and pain level, but really not since my last visit. He has been stable in his pain medicine in the last 8 months." (Emphasis mine)

However, in this same report he also states:

"In regard to healing for this type of injury, Mr. Hendrix has in my opinion reached the maximum medical improvement from his work injury on 8/2/1999, and in my opinion, the projected date of his maximum medical improvement is the last of my examination, which is July

27, 2004."

There is no doubt that the claimant has continued to experience chronic symptoms with his back and left lower extremity after October 21, 2003. In fact, chronic symptoms of this nature would be reasonably expected from the extensive permanent damage to the claimant's left knee and lumbar spine. As indicated by the medical record, these chronic symptoms will likely persist, to some degree, for the remainder of the claimant's life. However, the greater weight of the medical evidence shows that the actual physical damage producing these symptoms had stabilized and become fixed and permanent by October 21, 2003. Although the services provided the claimant by Dr. Short, which was intended to reduce the magnitude of these chronic symptoms, was reasonable and medically appropriate, these services in no way acted to improve the underlying physical damage to the claimant's lumbar spine and left knee, which had become fixed and permanent. Following the reasoning announced in the case of Mad Butcher, Inc. v. Parker (cited supra), neither the continuation of these complaints, nor the treatment that these complaints required would act to extend the claimant's healing period from his compensable physical injuries. Thus, the claimant has failed to prove that his healing period continued on and beyond October 21, 2003. Therefore, he would not be entitled to temporary total disability benefits on and after that date.

II. PERMANENT PARTIAL DISABILITY BENEFITS FOR PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE EARNING CAPACITY

_____ The next issue concerns the claimant's entitlement to benefits for his "unscheduled" permanent injury under Ark. Code Ann. §11-9-522(b). This subsection provides:

_____ "In considering claims for permanent partial disability benefits in excess of the employee's percentage of

permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity."

The record shows the claimant to be 46 years old and has a tenth grade education. At the hearing, the claimant appeared to be personable and of average or above intelligence. The claimant's testimony reflects that his previous job experience consists of construction work, primarily carpentry, and some heavy equipment operation. The claimant stated that his longest single employment was approximately a year and a half. For the majority of his work life, he stated he was self employed.

As a result of his compensable lumbar difficulties, the claimant has been permanently restricted from engaging in any employment that require substantial lifting, bending, lifting/turning, at the waist, and prolonged standing or walking. Clearly, these physical restrictions would preclude the claimant from his prior employment positions including the position he held with the respondent. However, as shown by the functional capacity evaluations, the claimant retains the physical abilities to perform light to medium work. These would include positions primarily in the area of sales and clerical work with some factory or assembly line position. These jobs exist in sufficient numbers within the general area of the claimant's residence to present him with a reasonable expectation of obtaining gainful employment. However, these remaining positions would be at substantially less wages than those he was earning at the time of his injury or that he could earn, if he continued to be physically capable of working in the construction trades.

After consideration of the extent of permanent impairment from the claimant's compensable lumbar injury and the physical restrictions on his potential employment activities resulting from this permanent impairment, in light of his age, education, and

prior work experience, I find that the claimant has proven by the greater weight of the evidence that he has sustained a permanent partial disability for permanent functional disability or loss of wage earning capacity in the amount of 35% to the body as a whole. This permanent partial disability would be in addition to the permanent partial disability for his permanent physical impairment of 14% to the body as a whole from his compensable lumbar injury and the permanent physical impairment of 17% to the leg below the hip from his compensate left knee injury. In total, the claimant would be entitled to permanent partial disability benefits for a permanent partial disability of 49% to the body as a whole and 17% to the left leg elbow the hip.

III. THE EFFECT OF ARK. CODE ANN §11-9-505(3) ON PERMANENT PARTIAL DISABILITY FOR PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE EARNING CAPACITY

Finally, the respondents contend that the claimant is barred from receiving any permanent partial disability benefits for permanent functional disability or wage earning capacity by Ark. Code Ann. §11-9-505(b)(3). This subsection provides:

"The employee shall not be required to enter any program of vocational rehabilitation against his or her consent. However, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an authorized program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings."

In the present case, the claimant has not requested or proposed a program of rehabilitation. However, it has long been recognized that a failure to request or propose a program of rehabilitation does not constitute a "waiver" of rehabilitation under Ark. Code Ann. §11-9-505(b)(3).

The record does show that the claimant refused to postpone the schedule hearing on February 22, 2005, in order to allow the respondents to obtain a

rehabilitation "evaluation." It is my opinion that this action by the claimant is reasonable and does not constitute either a waiver or refusal of rehabilitation or employment assistance within the meaning of Ark. Code Ann. §11-9-505(b)(3).

The record indicates that the claimant requested a hearing on his entitlement to permanent partial disability for permanent functional disability or wage earning capacity some time prior to the prehearing conference on October 26, 2004. The respondents had stopped paying temporary disability benefits and apparently commenced payment of permanent partial disability for permanent physical impairment as early as October 20, 2003. The respondents were clearly aware of the existence and extent of permanent physical impairment and significant physical restrictions as early as October of 2003. However, there is absolutely no indication that the respondents made no attempt, whatsoever, to even explore the potential of rehabilitation or employment assistance until only days prior to the scheduled hearing. In his letter of February 14, 2005, the respondent's counsel states:

"My client has advised me that it wishes to have Mr. Hendrix evaluated for vocational rehabilitation. I would discuss that with her today to decide on rehabilitation agency."

On February 14, 2005, the respondents were still not offering any specific program of rehabilitation or re-employment assistance. In fact, the respondents had not even made a decision on the provider of the "evaluation." Thus, there has not been any program of rehabilitation or re-employment assistance actually offered for the claimant to waive or refuse.

I further find that the respondents' unexplained and unreasonable delay in even exploring the potential for rehabilitation or reemployment assistance would estop them from ascertaining the provisions of Ark. Code Ann. §11-9-505(3). If the respondents had truly desired to explore the potential of rehabilitation and

employment assistance to reduce or extinguish their liability for permanent partial disability benefits for permanent functional disability or loss of wage earning, they had ample opportunity to do so long before February 14, 2005. The respondents' last minute request for a continuance to explore the potential for rehabilitation or reemployment assistance was probably rejected by the claimant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 2, 1999, the relationship of employee-employer- carrier existed between the parties.
3. On August 2, 1999, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$323.00 for total disability and \$242.00 for permanent partial disability.
4. On August 2, 1999, the claimant sustained a compensable injury to his left knee.
5. The claimant subsequently sustained a compensable injury to his lumbar spine, as a compensable consequence or complication of his initial compensable left knee injury.
6. There is no dispute at present over the claimant's entitlement over the expense incurred for reasonably necessary medical services related to his compensable left knee and compensable back injuries.
7. There is no dispute over the payment of temporary total disability benefits accruing through October 20, 2003.
8. The claimant has failed to prove that he continued to be temporarily totally disabled on and after October 21, 2003. Specifically, he has failed to prove that he continued within his healing period from the

effects of either his compensable left knee injury or his compensable lumbar injury on and after that date.

9. As a result of his compensable lumbar injury, the claimant has sustained a permanent partial disability of 49% to the body as a whole. This includes permanent partial disability for a permanent partial disability of 14% to the body as a whole and permanent partial disability for permanent functional disability or loss of wage earning capacity in the amount of 35% to the body as whole.
10. The claimant has also sustained a permanent partial disability of 17% to his left leg below the hip, as the result of his compensable left knee injury. This includes only permanent partial disability benefits for permanent physical impairment attributable to the compensable scheduled injury.
11. The respondents have controverted the claimant's entitlement to any temporary total disability benefits accruing after October 20, 2003 and his entitlement to any permanent partial disability benefits for permanent functional disability or loss of wage earning capacity.
12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded.

ORDER

For the reasons heretofore stated in this Opinion, the claimant's request for additional temporary total disability benefits should be and hereby is denied and dismissed.

The respondents shall pay to the claimant permanent partial disability benefits for a permanent partial disability of 49% to the body as a whole and 17% to the leg

below the hip. The respondents shall be entitled to credit for all such benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded in the amount of 35% to the body as a whole. One-half of the fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these 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.

MICHAEL L. ELLIG
Administrative Law Judge