

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108142

DONNA KEY	CLAIMANT
OWENS CORNING CORPORATION	RESPONDENT
OLD REPUBLIC INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 12, 2005

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

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

Respondents represented by JEREMY SWEARINGEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 21, 2004, 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 July 21, 2004. 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. Matter resolved by Consent Order dated December 11, 2003, are res judicata and the law of the case.

3. Respondents have accepted and paid impairment rating of 14% to the right lower extremity.

By agreement of the parties the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. The claimant's entitlement to impairment for RSD rating.
2. The claimant's entitlement to wage loss over and above her impairment rating.
3. Attorney's fees.

Claimant contends that she is entitled to a permanent impairment for her RSD and that she is permanently and totally disabled or in the alternative she is entitled to wage loss over her impairment rating. Claimant further contends that her attorney is entitled to the maximum fee.

Respondent contends that they have paid medical on the claimant's RSD or related condition but that she is not entitled to an impairment rating nor is she permanently and totally disabled or entitled to wage loss over any impairment rating.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted the deposition of Dr. William Ackerman taken on September 23, 2003, marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1, No. 2 and No. 3. The respondents also submitted the vocational assessment report marked Respondents' Exhibit No. 4 and the deposition of Dr. William Ackerman taken on October 5, 2004, marked Respondents' Exhibit No. 5. All these exhibits were admitted without objection.

DISCUSSION

It has been agreed by the parties that the claimant sustained a compensable injury while working for the respondent in July 2001. The claimant explained that while working for the respondent she tripped while coming down stairs and injured her right foot and ankle. The claimant testified that at this time she had been working for the respondent for eleven years. The claimant testified that at the time of her fall she felt tremendous pain and that she was taken by ambulance to the hospital. The claimant testified that at the emergency room she was x-rayed, put on crutches and told to follow up with her doctor. The claimant testified that she was then seen at Pro Med where x-rays were done and she was put in a foam boot and told to have a follow up appointment. The claimant testified that she has not worked since the date of her accident and she has been under regular medical treatment since that time. The claimant testified that she then was seen by Dr. Wolfe who recommended physical therapy for her and put her in a boot brace. The claimant testified that she was eventually seen by Dr. Alberty who also sent her to physical therapy as well as to Dr. Swicegood for pain injections in her back, remembering that these injections just gave her temporary relief for her ankle and foot but caused her back to bother her. The claimant testified that she then was seen by the respondents' doctor, Dr. Holder, who gave her a stimulator machine and referred her to Dr. Ackerman who in turn referred her to Dr. Kulik. The claimant remembers that Dr. Ackerman treated her with medications

for a period of time before he referred her to Dr. Kulik. The claimant testified that Dr. Kulik did surgery on her right lower extremity and thinks, but is not positive, that after the surgery she began to have problems with her left ankle and foot as well. The claimant agreed that Dr. Ackerman ended up treating both her right and left lower extremities remembering that she was experiencing burning pain in her lower extremities, occasional spasms and just something like a jabbing pain in the tendon part. The claimant testified that she has swelling in her legs daily and has to keep them elevated throughout the day. The claimant agreed that she also has unusual sweating in her feet and ankles which she currently experiences and that she agrees with Dr. Ackerman's records that note a change of color and temperature in her feet and ankles. The claimant testified that these problems are ongoing. The claimant testified that because she cannot stand the pressure of shoes on her feet, she normally wears sandals and will even kick those off and go barefooted when possible. Likewise the claimant testified that she cannot stand the pressure or feel of socks on her feet. The claimant stated that, "I can't stand the touch of them---the pain. It hurts."

The claimant testified that she rarely goes shopping but when she does she rides in a little scooter and that her daughter helps her with the cart. The claimant testified that she also has a limp noting that all of these symptoms and complains she did not experience prior to her July 2001 injury.

The claimant testified that she currently is 55 years of age and that she went through the seventh grade but has taken her GED test. The claimant testified that her job for the respondent required her standing twelve hours a day on the concrete and involved her lifting as much as twenty to twenty-five pounds during her shift. The claimant agreed that she regularly lifted up to twenty pounds on her job. The claimant testified that currently she is unable to do her job, noting that after standing for ten to fifteen minutes she begins to hurt. The claimant stated that before working for the respondent she worked for John Garner Wholesale Meats running a hamburger patty machine. The claimant remembers that this job required her standing for her eight-hour shift. The claimant testified that she worked for John Garner meats for eleven years. The claimant stated that as to her upper body she does not have problems that would prevent her from working. The claimant indicated that she cannot make it throughout the day without alternating between sitting and standing and that her previous employments would not allow this. The claimant testified that her house work is limited and that her daughter helps her with the heavy things. The claimant testified that her problem is standing on her feet and the pain in her feet, noting that the longer she stands on her feet the worse the pain is if she is not able to elevate her feet. The claimant testified that the pain never completely goes away but that the medications do help. The claimant was asked about Dr. Ackerman's recommendation that she try a stimulator in order to try and make her condition better and

the claimant testified that she was afraid of the needles in her back because of what she went through with her pain blocks. The claimant testified that she has followed all the recommendations of her treatment physicians except for the implementation of a stimulator as recommended by Dr. Ackerman. The claimant agreed that the various treatments she has undergone over the past three years have not improved her condition.

On cross examination, the claimant agreed that she had taken a secretarial class and had learned to type and use the computer. The claimant remembered that this class was taken back in the late 80s. The claimant agreed that she can e-mail and with some help or perhaps reading the instruction manuals, she could type a letter and print it off the computer. The claimant agreed that she had surgery on her right ankle peroneal tendon in July 2002 which was followed by physical therapy. The claimant testified that Dr. Kulik referred her back to Dr. Ackerman. The claimant stated that she was not sure of the exact date but it probably was in October 2002 after her surgery that she began to experience symptoms in her left lower extremity. The claimant agreed that Dr. Kulik gave her an impairment rating for her right lower extremity. The claimant testified that the medications she is prescribed, Neurotin, Oxir and Celebrex help numb her symptoms. The claimant indicated that initially her medications caused her to have side affects of dizziness, drowsiness and confusion but it has gotten better. The claimant agreed that Dr. Ackerman had counseled her that an implanted stimulator might improve her symptoms 65 to 70 percent.

The claimant agreed that the reason she does not want to have the stimulator procedure is out of fear that it might cause the same type of pain that she experienced with the injections given to her by Dr. Swicegood. The claimant agreed that her height is 5'3" and that she weighs 260 pounds. The claimant testified that she had not made any serious effort to lose weight, noting that it is difficult to lose weight when you cannot get up and move around. The claimant testified that she is able to drive approximately thirty minutes at a time and that she is also able to do her own personal grooming and dressing as well as bathing. The claimant stated that she is able to go fishing with her husband but she sits in a chair and props her feet up while her husband baits her hook. The claimant testified that she pays her bills as well as balances the checkbook. The claimant testified that she does not feel that she is able to work, noting that she is currently on social security.

On redirect examination, the claimant testified that before her injury she and her husband regularly walked and that this exercise helped keep her weight under control. The claimant agreed that since her accident she has gained about fifty pounds due to her inability to be active. The claimant testified that before her injury she was earning \$13.00 an hour and was working as a full time employee for the respondent.

The respondents called Richard Marron who testified that he was a vocational consultant and had been working in this type of employment for over twenty-five years. This witness testified that

he had met with the claimant the previous Monday, asked her a series of questions and had generated a report based on their interview. Mr. Marron testified that he also reviewed the depositions of Dr. Ackerman as well as reviewed the claimant's medical records. This witness testified that he also had a functional capacity assessment which had been completed just before he met the claimant. Mr. Marron stated that based on the information he gathered from the claimant as well as from the functional capacity evaluation and a review of her medical records, he opined that she could do work at a sedentary level. Specifically, Mr. Marron testified that the claimant should be able to work as a cash accounting clerk, a claims clerk and a cashier. Mr. Marron testified that sedentary work is usually lifting ten pounds or less, picking up dockets, being able to sit up to six hours out of an eight-hour day and walking up to two hours.

On cross examination, Mr. Marron testified that he thought that if a person were caught up emotionally in their pain it would affect their ability to physically perform. This witness testified that he thinks that there are a lot of people in pain who do perform above and beyond what their expectations are, specifically noting someone who is self employed. Mr. Marron testified that, in his opinion, it would be a challenge for an employer to employ a person who is on multiple prescriptions medication as well as require a sit stand option for the work place but was not sure if it would be an impediment. Mr. Marron was asked if the Federal Government recognized that once a person reaches a certain age they

are considered to be of advanced age and, therefore, that is a negative factor toward employment. Mr. Marron testified that he did not know if it was negative. Mr. Marron stated that the Federal Government considers 50 years or older advanced age where you have to have transferable skills that are related to the work that you have done in the past, at 55 they have to be directly related by transferable skills and at 60 a person is pretty much knocked out of the market. This witness testified that, in his opinion, a person over 50 has less motivation to work than one who is twenty. Mr. Marron testified that based on the walking, standing and going up and down flights of stairs requirement that the claimant's job with the respondent required, in his opinion because of her current disability, she would not be able to perform that job. This witness testified that based on the breakdown of the labor market into sedentary, light, medium, heavy or very heavy, he would estimate that 30 percent of the market is going to fit into the sedentary category.

On recross examination, Mr. Marron testified that a longer functional capacity evaluation would give a more realistic assessment of a person's ability to work in the real world. On redirect examination, the claimant responded that her functional capacity evaluation lasted around three hours. Then on recross examination, the claimant agreed that there were many of the tests on the functional capacity evaluation which she was unable to do. The claimant testified that several of these tests were at the end

of the testing period and that she was not able to go forward with any further testing at that time.

The parties have stipulated that the claimant is entitled to a 14 percent right lower extremity impairment rating as assessed by Dr. Kulik, on December 11, 2002. On this date Dr. Kulik wrote that the claimant had reached maximum medical improvement for her right lower extremity and set forth her permanent restrictions of sitting only, no standing or walking greater than ten minutes without a rest and no climbing. Dr. Kulik operated on the claimant's right lower extremity on July 19, 2002, performing a tenosynovectomy of the peroneal tendons and a groove deepening removal of exostosis from the distal posterolateral fibula. Prior to the claimant's surgery she had undergone a three-phase bone scan of her ankles and feet on November 2, 2002, where it was found that there were findings consistent with reflex sympathetic dystrophy with decreased blood flow, soft tissue and bone phase activity diffusely over the ankle and foot on the right. Dr. Swicegood, who was treating the claimant for pain management from November 1, 2001, through December 28, 2001, consistently diagnosed the claimant with having RSD based on his findings of temperature, skin coloration, and edema. Dr. Ackerman, in his two depositions, answered extensive questions concerning RSD and explained that it is a dynamic entity which varies from day to day. Dr. Ackerman stated that once the RSD spread into the claimant's spinal cord there were changes occurring within the spine itself and the spinal cord becomes hyperactive thus allowing the RSD to continue to spread.

Dr. Ackerman stated that there has to be something in the spinal cord that changes as opposed to being in the extremity itself, further noting that as the RSD spread from, as in this case, the claimant's right extremity to her left extremity, something had to occur in the spine. Thus the reason for an impairment to the body as a whole. Dr. Ackerman agreed that the diagnosis and impairment rating for RSD is some bit objective but considering the factors which he had observed with the claimant over a period of time, he assessed her with having a 7 percent whole body impairment as a result of her RSD alone. Dr. Ackerman was asked if, in his opinion, the claimant's RSD related to her July 10, 2001, injury and subsequent surgery. The doctor responded, "Yes."

Based on this entire record, I find that the claimant is entitled to an impairment rating for her diagnosis of RSD as a result of her right extremity injury of July 10, 2001. The claimant's injury was accepted as compensable and the respondents have accepted a 14 percent impairment to the claimant's right lower extremity. Prior to the claimant's surgery she was treated by Dr. Swicegood for pain management who diagnosed her with having RSD based upon a bone scan as well as his observations and examination of the claimant. Following the claimant's right extremity surgery, the claimant was referred to Dr. Ackerman who, after extensive treatment and observation of the claimant, diagnosed her with RSD, noting it had spread to her spinal cord as well as to her left extremity for which he assessed her a 7 percent whole body impairment rating. Dr. Ackerman clearly set forth that this 7

percent whole body impairment rating is over and above and independent of her 14 percent right lower extremity impairment of 14 percent. Dr. Ackerman clearly sets forth in his deposition that it is his opinion, based on a reasonable degree of medical certainty, that her reflex sympathetic dystrophy is related to her July 10, 2001, compensable right extremity injury. The respondents, therefore, should pay a whole body impairment rating of 7 percent to this claimant for her reflex sympathetic dystrophy. It is further found, based on the claimant's age, education, transferable job skills and physical impairment, that she is entitled to wage loss in the amount of an additional 7 percent to the body as a whole giving her a total whole body disability rating of 14 percent. The rehabilitation specialist, Richard Marron, testified at length as to the claimant's ability to work in a sedentary type employment. Mr. Marron further stated that an employer would be challenged in accommodating the claimant's various restrictions in order for her to be employed.

FINDINGS & CONCLUSIONS

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

2. Matter resolved by Consent Order dated December 11, 2003, are res judicata and the law of the case.

3. Respondents have accepted and paid impairment rating of 14% to the right lower extremity.

4. The claimant has proven by a preponderance of the evidence that she is entitled to a whole body impairment rating of 7 percent

for her finding of RSD as assessed by Dr. Ackerman. See discussion above.

5. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss in the amount of an additional 7 percent over and above her 7 percent impairment rating for her RSD. This will give the claimant a total disability rating for her whole body of 14 percent. See discussion above.

6. The respondents have controverted the claimant entitlement to an impairment rating for RSD as well as wage loss.

7. 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 she is entitled to an impairment rating for her RSD of 7 percent to the body as a whole. Therefore, the respondents should pay this impairment rating.

The claimant has also proven by a preponderance of the evidence that she is entitled to wage loss in the amount of 7 percent to the whole body over and above her 7 percent impairment rating. The respondents shall be responsible for paying this 7 percent wage loss to the whole body.

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