

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E914107

DANA RENDELUK, Employee	CLAIMANT
ATWOOD DISTRIBUTING, INC., Employer	RESPONDENT #1
ROYAL & SUN ALLIANCE, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JANUARY 11, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL H. HAMBY, Attorney, Greenwood, Arkansas.

Respondent #1 represented by CHRISTY KING and JEREMY SWEARINGEN, Attorneys, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 13, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 14, 2004, and a pre-hearing order was filed on June 17, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulation:

1. The prior opinions are final and res judicata.

At the time of the hearing the parties also agreed to additional stipulations. These include:

1. Claimant's average weekly wage was \$260.00 which entitles her to compensation at the rate of \$173.00 for total disability and \$154.00 for permanent partial disability.
2. Claimant reached maximum medical improvement on July 13, 2004.
3. Claimant is entitled to permanent partial disability benefits in an amount equal

to 13% based upon an anatomical impairment rating.

In addition, subsequent to the pre-hearing conference the parties have agreed to litigate the following issues:

1. Claimant's entitlement to permanent disability benefits in excess of 13%.
2. Claimant's entitlement to payment of medical bills relating to treatment for boils or lesions.
3. Whether respondent #1 is entitled to a credit for permanent partial anatomical disability benefits against its \$75,000.00 maximum liability pursuant to A.C.A. §11-9-502(b)(1).
4. Attorney fee.

The claimant contends that as a result of her compensable injury she is permanently totally disabled. Claimant also contends that medication she was prescribed for her compensable injury resulted in lesions and additional medical treatment which should be the liability of respondent #1.

Respondent #1 contends that it has paid claimant all benefits to which she is entitled.

The Trust Fund contends that respondent #1 is not entitled to credit against its \$75,000.00 maximum for payment of claimant's permanent partial anatomical rating for the compensable injury.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Prior opinions are final and res judicata.

2. Claimant's average weekly wage was \$260.00 which entitles her to compensation at the weekly rates of \$173.00 for total disability benefits and \$154.00 for permanent partial disability benefits.

3. Claimant reached maximum medical improvement on July 13, 2004.

4. Claimant is entitled to permanent partial disability benefits in an amount equal to 13% based upon an anatomical impairment rating.

5. Claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled. Instead, claimant is entitled to permanent partial disability benefits in an amount equal to 13% to the body as a whole as a result of her loss in wage earning capacity.

6. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for medical treatment provided to claimant in connection with her lesions.

7. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 13% to the body as a whole attributable to her loss in wage earning capacity.

FACTUAL BACKGROUND

_____The claimant is a 47-year-old woman who began working for the respondent in August 1999 and continued working there until December 18, 1999. The claimant suffered an admittedly compensable injury to her low back on September 20, 1999 when she picked up a vise while restocking shelves. Claimant's primary treating physician for her compensable injury has been Dr. Capocelli. Claimant was originally diagnosed with a lumbar strain/facet syndrome before she underwent an MRI scan which revealed herniated discs. As a result of claimant's injury Dr. Capocelli performed a fusion surgery at the L3-4 and L4-5 levels on October 17, 2003. Following that surgery the claimant has

undergone physical therapy and three functional capacities evaluations.

Claimant also was treated and evaluated for an abscess under both her right and left arms. This condition was diagnosed as hydradenitis. Claimant underwent an excision for this condition which was performed by Dr. Kelly on June 15, 2004.

With respect to her compensable back injury, Dr. Capocelli found that claimant had reached maximum medical improvement as of July 13, 2004. He assigned the claimant a permanent physical impairment rating in an amount equal to 13% to the body as a whole which was accepted by the respondent.

Claimant has filed this claim contending that she is permanently totally disabled as a result of her compensable injury. She also contends that respondent is liable for payment of medical treatment related to the hydradenitis.

ADJUDICATION

PERMANENT AND TOTAL DISABILITY BENEFITS.

_____ In order to be entitled to permanent and total disability benefits claimant has the burden of proving by a preponderance of the evidence that she has the inability, because of her compensable injury, to earn any meaningful wages in the same or other employment. A.C.A. §11-9-519(e)(1). After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she is permanently totally disabled. Instead, after consideration of all the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 13% to the body as a whole.

In considering claims for permanent disability in excess of the percentage of permanent physical impairment the Commission may take into account various factors

including the impairment itself, as well as the claimant's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

In this particular case, the claimant suffered a compensable injury to her back which resulted in a two level fusion which was performed by Dr. Capocelli on October 17, 2003. In a report dated July 13, 2004 Dr. Capocelli indicated that claimant had reached maximum medical improvement. He also indicated that he did not believe the claimant would be able to return to her pre-injury job and that he believed the claimant was totally disabled. Dr. Capocelli's medical report does not contain any specific physical limitations.

After reviewing the remaining evidence in this case, I find that Dr. Capocelli's opinion that claimant is totally disabled to be entitled to little weight. The evidence indicates that claimant has undergone three functional capacity evaluations. Each of these evaluations has resulted in findings that claimant gave a sub-maximal effort. The first of these evaluations occurred on March 23, 2004. The functional capacities evaluation report of that date indicates that testing was suggestive of minor inconsistencies in the claimant's effort. Furthermore, the evaluation was not completed due to signs of increased pain by the claimant during testing. The second evaluation was on June 17, 2004. The evaluation report from that date indicates that claimant again gave sub-maximal effort. Although claimant was unable to perform some of the testing due to high blood pressure, activities which she did engage in revealed an inconsistent effort. The report indicates that claimant would be capable of working at least at a sedentary level with possible light duty work. The report goes on to state that testing was high for inappropriate illness behavior and inappropriate signs of discomfort.

Following claimant's release by Dr. Capocelli in July 2004, claimant underwent a third functional capacities evaluation on November 23, 2004. A review of the evaluation report indicates that claimant again gave an inconsistent effort. The report notes that even

with the inconsistent effort claimant demonstrated the ability to lift at the sedentary level and that this level would meet or exceed all physical demands of jobs as a data entry/secretary and as manager of a truck terminal which are classified by the DOT as sedentary-type jobs. This is relevant when one considers that claimant's prior jobs have included work as a data entry clerk and work as a terminal manager. Claimant testified that she has worked for Blue Ribbon Downs off and on for approximately ten years. Claimant's jobs for Blue Ribbon Downs have included work in maintenance and cleaning the bathrooms and stadium. However, claimant also worked in the print shop and worked as an entry clerk filing papers on the horses. Claimant has also worked as a terminal manager for a trucking company where she was responsible for dispatch, overseeing the shop, getting parts for drivers, and billing. Claimant performed this job for approximately six years. Claimant has also worked as a cashier in a convenience store and worked for herself in Oklahoma City cleaning houses.

The evidence also indicates that claimant is 47 years old and that she completed the eleventh grade. Claimant is currently drawing \$644.00 per month in social security benefits. According to claimant's testimony she has not looked for a job since her release by Dr. Capocelli.

In summary, while Dr. Capocelli was of the opinion that claimant was totally disabled, I find that his opinion is entitled to little weight given the remaining evidence in this case. Claimant has undergone three functional capacities evaluations and each of those evaluations has revealed a sub-maximum effort. Even with the sub-maximal effort, the functional capacities evaluations of June 17, 2004 and November 23, 2004 indicate that claimant is capable of performing at least sedentary-type work. This is important because some of claimant's prior jobs have included skills which would allow claimant to become employed at a sedentary-type job. Finally, I note that claimant is only 47 years old, has completed the eleventh grade, that she is drawing social security disability

benefits, and that she has not looked for any employment. After consideration of all of these relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 13% to the body as a whole over and above her anatomical impairment.

Combining the 13% disability for wage loss with the 13% anatomical impairment results in overall benefits of 26% to the body as a whole. At the rate of \$154.00 per week, even if respondent #1 were entitled to take credit for benefits attributable to the impairment rating, respondent #1 would not reach the threshold of \$75,000.00. Therefore, the issue regarding the Trust Fund and respondent #1's entitlement to credit for benefits paid for the impairment rating is moot.

ADDITIONAL MEDICAL TREATMENT.

Claimant also contends that respondent #1 is liable for payment of additional medical treatment related to treatment of boils or lesions which appeared under her arms. As previously noted, this condition was diagnosed as hydradenitis for which claimant underwent surgery by Dr. Kelly on June 15, 2004. Claimant contends that this condition was caused by a reaction to medication containing codeine which was prescribed by her treating physicians for her compensable injury.

Claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of her compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291). I find that claimant has failed to meet her burden of proof. Aside from claimant's contention that the hydradenitis was caused by her reaction to medication containing codeine prescribed for her compensable injury, there is no evidence of record establishing that causal connection. Specifically, the medical records do not contain any evidence linking claimant's hydradenitis to her medication containing codeine. In fact, Dr.

Capocelli's report of July 13, 2004 indicates that claimant gave a history of believing that this condition was caused by one of her pain medications or to some other source such as "soap, et cetera."

In short, claimant has the burden of proving by a preponderance of the evidence that her hydradenitis is causally related to her compensable injury. While claimant contends that this condition was the result of a reaction caused by medication prescribed for her compensable injury containing codeine, I find insufficient evidence of record which would lead to such a finding. Therefore, I find that claimant has simply failed to meet her burden of proof by a preponderance of the evidence that respondent #1 is liable for any medical treatment related to claimant's hydradenitis.

AWARD

Claimant has failed to prove by a preponderance of the evidence that she is permanently totally disabled as a result of her compensable injury. Claimant has proven by a preponderance of the evidence that she has suffered a loss in wage earning capacity in an amount equal to 13% to the body as a whole as a result of her compensable injury. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 13% to the body as a whole. Claimant has failed to prove by a preponderance of the evidence that respondent #1 is liable for payment of any medical treatment related to her hydradenitis.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE