

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E507146/E517684

RAYMOND STEELE, Employee	CLAIMANT
SEBASTIAN COUNTY EMS, Employer	RESPONDENT #1
ASSOCIATION OF ARKANSAS COUNTIES, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MARCH 15, 2005

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

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

Respondent #1 represented by PAUL GEHRING, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On February 28, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on December 20, 2004, and a pre-hearing order was filed on December 22, 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 stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant sustained compensable injuries to his lumbar spine on May 1, 1995 and to his cervical spine on November 21, 1995.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$270.00 for total disability benefits and \$203.00 for permanent partial disability benefits.
4. Respondent #1 has accepted and paid permanent partial disability benefits based upon 16% to the body as a whole for the lumbar spine injury and 10% to the body

as a whole for the cervical spine injury.

5. The Second Injury Fund accepted liability for wage loss in an amount equal to 30% to the body as a whole as of August 16, 2004.

6. Claimant's healing period ended on December 10, 2003.

7. By order filed January 5, 2002, claimant's sexual dysfunction was found to be compensable.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Extent of claimant's permanent disability, including wage loss and/or impairment for sexual impotence.

2. Attorney fee, including a fee on the 30% accepted by the Second Injury Fund.

At the time of the hearing the claimant withdrew and reserved as an issue his entitlement to an impairment rating relating to his sexual impotence. Claimant also withdrew his request for an attorney fee on the 30% wage loss accepted by the Second Injury Fund.

The claimant contends that he is permanently totally disabled. Alternatively, claimant contends that he is disabled to an extent greatly in excess of the amount of permanent disability previously accepted by the Second Injury Fund.

The Second Injury Fund contends that claimant is not entitled to any benefits for wage loss in excess of the 30% previously accepted.

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 made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference

conducted on December 20, 2004, and contained in a pre-hearing order filed December 22, 2004, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

3. The Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 30% to the body as a whole.

FACTUAL BACKGROUND

The claimant is a forty-year-old man who graduated from high school and has some college credit. The claimant worked for the respondent as an EMT paramedic for approximately fourteen years. The parties stipulated that claimant suffered a compensable injury to his lumbar spine on May 1, 1995, and to his cervical spine on November 21, 1995. After claimant's lumbar spine injury, he did undergo a surgical procedure which was performed by Dr. MacDade. Claimant subsequently returned to work for respondent and continued working until November 2000. Claimant testified that after he returned to work his condition continued to worsen until he felt he was no longer capable of performing his job duties.

After terminating his employment with the respondent claimant went to work for Bankers Life & Casualty selling insurance. Claimant testified that he performed this job for approximately five months before quitting because he was having difficulty concentrating due to his medication. Claimant also testified that he could not sit for extended periods of time to talk with clients.

Following that job the claimant went to work as a convenience store clerk operating a cash register and stocking the store. Claimant testified that he performed this job for

approximately seven months, that he worked part time three days per week and earned either \$7.25 or \$7.35 per hour. Claimant testified that his physical condition eventually worsened to the point where he could not perform his job.

Throughout the period of claimant's return to work for the respondent, his work as an insurance salesman, and his work as a convenience store clerk, the claimant continued to have problems with both his lumbar and cervical spines. Claimant testified that at one point he was receiving treatment from Dr. Luke Knox who wanted to perform surgery. According to claimant's testimony the respondent requested a second opinion and claimant was evaluated by Dr. Boxell, a neurologist in Oklahoma.

Dr. Boxell's medical treatment resulted in a three-level cervical fusion on August 22, 2002, and a three-level lumbar fusion on December 19, 2002. By letter dated January 28, 2004, Dr. Boxell stated that claimant had reached maximum medical improvement as of December 10, 2003. Dr. Boxell went on to assign the claimant permanent physical impairment ratings in amounts equaling 10% to his cervical spine and 16% to his lumbar spine. Respondent accepted and paid permanent partial disability benefits in accordance with these impairment ratings.

At some point in time the Second Injury Fund was made a party to this claim and following its investigation the Second Injury Fund accepted liability and agreed to pay claimant permanent partial disability benefits in an amount equal to 30% to the body as a whole for a loss in wage earning capacity.

Claimant has filed this claim contending that he is permanently totally disabled or that he is entitled to permanent partial disability benefits in excess of the 30% accepted by the Second Injury Fund.

ADJUDICATION

_____ Claimant contends that he is permanently totally disabled. A.C.A. §11-9-519(e)(1)

defines “permanent total disability” as the “inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.” Subsection (e)(2) of A.C.A. §11-9-519 states that the burden of proof shall be on the claimant to prove an inability to earn any meaningful wages in the same or other employment.

In determining an employee’s wage loss disability, the Commission may take into consideration the employee’s age, education, work experience, medical evidence, and any other matters which may reasonably be expected to affect their future earning capacity. *Glass v. Edens*, 233 Ark. 786, 346 S.W. 2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984).

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 prove by a preponderance of the evidence that he is permanently totally disabled. Instead, I find after considering all relevant wage loss factors that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

My primary basis for finding that claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled are the medical opinions of Dr. Boxell and Dr. Anthony. As previously noted, claimant underwent a cervical and lumbar fusion which were performed by Dr. Boxell. Dr. Boxell addressed the claimant’s ability to return to work in a letter dated January 28, 2004, wherein he assigned claimant’s impairment ratings. In his letter Dr. Boxell does state that he believes it is unlikely that claimant will be able to return to work; however, Dr. Boxell also states that the claimant is not totally disabled. I can only conclude after reading Dr. Boxell’s letter that while he believes it will be difficult for claimant to return to work, that claimant is not totally disabled but can work within certain restrictions. According to Dr. Boxell’s letter the claimant’s ability to complete a work conditioning program suggested that he could perform light-duty

sedentary work. Dr. Boxell stated that claimant could perform this type of work if he were given the ability to change positions every 25 to 30 minutes for half days. Dr. Boxell also went on to note that claimant had shown the capacity to lift 23 pounds from 19 inches off the floor to 34 inches continuously for 10 minutes. He also noted that claimant was able to push and/or pull a 100-pound weight sled continuously for 15 minutes. He also noted that claimant could lift 50 pounds with his lower extremities and 40 to 50 pounds with his upper extremities. He noted that claimant was capable of riding a stationary bike for 25 minutes and an elliptical machine for 16 to 17 minutes. Claimant was able to step up and down 6-inch steps for 5 minutes. Claimant could also walk on a treadmill for 25 to 26 minutes and was capable of devoting 76 to 80 minutes to aerobic activity. He also noted that claimant was capable of sitting for 25 minutes without changing positions and that he was capable of standing with activities using his upper extremities above and below shoulder level for 15 minutes. Finally, Dr. Boxell noted that claimant was able to maintain steady exercise for four and one-half hours with one 10 to 15 minute break.

Based upon these demonstrated abilities, it was Dr. Boxell's opinion that while claimant might have difficulty finding a job, he was nevertheless not totally disabled but instead was capable of performing light sedentary-type work.

Prior to the passage of Act 796 of 1993, Dr. Boxell's opinion might support a finding that claimant was permanently totally disabled under the "odd lot" doctrine where it could be shown that work was so limited in quality, dependability, or quantity that a reasonably stable market did not exist for those services. However, Act 796 of 1993 eliminated the "odd lot" doctrine as a consideration in a claim for permanent disability benefits. A.C.A. §11-9-519(f).

In addition to Dr. Boxell's opinion is the letter report of Dr. Anthony dated March 28, 2004. Dr. Anthony also opined that claimant was not totally disabled.

I do agree with Dr. Boxell that the patient is not totally disabled. This was a mistake on my part and I apologize. I have had a chance to review his past notes as well as his physical therapy notes and do feel that based on his effort and work hardening he is able to work in some capacity at the present time, though this will likely need to be sedentary.

Therefore, in summary, this gentleman is not totally disabled and I apologize for any inconvenience this may have caused.

Thus, two of claimant's treating physicians have both opined that he is not totally disabled, but instead have opined that claimant is capable of performing light to sedentary-type work. I find that these opinions are credible and entitled to great weight.

Reviewing the relevant wage loss facts reveals that claimant is only 40 years old and he is a high school graduate with some college credit. In addition to working for the respondent as an EMT paramedic for 14 years, the claimant also worked at Southern Medical Services as an EMT for one to one and a half years. Prior to Southern Medical the claimant worked at Bonanza as a bus boy/dishwasher for seven to eight months.

Subsequent to his injuries the claimant did return to work for the respondent as a paramedic until November 2000. Claimant subsequently went to work for Bankers Life & Casualty selling insurance. As previously noted, claimant testified that he performed this job for approximately five months before quitting due to an inability to concentrate and sit for extended periods of time. Claimant also worked as a convenience store clerk for approximately seven months.

It should be noted that all of these jobs occurred before claimant's initial surgery with Dr. Boxell in August 2002. Claimant has not worked anywhere since that time.

Following claimant's release by Dr. Boxell, respondent hired a vocational specialist to meet with claimant and identify jobs which he might be capable of performing. Documentary evidence reflects several jobs which were identified by the vocational specialist. According to claimant's testimony he contacted these various employers but

was not hired.

With respect to his current condition, claimant testified that he suffers from numbness in his left leg, that he cannot walk very far, that he has shooting pains, and that he cannot bend over to pick up things. Claimant also testified that his fingers occasionally go numb such as when he is using a computer.

The evidence also indicates that claimant has some woodworking equipment in his garage. According to claimant's testimony he makes bird houses for friends. Claimant testified that he might spend anywhere from 20 minutes to an hour working with his woodworking equipment. Claimant testified that he is able to set his own pace and can quit whenever he has pain or gets tired.

The evidence also indicates that claimant has on at least one occasion manufactured a picnic table with the woodworking equipment which he sold for \$30.00. According to claimant's testimony, this is the only item he has sold. Claimant did however admit telling a private investigator that he could build other picnic tables.

Finally, I note that claimant is currently drawing social security disability benefits. As of January 2003, claimant's monthly social security disability check equaled \$1,364.00.

In summary, claimant has the burden of proving by a preponderance of the evidence that he is permanently totally disabled. Based upon the opinions of Drs. Boxell and Anthony, I find that claimant is not permanently totally disabled. Both of those physicians opined that claimant was not permanently totally disabled, but indicated that claimant was capable of performing light to sedentary-type work. Although Dr. Boxell did indicate that claimant might not return to work, my reading of his letter report does not lead me to conclude that this statement is based upon claimant's physical inability to return to work but rather the difficulty claimant might have in finding employment. Dr. Boxell's letter indicates that claimant is capable of performing various physical activities.

After consideration of all the relevant wage loss factors, I find that claimant has

proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. Claimant has been assigned permanent physical impairment ratings in an amount equal to 10% for his cervical spine and 16% for his lumbar spine. According to Dr. Boxell's report claimant is capable of returning to light to sedentary-type duty with breaks every 25 to 30 minutes for half days. The evidence reflects that claimant is a relatively young 40 years of age, he has a high school education, and has completed some college work. The evidence also indicates that claimant has varying job skills which would translate to sedentary-type work. Given all of these relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

The Second Injury Fund previously accepted liability for permanent partial disability benefits in an amount equal to 30% to the body as a whole. The Second Injury Fund has controverted claimant's entitlement to additional permanent partial disability benefits in an amount equal to 30% to the body as a whole.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. The Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 30% to the body as a whole.

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 Second Injury Fund. The Second Injury Fund is 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