

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104417

NORMAN BATTEN, EMPLOYEE	CLAIMANT
FERRELL GAS LP, EMPLOYER	RESPONDENT #1
FIDELITY & GUARANTY INS. CO., CARRIER	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #1

OPINION FILED JANUARY 12, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on November 4, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE KRISTOFER E. RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE JARROD S. PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits.

On July 26, 2005, a pre-hearing conference was conducted in this claim, from which a Pre-Hearing Order of July 27, 2005, was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Norman Batten, the claimant, and Ronda Gray, coupled with medical reports and other documents, along with the prior hearing transcript, comprise the record in this claim.

DISCUSSION

Norman Dewayne Batten, the claimant, with a date of birth of April 29, 1956, completed the 11th grade and later obtained his GED. Prior to entering the military, claimant performed work roofing houses. Claimant was in the military for 15 years during which time he obtained training as a diesel mechanic. Claimant performed duties as a heavy equipment repairman.

Upon his discharge from the military claimant secured employment with respondent as a driver/salesman. Claimant characterized his employment history as consisting of heavy manual labor jobs. There is no evidence to reflect that the claimant experienced limitations or restrictions relative to his back prior to his March 17, 2001, compensable back injury in the employment of respondents. Claimant denies that he has had any other injuries or accidents to his back since that sustained in the employment of respondents.

The compensability of the claimant's March 17, 2001, low back injury was adjudicated during a March 19, 2004, hearing before the Arkansas Workers' Compensation Commission. Claimant suffered his compensable low back injury while starting the engine of his assigned vehicle on March 17, 2001. Although the claimant continued to discharge employment duties for respondents following his injury, as he continued to do so his symptoms grew progressively worse to the point that he sought medical treatment.

Claimant was seen at the emergency room of St. Bernards Regional Medical Center on April 2, 2001, relative to his low back complaints growing out of the March 17, 2001, accident.

The CT scan performed during the April 2, 2001, visits disclosed the presence of a moderate-size right paracentral HNP at L5-S1 causing right-sided spinal canal stenosis behind the superior vertebral endplate of S1 along with other objective findings. Claimant was provided a light/limited duty release by medical personnel as a result of the April 2, 2001, visit. The afore was provided to supervisory personnel of respondents by the claimant and appropriated work was provided to the claimant through November 2001. Claimant was still within his healing period relative to the March 17, 2001, compensable injury at the time respondents declined to further furnish light duty work to him.

The claimant was ultimately referred by his family physician, Dr. Samuel Birchfield, to Dr. W. Craig Clark, a Southhaven neurosurgeon, for medical treatment relative to the March 17, 2001, compensable injury. On March 28, 2002, claimant was admitted to Methodist Healthcare under the care of Dr. Clark with a diagnosis of herniated nucleus pulposus, L3-L4 right and herniated nucleus pulposus with lateral recess stenosis, L4-L5 left, and underwent a hemilaminectomy with microdisectomy, L4-L5 left and partial hemilaminectomy with microdisectomy, L3-L4 right..

On June 13, 2002, claimant underwent a functional capacity evaluation at Healthsouth pursuant to a referral by Dr. Clark. The FCE reflected that the claimant could perform a job within the "HEAVY" demand level. The FCE further noted the claimant's ability to return to his pervious job was undeterminable "secondary to his refusal to complete the nonmaterial handling portion of the evaluation". (R#1, ex. #2, p. 1-5).

On September 20, 2002, claimant was again admitted to Methodist Healthcare under the care of Dr. Clark where he underwent a partial hemilaminectomy with microdisectomy and

removal of extensive epidural fibrosis, L4-L5 on the right. (CX.#1, p. 33-39). Claimant reached the end of his healing period relative to the March 17, 2001, compensable back injury on October 31, 2002, with a residual anatomical impairment of 20% to the body as a whole.(CX. #1, p. 40).

Of note is the fact that the FCE was performed prior to the claimant's second surgical procedure of September 20, 2002. The credible evidence in the record reflects that when claimant responded to the preliminary instructions in preparation of a second Functional Capacity Evaluation, his affirmative answer to some of the questions his ineligible to participate in the FCE. (T. 33, 37). It is pertinent that the last attempt to schedule the claimant for a Functional Capacity Evaluation was on Monday, October 31, 2005, with the Workers' Compensation hearing being scheduled for November 4, 2005.

Claimant testified regarding his physical limitations and restrictions attributable to the March 1, 2001, compensable injury. Claimant noted that he takes prescription medications, Oxaprozin and Hydrocodone, twice daily due to pain. Claimant's testimony reflects that he has been taking the Oxaprozin and Hydrocodone since his second surgery of September 2002. Regarding his residual symptoms attributable to the compensable injury, the claimant testified that he has severe pain down his left leg

The testimony of the claimant reflects that he can sit/stand comfortably for fifteen minutes on a bad day and 30 minutes on a good. Claimant estimated that he could walk the distance of a city block and can lift five to 10 pounds. Claimant's testimony reflects that he is unable to bend comfortably. Over the three years since the June 13, 2002, functional capacity evaluation was performed claimant maintains that his condition has not remained the same.

Claimant testimony reflects his activities over the course of an average day:

I get up and have coffee and watch some TV, get my clothes on and sit, usually. My wife and me usually goes to my sister's and see what they're doing everyday and sit some more and go outside and sit out there. Just mainly nothing. (T. 20).

Claimant asserts that he is unable to do any household chores or yard work. Claimant's testimony reflects that he last drove a car six (6) months ago. Claimant explained that driving is painful for him, and that he is always on pain medication and he does not trust himself behind the wheel of a vehicle. Claimant concedes that none of his doctors has prohibited him from driving.

Claimant asserts that during the course of a day he devotes approximately seven (7) hours to resting. Claimant noted that he usually takes an hour nap after lunch. Claimant added that there are other times during the day when he needs to lay down, and does so on the couch. Claimant testified on one morning he was unable to get out of bed or walk, and that his wife went to the church, got a wheelchair, and got him up. Claimant added that he had to use the wheelchair for about two weeks, although he has not had to use it since.

Claimant asserts that while he feels that it would not be realistic, if respondents offered a program of rehabilitation or work placement program he would cooperate. Claimant acknowledged that in August 2005, he told the vocational rehabilitation individual that he was not interested in retraining and that he did not want any kind of vocational assistance. Claimant testified that he is unaware of any kind of work that he feels he could perform due to the residuals of his injury. Claimant has not worked since he last discharged light duty work in the employment of respondents in November 2001.

The testimony of the claimant reflects that he is not receiving any kind of indemnity benefits. Claimant has been approved for veterans disability benefits, however had not received

any as of the date of the hearing in this claim.

The testimony of the claimant reflects that the appointment he had with Dr. Clark was September 19, 2005. Claimant noted that he was prescribed pain medicine during the September 19, 2005, visit.

On cross examination, claimant acknowledged that during his August 2005, vocational assessment he sit for two hours straight. Claimant also agreed that his current physical activity level is minimal.

Claimant testified that while he does have training as a diesel mechanic as a result of his military service, he is unable to perform regular mechanic work on cars or other motors. His automotive training is strictly limited to diesel mechanics. Claimant acknowledged that he does know how weld and how to run a cutting torch. The testimony of the claimant also reflects that his CDL is current. Claimant's testimony reflects that he has not made any efforts to look for a job as a diesel mechanic or regular mechanic since leaving the employment of respondents.

Ms. Ronda C. Gray testified that she has been a vocational rehabilitation counselor for seven and a half years and employed by Genex for approximately three and a half years. Ms. Gray's testimony reflects that she performs from two to five vocational assessments a month in her employment with Genex. In describing the mechanics of her vocational assessment, such as the one performed relative to the claimant, Ms. Gray testified:

I administer three separate assessments and also including a interest survey and do an interview with each client to find out about their vocational history, education history, talk about their injury and I read medical records that are provided to me, do transferrable skills analysis, any type of research for any type of specific jobs or other training programs that might be requested and write a report to the carrier. (T. 43-44).

Ms. Gray continued, regarding her services:

Through the assessment if a client indicates that they are interested in retraining than I take their ideas and we try to brainstorm on some ideas or programs that would be appropriate or that they're interested in. I gather all the research to include start dates, tuition costs, fees, and I provide all that information to the carrier or to the attorney who's requested it. That's always done with the vocational evaluation. (T. 44).

Regarding the jobs that are identified in her report regarding the claimant, Ms. Gray's testimony reflects that the same is the product of a software program, OASYS, in which information of the vocational history of the claimant is inputted. Ms. Gray's testimony reflects regarding the wide spectrum of jobs identified in her report relative to the claimant, from toll collector to diesel mechanic:

I used the physical capacity of heavy that was documented in the FCE reports in June of '02, which is heavy so jobs that are considered transferrable from heavy down to sedentary will pop up. (T. 46).

Among the jobs identified by Ms. Gray were toll collector, escort vehicle driver, diesel mechanic, and sales route driver. Ms. Gray testified regarding her interview with the claimant:

I always ask, the last question I ask in the interview process is if the individual has a vocational goal and Mr. Batten responded that he did not believe that he could go back to work. And so I always ask as well, and I asked Mr. Batten, if he would be interested in some retraining. And he indicated that he was not interested. (T. 48).

Ms. Gray acknowledged that the interview she had with the claimant was not in person, but via telephone. Ms. Gray testified that the duration of the interview with the claimant was at least an hour. Regarding the availability of the jobs identified in her report, Ms. Gray's testimony reflects:

It's just a sample of some of the jobs. To find out the prevalence and the availability, I would have to do a labor market survey in the area.(T. 49).

Ms. Gray testified that she did not do research to check and see if any of the jobs were located in or around where the claimant actually lives. Ms. Gray added that based on the functional capacity evaluation claimant could return to work in the heavy capacity. In noting that the FCE was over three years old, Ms. Gray testified that she requested a copy of any newer medical, and “I asked, I said, let’s get a new FCE be conducted”. (T. 51).

The testimony of Ms. Gray reflects that prior to interviewing and preparing her report, she was only provided June 2002, FCE report. Ms. Gray did not review medical records prior to her interview with the claimant and preparing her report. Likewise, Ms. Gray testified that she was not privy to the report of the claimant having undergone a second surgical procedure on September 20, 2002, after the June 2002, FCE. When questioned whether the afore information would have been helpful in doing her evaluation, Ms. Gray responded:

If it changes his functional capacity, according to the physician, yes, it would. (T. 52).

Ms. Gray was aware of the attempt to schedule a new functional capacity evaluation for the claimant by respondent, however only learned during the hearing that the claimant was not permitted to undergo the FCE due to his blood pressure and back problem.

After a thorough consideration of all of the evidence in this record to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriated statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On March 17, 2001, the relationship of employee-employer-carrier existed among

the parties.

3. On March 17, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$299.00/\$224.00, for total/permanent partial disability.

4. On March 17, 2001, the clamant sustained an injury to his back arising out of and in the course of his employment.

5. The respondents shall pay all reasonable hospital and medical expenses arising out of the claimant's injury of March 17, 2001.

6. The claimant's healing period ended on October 31, 2002, relative to the March 17, 2001, compensable injury, and resulted in a permanent physical impairment of 20% to the body as a whole.

7. When the claimant's age, education, work history, permanent restrictions and physical limitations are considered, the evidence preponderates that he has suffered a loss of earning capacity in the amount of 70% over and above his anatomical impairment.

8. The respondents controverted the compensability of this claim in its entirety, to include wage loss benefits.

CONCLUSIONS

The compensability of the claimant's March 17, 2001, low back injury was adjudicated during a March 19, 2004, hearing before the Arkansas Workers' Compensation Commission. In addition to being found compensable, claimant was awarded temporary total disability and medical benefits along with permanent partial disability benefits to correspond with a 20% whole body impairment as a result of the prior hearing.

Claimant asserts that as a result of his March 17, 2001, compensable injury, he has been

rendered permanently and totally disable or has suffered loss of earning capacity in excess of his anatomical impairment, and is entitled to corresponding workers's compensation benefits, along with controverted attorney fees. Respondents take the position that the claimant has not sustained wage loss in excess of his permanent impairment rating and that he is not permanently and totally disabled. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the date of the afore provisions.

With a date of birth of April 29, 1956, the claimant will be fifty (50) years of age in April 2006. Claimant's presents a consistent work history of heavy manual labor jobs prior to his March 17, 2001, compensable injury in the employment of respondents #1. Claimant has his GED. Claimant received training as a diesel mechanic and discharged duties as a heavy equipment repairman during his fifteen years enlistment in the US Army. The evidence further reflects that claimant discharged duties driver/salesman in the employment of respondent and its predecessor for eight to nine years. Claimant did not experience physical limitations or restrictions relative to his employment activities prior to the March 17, 2001, compensable injury in the employment of respondents

Claimant last discharged employment duties in November 2001. The evidence reflects that from the time claimant sought medical treatment relative to the March 17, 2001, injury, he was released to light duty work and discharged same in the employment of respondent until respondent ceased to provide same. Claimant has undergone two (2) surgical procedures relative to his March 17, 2001, low back injury. Following the March 28, 2002, surgery claimant underwent a functional capacity evaluation in June 2002, which recommended that the claimant

could perform jobs in the heavy demand level. Despite the results of the June 2002 FCE, the credible evidence reflects that the claimant continued to experience residuals relative the March 17, 2001, compensable injury and to receive active medical treatment. On September 20, 2002, claimant underwent the second surgical procedural relative to his lumbar injury of March 17, 2001.

The claimant did not reach the end of his healing period relative to the March 17, 2001, compensable injury until October 31, 2002, at which time he was assessed with a 20% permanent physical impairment. Since the claimant underwent a second surgical procedure following the June 2002, FCE the results of the test as an indication of the claimant's functional capacity subsequent to the October 31, 2002, end of his healing period are nil. Indeed, the credible evidence reflects that because of the claimant's back problems and high blood pressure he was advised not to participate in a scheduled November 1, 2005, FCE by the administrator of the test.

Claimant continued to take medication to address symptoms of severe pain in his back and lower extremity. Claimant no longer drives due to pain and the adverse effects of medications that he take on a daily basis to address his residual symptoms. Claimant has severe limitations on his physical activities of walking, sitting, standing, lifting, and bending as a result of the compensable injury and surgeries.

Claimant was last seen by his treating physician on September 19, 2005. The credible testimony in the record reflects that claimant was continued on the prescription medicines by Dr. Clark during the afore visit, however no further active medical treatment was proposed or planned. Prior to the September 2005, visit, claimant had last seen Dr. Clark on August 24, 2005. The physical examination of the claimant conducted by Dr. Clark during the August 24,

2005, visit disclosed:

EXAMINATION today reveals a non-antalgic gait with no evidence of limp or lateralization present. He forward flexes to about 70 degrees limited by left SI joint discomfort. He extends to the 0 degree or neutral position limited by left SI joint discomfort. Lateral bending to the left results left SI joint discomfort but less so than lateral bending to the left. There is no significant lumbar spasm present. There is no loss of segmentation appreciated. He is tender to palpation over the left SI joint. Motor examination of the lower extremities including flexor hallucis longus, extensor hallucis longus, anterior tibialis, flexors and extensors of the knee and flexors and extensors of the hip is intact at 5/5 with symmetry. Deep tendon reflexes, the left ankle jerk is 0/2, the right 2/2, knee jerks are 2/2 with symmetry. Toes are downgoing. Straight leg raising on the left at 90 degrees results in pain to the knee. No sciatica is elicited. This is not worsened with sciatic stretch. Cross straight leg raising is negative at 90 degrees not exacerbated with sciatic stretch. Femoral stretch does not exacerbate his complaints. FABER is within normal limits.

As the result of the localized tenderness palpable on the left SI joint, we have today performed a trigger point injection and placed him in a lumbar support. He will continue his NSAID in this regard and we have added Medrol to the medical regimen. Because of the persistent symptoms status post a 2 level surgery, we will proceed with MRI of the lumbar spine with and without contrast to see if there is any evidence of continued or residual neural compression. We will see him back after the MRI scan and make further recommendations based on those results.(R#1,ex. #1 p.5).

Claimant's medical treatment relative to his March 17, 2001, compensable injury as of August 24, 2005, included a trigger point injection at the left SI joint, lumbar support with insert, continued medication and additional diagnostic testing.

Ark. Code Ann. §11-9-519 (e), provides, in pertinent part:

- (1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.
- (2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

In the instant claim claimant acknowledges that he has not sought employment since he last discharged light duty employment with respondents in November 2001, although he reached the end of his healing period on October 31, 2002, after having undergone two surgical procedures relative to his compensable low back injury. The claimant's work history is one of heavy manual labor. Contrary to the June 2002, FCE, the evidence preponderates that the claimant is physically unable to perform jobs in the heavy demand category.

It is noteworthy that claimant underwent the vocational evaluation pursuant to the request of respondents on August 29, 2005. Five (5) days earlier, August 24, 2005, claimant had been seen by his treating physician, received active medical treatment - to include a lumbar injection, and was scheduled for further diagnostic testing on August 30, 2005. The vocational evaluation report of Ms. Gray is telling with respect to the importance of recent medical or evaluation studies:

Therefore, it is my professional opinion in light of the FCE indicating Mr. Batten has a heavy capacity work ability that job placement would be a viable option as transferable occupations were identified. Due to To FCE being conducted three years prior, it would be beneficial to either have a repeat FCE or IME to assess for any changes in physical ability. In the event that more recent or updated restrictions are obtained, I would be happy to review and provide an addendum if needed. (R#1, ex. #2, p. 17).

The evidence preponderates that the claimant is unable to earn any meaningful wages in the employment he was performing at the time of his March 17, 2001, compensable injury in the employment of respondents. The residual physical limitations and restrictions attributable to the March 17, 2001, compensable injury have foreclosed the claimant to returning to employment as a route/delivery salesman, a job he performed for nine years prior to his compensable injury. There is no evidence in the record to reflect that respondent-employer has solicited the claimant

to return to its employment since claimant reached the end of his healing period on October 31, 2002. The claimant's permanent physical restrictions and limitations also reduce his access to other employments where he could earn any meaningful wages. Claimant takes prescription narcotic medication which impairs his ability to remain mentally alert and operate equipment, to include automobiles. Claimant is unable to lift greater than 10 pounds, limited in bending, walking, sitting, and standing. His prior work history has been limited to heavy manual labor jobs.

Claimant does have a GED. Testing performed during the vocational evaluation reflects that the claimant is at the post high school level in reading. The testing also revealed that the claimant was in the below average range of human intelligence which suggested that he had the ability to retrain at the technology center level of learning, however would be required to take educational enhancement classes in order to prepare for such training.

The claimant has failed sustain his burden of proof by a preponderance of the evidence that he has been rendered permanently and totally disabled from engaging in gainful employment or from earning any meaningful wages in other employment as a result of the March 17, 2001, compensable injury. The evidence does preponderates that when the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity are considered, the claimant has suffered a lose of earning capacity in the amount of 70% in addition to his 20% permanent physical impairment. Respondents #1 have controverted this claim in its entirety, to include the claimant's claim for wage loss benefits.

AWARD

Respondents #1 are herein ordered and directed to pay to the claimant permanent partial

disability benefits at the weekly compensation benefit rate of \$224.00, to correspond with the claimant's 70% wage loss disability over and above his 20% permanent physical impairment growing out of the March 17, 2001, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondents #1 are further ordered and directed to pay all reasonably related medical, hospital, nursing and other apparatus expenses growing out of the claimant compensable injury of March 17, 2001, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge