

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E314827

GLORIA BLAIR, EMPLOYEE	CLAIMANT
GEORGIA PACIFIC CORPORATION, EMPLOYER	RESPONDENT NO. 1
SEDGWICK CLAIMS MANAGEMENT, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED DECEMBER 5, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on September 6, 2006 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SILAS H. BREWER, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of permanent disability benefits and attorney's fees.

At issue is whether or not the claimant has suffered a loss of earning capacity pursuant to Ark. Code Ann. §11-9-519, §11-9-521, §11-9-522; and Fund liability pursuant to Ark. Code Ann. §11-9-525 and §11-9-502.

After reviewing the evidence impartially without giving the benefit of the doubt to either

party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on September 11, 1993 at which time the claimant sustained a compensable scheduled injury at a compensation rate of \$252.30/\$189.23. Medical expenses, temporary total disability benefits and a 53% rating to the foot have been accepted. The healing period ended March 14, 1995. The claimant has not worked since March 31, 2004.

Some medical expenses have been paid by Blue Cross Blue Shield and some benefits have been paid by MetLife and UNUM. The claimant also receives social security benefits and a retirement pension.

After her compensable injury, the claimant returned to work at light duty from 1994 to 2004, when the plant discontinued light duty. The claimant contends she is not a viable candidate for vocational rehabilitation. Based on her age, 57 (D.O.B. June 4, 1949), education and work experience, the claimant is permanently and totally disabled.

Respondent No. 1 contends all appropriate benefits have been paid. Alternatively, in the event of an award, the Fund would be liable for additional permanent benefits.

Respondent No. 2, Second Injury Fund, contends the claimant is not permanently and totally disabled nor is she entitled to any wage loss disability benefits. Furthermore, the Fund has no liability in this case. Alternatively, in the event of an award, the Fund would be entitled to a credit against payments made by third parties (short-term disability and disability retirement).

Respondent No. 3, the Death & Permanent Total Disability Trust Fund, contends they have no liability until the claimant's wage loss and the Second Injury Fund's liability is determined, and

they have not controverted this claim. Additionally, respondent No. 1 is not entitled to a credit for payment of the impairment rating against its \$75,000.00 maximum liability under Ark. Code Ann. §11-9-502(b)(1).

The following were submitted without objection and comprise the evidence of record: The parties' prehearing questionnaires and exhibits contained in the transcript along with the depositions of the claimant; Stacey Campbell, Dr. Walsh and Tim Atkinson, incorporated by reference.

The claimant was the only witness to testify at the hearing. The claimant, age 57 (D.O.B. June 4, 1949), is a high school graduate with some college courses. Her work experience includes jobs in factories, convenience stores and supermarkets. The claimant began work for the respondent-employer in 1989 as a utility person and service operator.

The claimant's health history includes high blood pressure and high cholesterol which is managed by medication. In 1990 she sustained neck and back injuries in a motor vehicle accident (MVA) which were treated conservatively with physical therapy. No permanent impairment was assessed and the claimant resumed her full duties at work. In 2004, the claimant woke up with neck and shoulder pain. She was treated conservatively for cervical degenerative disc disease and is not considered a surgical candidate.

The claimant has not worked since 2004. She draws Social Security Disability benefits for her neck and ankle problems (\$1,094.00 monthly) and receives retirement benefits (\$351.00 monthly) through her employer, (Tr. p. 46-48).

The claimant injured her left ankle on September 11, 1993 when she fell from a conveyor belt. She was taken to the hospital where she came under the care of Dr. Walter Giller. Surgery was performed on September 13, 1993 for a fracture and dislocation. Complications ensued and a second

surgery was performed on October 10, 1993 to remove hardware. The claimant developed aseptic necrosis and fusion surgery was performed on January 11, 1994. Once the cast was removed, the claimant was fitted with a brace and used a cane to ambulate. Dr. Giller released the claimant in November 1994, but the claimant continued to return to his clinic on a yearly basis to avoid closure of her case by the statute of limitations (Tr. p. 41-43). Dr. Daniels, Dr. Giller's partner, was unable to offer any other treatment to improve her condition, however, and these visits were used to fix her shoe, perform x-rays to monitor the fusion, and prescribe pain medication.

The claimant returned to work in 1994 and the respondents accommodated her by providing her with a clerical job where she could sit or stand as needed. They also allowed her to park her car close to the plant and transported her through the plant on a golf cart when necessary. The claimant was assigned to assist an administrative assistant with filing, answering the phone, recording employee attendance and shift changes, some computer work and other odd jobs as needed.

The claimant worked light duty for the next ten years until April 2004, when the department was restructured and her job was eliminated. Her employer briefly relocated her to the shipping department to operate a motorized sweeper. They were unable to add steps to the equipment to facilitate her climbing on board and superintendent Stacey Campbell advised that no other jobs were available.

The claimant was then sent to general practitioner Dr. Benjamin Walsh in April, 2004 to assess her disability. He recommended that she not return to work as a service operator (the job she held in 1993 when she was injured) and recommended work restrictions regarding heights, mechanical hazards, moving objects, twisting and walking.

The claimant has also participated in two Functional Capacity Evaluations (FCEs) in 2002 and in 2005 at the request of the respondents. The second examiner, Tim Atkinson, opined that the test was invalid due to the claimant's unreliable and inconsistent effort, and refusal to participate in certain tests. The claimant complained about the accuracy of the second FCE. She stated the test equipment looked homemade and was a completely different set up from the first FCE that she took. The evaluator asked her to crawl and she refused because to stand back up after kneeling requires her to push off her weight on the injured ankle.

The claimant does not feel she is a candidate for vocational rehabilitation (Tr. p. 32). She stated her ankle remains symptomatic with pain and a burning sensation if she walks more than three or four feet. The claimant also testified she is unable to work due to mental stress surrounding her financial difficulties and sleepiness caused by her high blood pressure medication. She has also gained weight since her accident due to inactivity and developed neck and shoulder pain. The claimant explained that her daughter helps her with housework and a neighbor mows her lawn.

In his deposition, superintendent Stacey Campbell testified he was in charge of 350 employees in the Tissue Converting department of Georgia Pacific. He was aware of the claimant's accident, work restrictions and light duty status since she used a brace and walked with a cane (Depo. p. 14-15). Her job duties involved helping an administrative assistant with clerical work (Depo. p. 7). Mr. Campbell testified the claimant's job ended due to restructuring of the department (Depo. p. 8-13). There were a few other employees who were also affected by the restructuring program (Depo. p. 22-23). After an FCE, the claimant was assigned to the shipping department but she could not climb aboard a motorized sweeper (Depo. p. 14).

A letter from Georgia Pacific to their private disability carrier, UNUM, dated March 28, 2005 explains the termination. It should be noted that Georgia Pacific employees are under a union contract.

Ms. Gloria Blair was employed with Georgia-Pacific Corporation from September 1, 1989 through October 2, 2004. At the time of her disability termination, Ms. Blair was a Service Operator in our Tissue Converting department. Her rate of pay was \$17.57 per hour. Ms. Blair was injured on the job in 1993 and was released to return to work with restrictions. At the time of her release, we accommodated those restrictions by finding various work for Ms. Blair to do throughout her department. In late 2003 the severity of the restrictions and changes within our plant such as workforce reductions caused an unreasonable strain on our ability to manage our plant and we could no longer accommodate her restrictions. Ms. Blair was contractually allowed to return to her permanent job as a Service Operator on a full-time basis. Due to the restrictions of Ms. Blair's medical condition, she was not able to perform the Service Operator job as was required, and she subsequently went off work on disability.

In his deposition, Dr. Walsh, a general practitioner, testified he first saw the claimant in April, 2004 to assess the claimant's physical condition so she could apply for disability. He was unaware of any health problems she may have had prior to 1993.

Based on her ankle injury, Dr. Walsh issued a form on April 1, 2004 indicating the claimant was unable to return to her Service Operator job (the post she held at the time of the 1993 accident). Dr. Walsh did not comment on the claimant's ability to perform other types of employment. He did recommend work restrictions, however, regarding height of work, mechanical hazards, moving objects, twisting and walking.

The claimant returned to Dr. Walsh for visits in 2004 and 2005 to address cervical problems, high blood pressure and high cholesterol but she made no complaints about her ankle and did not

require any treatment for her ankle (Depo. p. 18-19).

Dr. Walsh opined that the ankle injury was the major cause of her inability to work as a Service Operator (Depo. p. 20), however, he had not been provided with all of her medical records.

Dr. Walsh explained that the medication for high blood pressure and cholesterol had some potential side effects (dizziness, diarrhea, muscle weakness, blurred vision, fatigue, joint and muscle aches), (Depo. p. 10-15) but the claimant had never told him that she was experiencing any side effects or difficulty working due to the medication (Depo. p. 20-21, 26).

In his deposition, Tim Atkinson, who performed the second FCE on the claimant in 2005, testified he has a degree in Kinesiology and is a certified athletic trainer and disability analyzer. He has worked in sports medicine, outpatient physical therapy, and functional capacity evaluation.

Mr. Atkinson was aware of the claimant's ankle injury but the respondents did not provide the claimant's medical records for his review prior to the evaluation. Mr. Atkinson testified he was unaware of the claimant's work restrictions (Depo. p. 20, 32), and his "Medical History Profile" does not inquire about work restrictions. I am surprised that an evaluator would not be interested in the doctors' recommendations. The claimant might be asked to perform a task prohibited by the doctor that would cause an exacerbation of the injury. Nevertheless, as Attorney Pake pointed out in his cross-examination of Mr. Atkinson, (Depo. p. 61), there were other signs of inconsistent effort in the claimant's FCE aside from her refusal to perform certain tasks.

Mr. Atkinson opined that the claimant demonstrated unreliable effort during her FCE, but she did demonstrate the ability to perform sedentary work. However, he did feel the claimant was deconditioned and unable to lift one to ten pounds consistently.

When asked to compare the 2002 FCE which was considered valid to the 2005 FCE which was considered unreliable, Mr. Atkinson testified the claimant was capable of performing clerical work using either of these test results (Depo. p. 53).

VOCATIONAL REHABILITATION

The claimant has undergone two vocational evaluations. The first report was issued on December 30, 2005 by Mr. Thomas. He noted the claimant was earning \$17.06 per hour at the time of her injury and there was limited job availability in the Crossett area. However, he felt the claimant was capable of working in a clerking position and provided a listing of jobs in the Pine Bluff area. Although I understand the list was not tailored to the claimant's situation, I was surprised to find "postal service mail carrier" in the listing in view of her limited mobility.

A second report was issued by Bob White on June 21, 2006 who concluded the claimant was unable to return to the workforce due to chronic pain which caused limited physical activity, weight gain, lack of stamina, and an inability to stand or walk for any length of time. As a 57 year old, she would be competing with much younger people for unskilled sedentary work and could not reliably attend a full time work week.

She stated when she was laid off from Georgia-Pacific she could do office work, but her condition has deteriorated and I cannot work now, even in an office job.

I was unable to find anything in the medical records to substantiate the claimant's feeling that her condition had deteriorated. I also note that the claimant has not asked for a work hardening program or job placement assistance.

DOCUMENTARY EVIDENCE

The claimant underwent an FCE on March 26, 2002. The evaluator, J. Brian Vance considered the test valid. He opined the claimant was able to work in the medium level with no lifting over 30 pounds and no crawling, crouching, kneeling, or walking on uneven ground.

The claimant applied for disability benefits through MetLife on July 31, 2002, listing high blood pressure and cholesterol as her health problems. Dr. Barry Thompson signed a MetLife form listing the ankle fracture and fusion as the claimant's health problems, limiting her ability to walk, stand and climb. However, Dr. Thompson indicated the claimant was capable of working an 8 hour day and indicated that vocational rehabilitation was not needed. MetLife Forms were also completed by Dr. Walsh on April 1, 2004 listing the ankle injury as the disability. A MetLife form dated October 28, 2004 lists a neck injury as the cause of disability.

Dr. Walsh completed a Georgia-Pacific Physical Demands form on April 1, 2004. The form lists the job requirements for a service operator position, the job the claimant held in 1993 at the time of injury, however, the restrictions would apply regardless of the specific job. Dr. Walsh recommended work restrictions on lifting, carrying and almost all aspects of mobility (turning, pulling, twisting, walking, climbing, running, standing and balancing). Dr. Walsh advised the claimant to avoid working at heights, around mechanical hazards and moving objects.

MEDICAL EVIDENCE

Medical records show the claimant suffered a crushing type injury requiring three surgeries for a dislocated fractured left ankle, hardware removal and fusion due to aseptic necrosis. Mal union of the ankle fusion was detected by diagnostic testing, resulting in a shortened left leg. The claimant

requires a brace, cane, heel pad and orthopaedic shoes. Dr. Giller issued several reports (11-7-94, 12-12-94, 3-14-95, 10-4-95) assessing an impairment rating of 53% to the foot or 37% to the lower extremity.

Dr. Earl Peebles examined the claimant in 1995 and assessed a 35% rating to the lower extremity and advised the claimant to avoid heavy lifting, climbing, and walking on uneven surfaces.

The workers' compensation carrier, in a letter dated June 5, 1996 accepted a 53% rating to the foot.

In 2000 and 2001, Dr. Dwayne Daniels treated the claimant for an incisional neuroma related to scar tissue from the surgeries, and a ganglion cyst of the fourth toe requiring excision. In 2001, the claimant underwent a bone density scan revealing lumbar osteoporosis and left femoral neck osteopenia.

In 2004, the claimant developed neck and radiating left shoulder pain. She was diagnosed with degenerative disc disease, osteophytes and stenosis. The claimant was examined by Dr. P. B. Simpson who opined she was not a surgical candidate. The claimant has not been assessed any impairment rating or work restrictions for her neck or back.

FINDINGS AND CONCLUSIONS

At issue in this case is the extent of the claimant's disability based on her age (57), education (high school and some college) and work experience (factory, clerical) impairment (53% to the foot), and work restrictions (loss of mobility).

Although the claimant sustained a scheduled injury, permanent disability benefits may be awarded in some instances based on the facts of the case, McDonald v. Batesville Poultry Equipment, 90 Ark. App. 435, ___ S.W.3d ___ (2005).

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bone fide job offers, credibility, or voluntary termination. 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), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The evidence of record shows the claimant sustained a severe ankle injury with complications (three surgeries, brace, cane, orthotic shoes) which limits her mobility. She has permanent work restrictions (walking, climbing, standing and lifting) which led to a light duty job for several years with her employer until the position was eliminated.

By her own admission, the ankle injury has not required medical treatment for several years. The claimant has also demonstrated an ability to perform clerical work and would still be working at Georgia-Pacific if her position had not been eliminated. Therefore, I find the claimant is not permanently and totally disabled.

There are three elements of proof for Second Injury Fund liability:

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 5, 746 S.W.2d 539, 541 (1988).

The claimant does have some other health problems, high cholesterol and high blood pressure, but these conditions are controlled with medication. There is no medical evidence to substantiate the idea that side effects from the medication prevent her from returning to work. She has never reported any side effects to her physician nor requested to try other medications. There is no permanent impairment or work restrictions associated with these conditions.

The claimant has had a previous injury to her neck and back in a MVA, however, according to her testimony, she made a full recovery after conservative treatment and returned to full duty. Again, there is no permanent impairment or work restrictions associated with this injury.

The claimant also suffers from chronic neck pain caused by degenerative joint disease. She has been treated conservatively and is not considered a surgical candidate. Again, there is no permanent impairment or work restriction associated with this condition.

Therefore, after reviewing the claimant's health history, I find the Second Injury Fund has no liability in this claim as the claimant was not experiencing "permanent physical impairment" or "disability" at the time of the compensable injury as required by Ark. Code Ann. §11-9-525.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 11, 1993 at which time the claimant sustained a compensable scheduled injury at a compensation rate of \$252.30/\$189.23. Medical expenses, temporary total disability benefits and a 53% rating to the foot have been accepted. The healing period ended March 14, 1995. The claimant has not worked since March 31, 2004. Some expenses and benefits have been paid by third parties to this claim, (Blue Cross/Blue Shield, MetLife, and UNUM). The claimant also receives Social Security Disability and a retirement pension.

2. The claimant has failed to prove by a preponderance of the evidence of record that she is permanently and totally disabled based on her age, education, work experience and injury.
3. The Second Injury Fund has no liability in this case as the claimant suffered from no impairment or disability at the time of her compensable injury.
4. The Death & Permanent Total Disability Fund has no liability in this case.

This case is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge