

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F401752**

<b>SYLVESTER DISMUKE, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>CONAGRA POULTRY COMPANY, EMPLOYER</b>	<b>RESPONDENT</b>
<b>GALLAGHER BASSETT SERVICES, INC., TPA</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 15, 2006**

Hearing before Administrative Law Judge J. Mark White on February 23, 2006, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Jeffery Kearney, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Norwood Phillips, Attorney at Law, El Dorado, Arkansas.

**STATEMENT OF THE CASE**

On February 23, 2006, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on November 14, 2005, and a Prehearing Order was entered that same day. A copy of the November 14, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times, including July 2003; that in July 2003, the claimant sustained a compensable injury to his left ankle; that respondents accepted the July 2003 left ankle injury as compensable and paid benefits, including a permanent anatomical impairment rating of nineteen percent (19%) to the lower extremity; and that the claimant earned wages sufficient to entitle him to a compensation rate of \$277 for total disability benefits and \$208 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional medical treatment; whether the claimant is entitled to additional temporary total disability benefits; in the alternative, whether the claimant is permanently totally disabled; and controversion and attorney's fees. The issue of rehabilitation was expressly reserved by the claimant.

The claimant contends that he suffered a compensable injury on July 24, 2003 when he was working on a pallet jack and crushed his ankle between the pallet jack and the pallet; that he was off work for 12 weeks on short-term disability commencing in the fall of 2003; that he went back to work for two weeks in February 2004, but was unable to continue; that he was advised by respondent at that time that there were no additional benefits, either short term or long term, for which he is eligible; that certain temporary total and permanent partial disability

payments were subsequently made but that claimant remains entitled to wage-loss benefits, further temporary total disability and permanent total disability benefits; medical benefits, rehabilitation and attorney's fees.

Respondents contend that claimant has received all disability benefits, temporary total and permanent partial, to which he is entitled.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from November 1, 2004, through March 1, 2005.

4. The claimant has therefore proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from November 1, 2004, through March 1, 2005.
5. The claimant has proven by a preponderance of the evidence that additional medical treatment remains reasonably necessary in connection with the compensable injury.
6. The claimant has proven by a preponderance of the evidence that he is unable to earn meaningful wages in any occupation; that his compensable injury is the major cause of his permanent disability; and that the existence and extent of his disability is established by objective findings.
7. The claimant has therefore proven by a preponderance of the evidence that he is permanently totally disabled.
8. The respondents have controverted all benefits sought herein.

## DISCUSSION

### I. History

The claimant sustained a compensable injury to his left foot on July 24, 2003, when a pallet jack rammed into his ankle. It does not appear he initially reported the injury, and as a result the respondents controverted his claim. Eventually his claim was accepted as compensable and benefits were paid.

He first sought treatment for his foot from his family physician, Dr. Larry Ezell, on July 28, 2003. Dr. Ezell noted "marked edema of the soft tissues" of the left ankle extending to the mid-foot, and "abundant soft tissue swelling." The following month Dr. Ezell referred the claimant to an orthopedic specialist, Dr. Greg Massanelli.

Dr. Massanelli first saw the claimant on August 4, giving his impression as "contusion with persistent swelling of the left lower extremity." He treated the claimant conservatively without success. MRI and CT exams confirmed the existence of an injury, and Dr. Massanelli ruled out deep venous thrombosis (DVT). Dr. Massanelli returned the claimant back to work at one point, but the claimant was unable to perform his duties and Dr. Massanelli took him back off of work. As of November 20 his treatment had failed to alleviate the swelling, and Dr. Massanelli referred the claimant to Dr. Jason Stewart.

Dr. Stewart gave his impression as “chronic left ankle pain undetermined etiology.” He too noted edema in the foot. He opined that the claimant did not have reflex sympathetic dystrophy (RSD), and he released the claimant from care as of December 23.

Dr. Ezell had continued to see the claimant during this time, and he suggested that the claimant might be suffering from RSD. The claimant was then sent to a neurologist, Dr. Reginald Rutherford. When a triphasic bone scan returned normal results, Dr. Rutherford opined there was “no evidence to suggest RSD.” He released the claimant back to Dr. Ezell as of January 9, 2004.

The claimant treated with Dr. Ezell over the following months, and it appears Dr. Ezell did little other than monitor the claimant’s medication. Dr. Ezell authored a letter on November 1, 2004, in which he diagnosed the claimant with neuropathy and “probably RSD” and declared the claimant to be at maximum medical improvement. Dr. Massanelli likewise released the claimant as of November 24, assigning the claimant a permanent anatomical impairment rating of 19% to the lower extremity. However, Dr. Massanelli also suggested a work-up by a neurologist. Three months later the claimant saw neurologist Dr. Coburn Howell, who gave his impression as “pain in left foot, posttraumatic, etiology undetermined.” EMG and nerve conduction studies revealed no abnormalities, and

Dr. Howell released the claimant from care as of March 1, 2005.

The claimant continued to treat with Dr. Ezell. Dr. Ezell noted on May 26, 2005, that the claimant was “incapable of even the most sedentary type work.” He authored a letter on September 6, 2005, repeating the diagnosis of neuropathy and RSD and opining as follows:

The patient has reached maximum medical improvement and continues to be incapable of prolonged walking, standing, squatting, bending, kneeling, climbing or accomplishing repetitive use of the left lower extremity including foot and ankle. He has had continuous pain, edema and disability with extensive evaluation of the left foot crush injury.

Dr. Ezell added, “the prognosis for Mr. Dismuke ever returning to gainful employment is poor.” Dr. Ezell opined that the claimant had “failed medical management therapy” and was not a surgical candidate.

Dr. Shailesh Vora saw the claimant on January 16, 2006, to perform an evaluation for the Social Security Administration. After noting the presence of a left foot drop, Dr. Vora gave an assessment of “left ankle injury.” He opined the claimant had an impaired ability to “work, walk, stand, carry and handle objects, [and] travel.”

The claimant was terminated from his employment as of January 6, 2006. Correspondence from the respondent-employer reflects that the 19% permanent

impairment rating has been paid, along with temporary total disability benefits from July 26, 2003, through November 1, 2004.

## **II. Adjudication**

### **A. Temporary Disability Benefits**

An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever occurs first. Ark. Code Ann. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant attempted to return to work once, but he testified he was unable to do his job. Dr. Massanelli subsequently took him back off of work. I note the courts have found that an “unsuccessful” return to work will not terminate a claimant’s entitlement to temporary benefits. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Farmer Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). I find that this claimant’s return to work was in fact unsuccessful.

Dr. Ezell declared the claimant to be at maximum medical improvement as of November 1, 2004, and the respondents paid temporary benefits through that date. However, shortly thereafter Dr. Massanelli suggested the claimant see a neurologist, and the claimant did not see the neurologist, Dr. Howell, until the following February. Dr. Howell released the claimant as of March 1, 2005. Though Dr. Howell was unable to successfully treat the claimant, the fact remains that Dr. Massanelli had recommended this additional examination and treatment.

Given these findings, and given the other medical evidence of record, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and had not returned to work from November 1, 2004, through March 1, 2005. I therefore conclude that the claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from November 1, 2004, through March 1, 2005.

### **B. Additional Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark.

App. 232, 878 S.W.2d 420 (1994).

Though the claimant's condition has stabilized, and no further extraordinary treatment has been recommended, it is clear from the record that he requires continued treatment to manage his medication. It is well settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). I find that the claimant has proven by a preponderance of the evidence that additional medical treatment remains reasonably necessary in connection with the compensable injury.

### **C. Permanent Total Disability**

The claimant contends that he is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519 (e). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). Permanent total disability benefits may be awarded even where the compensable injury is a single scheduled injury. *McDonald v. Batesville Poultry Equipment*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (April 13, 2005).

As of the hearing, the claimant was 53 years of age. He has no high school or college education, and he testified that he is unable to read or write. He testified that he quit school in the 6<sup>th</sup> or 7<sup>th</sup> grade at the age of 19. He worked for the respondents for thirty years performing manual labor. His only other work experience is some limited farm work. He has no specialized job skills.

Dr. Ezell has opined that the claimant is permanently totally disabled. Though Dr. Ezell may not be qualified to pass judgment on the non-medical factors, it is plain from the record that in medical terms he considers the claimant to be physically unable to work. Dr. Vora has opined that the claimant's physical abilities are substantially impaired. Dr. Stewart did allow the claimant to return to work, but Dr. Stewart explained he did so only because there was no "objective" reason to keep the claimant off of work. There is no requirement in Arkansas law that a claimant prove his inability to earn wages by objective findings, and I therefore give little weight to Dr. Stewart's opinion.

Given the record before me, I find that the claimant has proven by a preponderance of the evidence that he is unable to earn meaningful wages in any occupation. Though the claimant has other medical problems, the record is clear that his disability stems from his compensable foot injury. I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major

cause of his permanent total disability. The claimant's physicians have consistently observed edema and swelling in the claimant's foot; I therefore find that the claimant has proven by a preponderance of the evidence that the existence and extent of his disability is established by objective findings. I therefore conclude that the claimant has proven by a preponderance of the evidence that he is permanently totally disabled.

## AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from November 1, 2004, through March 1, 2005; that additional medical treatment remains reasonably necessary in connection with the compensable injury; and that he is permanently totally disabled. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Jeffery Kearney, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge