

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303334

VINCENT HENDERSON, EMPLOYEE

CLAIMANT

COOPER TIRE & RUBBER CO.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JUNE 20, 2007

Hearing held on April 2, 2007, at Hope, Hempstead County, Arkansas before HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant appeared Pro Se.

Respondents represented by HON. WILLIAM G. BULLOCK, Attorney at Law, Texarkana, Texas.

STATEMENT OF THE CASE.

On April 2, 2007, the above-captioned claim came on for a hearing in Hope, Arkansas. A prehearing order was entered in this matter on January 19, 2007. A copy of the January 19, 2007, prehearing order was marked as Commission Exhibit "1" and made a part of the record without objection, subject to any modifications made at the full hearing.

The parties stipulated to the following at the April 2, 2007, full hearing:

- 1) The claimant's applicable compensation rates are \$425.00 per week for TTD and \$319.00 per week for PPD.
- 2) The claimant was playing football in 1980, suffered an injury to his left elbow and underwent an open reduction surgery due to that injury.
- 3) The claimant sustained a compensable left upper extremity injury on August 5, 2002, while working for Respondent #1.

- 4) On December 27, 2002, Dr. Frazier performed left elbow surgery on the claimant, which Respondents #1 paid for.
- 5) On February 21, 2003, claimant underwent an open manipulation on his left upper extremity by Dr. Frazier.
- 6) On November 20, 2003, Dr. Bindra performed another surgery on Claimant's left elbow which respondents #1 paid for.
- 7) Respondents #1 voluntarily paid TTD benefits to claimant for the period of December 27, 2002, through September 9, 2003, and then again November 19, 2003 through March 24, 2004.
- 8) On May 27, 2005, this Administrative Law Judge entered an order directing respondent-employer to pay claimant TTD from September 10, 2003 through November 19, 2003, and an additional four percent (4%) of PPD for the left upper extremity, plus attorney's fees.
- 9) The respondent-employer timely paid all benefits as directed in the May 27, 2005, ALJ's opinion.
- 10) Respondents #1 accepted that the claimant sustained a twenty-seven percent (27%) impairment to his left upper extremity.

- 11) Parties agree that the hearing transcript and all exhibits from the March 1, 2005, full hearing before the Commission be hereby incorporated by reference to the record of this proceeding.
- 12) Parties agree that the ALJ's opinion and order entered on May 27, 2005, in this matter is hereby incorporated by reference to this proceeding.

The parties agreed at the full hearing on April 2, 2007, to litigate the following issues:

- 1) Whether claimant sustained a compensable mental injury pursuant to A.C.A. §11-9-113.
- 2) Whether claimant is entitled to one year of lost wages due to Respondent #1's refusal to return the claimant to work pursuant to A.C.A. §11-9-505.
- 3) Whether claimant is now permanently and totally disabled due to his stipulated left upper extremity injury and his alleged mental injury.
- 4) Whether claimant is entitled to additional medical treatment for his left upper extremity compensable injury.
- 5) If compensability is overcome with regard to the alleged mental injury, whether claimant is entitled to medical

benefits associated with his mental injury.

- 6) If claimant proves he is permanently and totally disabled, it must be determined on what date the claimant became permanently and totally disabled.
- 7) If claimant is found to be permanently and totally disabled, whether Respondents #1 are entitled to a credit for permanent benefits paid prior to the date claimant became permanently and totally disabled.
- 8) Affirmative defense of Statute of Limitations, res judicata, latches, estoppel and "law of the case," must be addressed.

The claimant contended, in summary, that on August 5, 2002, he sustained a compensable left arm injury and that due to that injury he has sustained a compensable mental injury pursuant to A.C.A. §11-9-113. Claimant contended that due to his stipulated left arm injury and mental injury that he became permanently and totally disabled on 11/20/03. Claimant contended he is entitled to one year's lost wages for Respondents #1's refusal to return him to work pursuant to A.C.A. §11-9-505(a). Claimant contends entitlement to all medical benefits associated with his mental injury and to additional medical benefits for his compensable left upper extremity injury.

Respondents No. 1 contended the following:

1. All or part of claimant's claims for benefits under the Arkansas Workers' Compensation Laws are barred by the statute of limitations.

2. All or part of claimant's claims for benefits under the Arkansas Workers' Compensation Laws are barred by the application of the equitable doctrines of laches and/or estoppel.

3. All or part of claimant's claims for benefits under the Arkansas Workers' Compensation Laws are barred by the application of the doctrine of res judicata.

4. All or part of claimant's claims for benefits under the Arkansas Workers' Compensation Laws are barred by the application of the doctrine of collateral estoppel.

5. All or part of claimant's claims for benefits under the Arkansas Workers' Compensation Laws are barred by the application of the doctrine of law of the case.

6. The Commission has no jurisdiction over claimant's claim for "compensational damages as a result from economic loss and emotional and physical distress."

7. Assuming the Commission has or elects to exercise jurisdiction over claimant's claim for what he calls "compensational damages as a result from economic loss and emotional and physical distress," all or part of such claim is barred by the statute of limitations.

8. Assuming the Commission has or elects to exercise jurisdiction over claimant's claim for what he calls "compensational damages as a result from economic loss and emotional physical distress," all or part of such claim is barred by the statute of

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limitations and/or the equitable doctrines of laches and/or estoppel.

9. Assuming the commission has or elects to exercise jurisdiction over claimant's claim for what he calls 'compensational damages as a result from economic loss and emotional and physical distress," all or part of such claim is barred by the doctrines of res judicata, collateral estoppel, and/or the law of the case.

10. The Arkansas Workers' Compensation laws do not permit a pro se claimant such as Mr. Henderson to seek or be awarded an attorney's fee. To the contrary, Ark. Code Anno. §11-9-715 contemplates only the payment of fees for legal services rendered by attorneys.

11. Claimant cannot meet the statutory burden of proving that he is totally and permanently disabled as a result of the upper extremity injury he sustained in respondents' employ on August 5, 2002.

12. Since claimant's injury was a scheduled upper extremity injury, and since claimant cannot meet the statutory burden of proving that he is totally and permanently disabled as a result of the upper extremity disability injury he sustained in respondents' employ on August 5, 2002, disability benefits payable with respect thereto should be subject to the limits set forth in Ark. Code Anno. §11-9-521.

13. The "major cause" of any permanent disability claimant has experienced in excess of the impairment ratings paid by respondent is not the compensable injury he

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sustained on August 5, 2002, but instead was one or more intervening and superseding causes and/or the natural progression of claimant's well documented pre-existing left elbow injury/condition.

14. Claimant cannot prove a compensable mental injury pursuant to A.C.A. §11-9-113.

15. Claimant is not entitled to additional medical treatment for his left upper extremity.

16. Claimant cannot prove entitlement to benefits under A.C.A. §11-9-505(a)(1).

17. Arkansas Statutes specifically limit the duration of the disability benefits for mental injury to twenty-six (26) weeks.

18. Respondents No. 1 have a collective bargaining agreement that applies to A.C.A. §11-9-505(a)

Respondents No. 2 contended they would defer to the outcome of litigation, but did contend claimant could not be permanently and totally disabled before February 20, 2006.

Respondents #1 are not entitled to credit for the payment of any permanent disability benefits prior to the date that the claimant is ultimately found to be permanently and totally disabled, if claimant is found to be permanently and totally disabled.

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 A.C.A. §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 failed to prove by a preponderance of the evidence that he sustained a compensable mental injury or illness pursuant to A.C.A. §11-9-113.
- 4) The claimant has failed to prove by a preponderance of the evidence that he is unable, because of his compensable left upper extremity injury, to earn any meaningful wages in the same or other employment.
- 5) The claimant has, therefore, failed to prove that he is permanently and totally disabled.
- 6) The claimant has failed to prove by a preponderance of the evidence that he is entitled to one year of lost wages pursuant to A.C.A. §11-9-505(a).

- 7) The claimant has failed to prove by a preponderance of the evidence entitlement to additional medical benefits related to his compensable left upper extremity injury.
- 8) The documents contained in claimant's proffered Exhibit "2" violated the Commission's seven (7) day rule outlined in the 1/19/07 Prehearing Order, (CX-1), and are therefore not admissible as evidence to be considered for the purpose of this opinion.
- 9) Based on the above findings of fact and conclusions of law, issues 5, 6, 7 & 8 outlined herein are rendered moot.

DISCUSSION

A. Admissibility of Claimant's Proffered Exhibit 2.

At the onset of the 4/2/07 full hearing, the claimant attempted to introduce those documents now contained as a group in claimant's Proffered Exhibit #2. Respondents No. 1 objected to the introduction of those documents on the basis that they were not timely disclosed as exhibits.

The claimant admitted at the full hearing that he did not send the documents contained in his proffered exhibit "2" to the respondents or notify the respondents of his intention to rely on the documents as evidence at the hearing.

The Court: Did you send these to Mr. Bullock and Ms. Rudd evidencing and stating that you were going to ask to introduce

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those at today's hearing?

Mr. Henderson. No, I did not. (T. pgs. 25 & 26, lines 24-25 & 1-2, respectively.)

The Commission's Prehearing Order, (CX-1), specifically stated that "no documents will be allowed into evidence unless exchanged by the parties at least seven (7) days prior to the scheduled hearing." The Order also stated that "Any evidence, whether documentary or testimonial, that is not disclosed or exchanged in compliance with this order and the applicable law shall not be considered at the hearing except with prior leave of the Commission and upon a showing of good cause." (Emphasis added.)

The claimant clearly acknowledged he did not follow the directions outlined in the prehearing order with respect to the introduction of documents; therefore, the documents contained in Claimant's Proffered Exhibit "2" are hereby excluded as evidence for the purposes of this opinion as they violated the seven (7) day rule.

B. Compensability of Mental Injury of Illness.

The claimant's work history and previously stipulated compensable left upper extremity was discussed in detail in the previous ALJ opinion dated 5/27/05, which has been incorporated herein by reference.

The claimant has alleged that due to his compensable left upper extremity injury he now suffers from a compensable mental injury pursuant to A.C.A. §11-9-113. A.C.A.

§11-9-113 states:

"(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and

shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence."

"(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders."

In the case at hand, the claimant has failed to meet his burden of proof with regard to a mental injury because nowhere in the record has a licensed psychiatrist or psychologist diagnosed the claimant with mental injury or illness within criteria outlined in the most current issue of the Diagnostic and Statistical Manual of Mental Disorder. Therefore, the claimant has failed to prove by a preponderance of the evidence a compensable mental injury or illness pursuant to A.C.A. §11-9-113.

C. Benefits Pursuant to A.C.A. §11-9-505(a).

Claimant has alleged that he is entitled to one year of lost wages pursuant to A.C.A. §11-9-505(a) because Respondents No. 1, without reasonable cause, refused to return him back to work after his stipulated compensable left upper extremity injury. The claimant has failed to meet his burden of proof. A key element under A.C.A. §11-9-505(a) is that it must be shown the employee has "suitable employment...available within the employees physical and mental limitations." The claimant testified himself at the full hearing that Cooper Tire & Rubber Company did not have work available within his present work restrictions.

Q. And when Dr. Bindra released you on May 29, 2004, what

did you understand your restrictions to be? Your work restrictions I mean.

A. I can't recall them all at one - I mean, not a lot of - no physical working, no climbing, no using machinery. I'm not for sure about the hours but I think it was just like a break every 10 minutes and I think the hours was just like regular shift, like 7.5 hours or something. That's all I can recall.

Q. I'm looking at his report and it says, his work physical demands for medium capacity are defined as occasional lifting or 21 to 50 pounds, frequent lifting of 11 to 27 pounds, and constant lifting of no more than 10 pounds. Do you remember that.

A. Yes.

Q. Based on those restrictions, do you feel that there were any jobs out at Cooper Tire that you could do?

A. Based on the - no, not at Cooper Tire. We do a lot of - well, they do a lot of work with their hands so it's always a lot of lifting and pulling and pushing and climbing. (T. pgs. 138 & 139, lines 23 & 1-22, respectively)

In addition, Mr. Ricky Norton credibly testified that pursuant to the collective bargaining agreement between labor and management, Cooper Tire & Rubber Company did not have any work suitable for a production worker to work an eight hour shift. (T. pg. 41, lns. 6-25)

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Section (a)(2) of A.C.A. §11-9-505 specifically states "In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control."

Based on the claimant's own admission that Cooper Tire & Rubber Company had no employment available to him within his work restrictions, I find the claimant has failed to prove by a preponderance of the evidence entitlement to benefits under A.C.A. §11-9-505(a).

D. Permanent and Total Disability Benefits.

Claimant contends 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." (A.C.A. §11-9-519(3)) Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. (A.C.A. §11-0-102(4)(F)(ii)(a))

Several factors weigh against the claimant's claim of permanent and total disability. On 3/10/05, claimant saw Dr. Roshan Sharma complaining about his left upper extremity. Dr. Sharma stated as follows in his 3/10/05 report:

"Patient is at maximum medical improvement and no further treatment is necessary for his present condition. He is not taking any medications regarding etiology of pain in the left elbow. I am not sure as to the cause of pain." (Rx-1, pg. 7-9)

Dr. Bindra, in his March 29, 2004 report stated:

"He has had functional capacity evaluation. According to the report, this gentleman demonstrated the ability to do lifting

activities at a medium level, with a maximum bimanual lift to 41 pounds and carry 31 pounds. According to the therapist who did the test on 3/25/04, this gentleman demonstrated the ability to work at medium physical demand level for an 8 hour day." (RX-1, pg. 1)

Dr. Bindra went on in his 3/29/04 report to release the claimant back to work at a medium level. In addition, the claimant testified the he had been employed by the Texarkana School District as a substitute teacher as recently as February 20, 2006.

The evidence clearly shows the claimant is far from unable to earn any meaningful wages. In fact, the medical records clearly show the claimant could work at a medium level. Based on the credible evidence contained in the record, I find the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled due to his compensable left upper extremity injury.

Additional Medical Benefits.

The claimant has alleged entitlement to additional medical treatment for his compensable left upper extremity injury; however, claimant failed to introduce any medical reports recommending specific treatment, and failed to testify about the specific treatment he alleges is necessary for his left upper extremity.

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. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Department of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W. 2d 420 (1994).

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As stated above, Dr. Sharma specifically stated in his 3/10/05 report that "NO FURTHER TREATMENT IS NECESSARY." (RX-1, pg. 9) Dr. Bindra stated in his 3/29/04 report:

"I have no further treatment that is required for him. He does not need any therapy and has reached maximum medical improvement. (RX-1, pg. 1)

The medical records indicate the claimant needs no further medical treatment related to his left upper extremity. Therefore, I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional medical treatment related to his left upper extremity compensable injury.

Based on the findings set forth herein, issues 5, 6, 7 & 8 listed herein are hereby rendered moot.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

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