

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E309628

SANDRA PEACOCK, EMPLOYEE	CLAIMANT
LOMAS FINANCIAL CORPORATION., EMPLOYER	RESPONDENT
AETNA CASUALTY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 25, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on June 27, 2007 at Little Rock, Pulaski County, Arkansas.

Claimant appeared Pro Se.

Respondents represented by the HONORABLE BETTY HARDY, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of wage loss disability benefits, mileage and medical expenses.

At issue is whether or not the claimant is permanently and totally disabled pursuant to Ark. Code Ann. §11-9-522 and §11-9-505 and whether or not additional medical expenses are reasonable and necessary pursuant to Ark. Code Ann. §11-9-508.

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 preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on May 25, 1993 at which time the claimant sustained a compensable back injury at a compensation rate of \$252.30/\$189.23. Medical expenses, temporary total disability benefits and a 25% rating by Dr. Chakales in 2006 (10% in addition to a prior rating of 15% from Dr. Saer) have been accepted.

This claim has been the subject of previous hearings with Opinions issued by Judge Dail Stiles on October 9, 1996, August 10, 2000 and August 6, 2003, the Full Commission on March 3, 2004 and February 16, 2006, the Court of Appeals on February 2, 2005, and Judge Cynthia Rogers on September 28, 2005.

The claimant sustained a back injury when she fell off the deck of a house she was inspecting. The claimant received medical treatment from Dr. Saer, who performed surgery in January, 1994 (fusion at L2-L3), and Dr. Chakales who performed surgery in November, 2001 (L2 to sacrum fusion) and December, 2003 (hardware removal). The claimant contends she is permanently and totally disabled based on her age, (D.O.B. January 20, 1954) education (college degrees in criminal justice, psychology, public administration) and work experience (inspecting houses for Lomas, owning a contracting company), work restrictions and chronic pain.

The respondents contend all appropriate benefits have been paid. The claimant is able to return to the workforce and is not entitled to any additional benefits.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript. There were some discovery problems in this case with both the claimant and respondents at fault. Rather than postpone the hearing, the claimant signed a medical release form on the day of the hearing with the understanding that the respondents would be allowed to submit any newly discovered medical evidence after the hearing. No additional evidence was received from Attorney Hardy. Also, the respondents should have provided the claimant with a 1995 surveillance report even if they didn't plan to introduce the report into evidence. The document might not have been relevant but it was discoverable. Since both parties erred, Respondents' request for contempt sanctions against the claimant were denied.

The following witnesses testified at the hearing: the claimant and vocational rehabilitation specialist, Heather Taylor. The claimant was hostile, argumentative and secretive to the point of damaging her case.

The claimant, age 53 (D.O.B. January 20, 1954), has a college education (criminal justice, psychology, public administration), Air Force training, and work experience in the construction industry (inspecting homes and owning a contracting company from 1970 to 1999). She also worked as a licensed real estate agent and broker, an insurance adjuster, and juvenile probation officer (Tr.

p. 45-49). She has worked in property management and has experience with foreclosures and bankruptcy.

The claimant injured her low back on May 25, 1993 when she fell off the deck of a home she was inspecting, (Tr. p. 34). The claimant has undergone three surgical procedures (fusion at L2-3 by Dr. Ed Saer in January 1994, fusion from L2 to the sacrum by Dr. Chakales in November 2001 and hardware removal in December 2003), and has been assessed a total impairment rating of 25% to the body as a whole from her physicians.

Presently, the claimant has chronic back and hip pain. She takes medication (pain pills, muscle relaxers, tranquilizers, sleeping pills, and pills for arthritis) prescribed by Dr. Short. The claimant uses a cane prescribed by Dr. Short as her hip occasionally pops out when she walks.

She does not feel physically able to return to work due to pain and her need for medication. She has not returned to work since her accident nor looked for work (Tr. p. 49-53), and draws Social Security Disability benefits (beginning in 1995 at \$14.00 per month increasing to \$708.00 presently). The claimant's husband also draws Social Security Disability.

On cross-examination, the claimant indicated she had been to deer camp and fishing camp in the past (Tr. p. 54-55).

Rehabilitation specialist, Heather Taylor, testified she reviewed the claimant's deposition, medical records, the claimant's 1997 rehabilitation evaluation and a 2006 Functional Capacity Evaluation before meeting with her to evaluate her transferable skills. Based on the Functional Capacity Evaluation results, the claimant was able to perform light work (alternate standing and walking, lifting limit of 20 pounds, Tr. p. 67). Ms. Taylor identified several jobs the claimant could perform but the claimant did not follow-up on these opportunities (Tr. p. 68-17).

MILEAGE EXPENSES

The claimant's mailing address is 909 W. Main St. in Jacksonville. She refused to give the respondents her physical address of 605 Charlotte, Cabot 72023 until the day of the hearing. Using the mailing address, the claimant's mileage expenses could not be verified by the carrier through

Mapquest, so they were not paid. Now that the respondents have the claimant's correct physical address, they are directed to pay mileage expenses from Cabot to those various medical providers.

MEDICAL EXPENSES

The claimant's spouse, Joe C. Peacock (D.O.B. April 29, 1944), has group health insurance with Aetna which is also the workers' compensation carrier for Lomas Financial Corporation. Apparently Aetna has confused the two accounts and some of Mr. Peacock's bills appear on the printout of workers' compensation expenses paid. I note a reference to Aetna's accident and health policy with the employer paying some expenses in the past, (see p. 7 of Judge Stiles' August 6, 2003 decision).

Given the confusion over the accounts, this portion of the claim has been transferred to the medical Cost Containment Division for an audit.

I also noticed that non-payment of benefits has been the topic of previous hearings. I would suggest the claimant request a conference with the respondents, mediated by the Legal Advisors to discuss any discrepancies as soon as she notices a problem with her bills rather than wait for reimbursement longer than 3 months.

MEDICAL EVIDENCE

The claimant has been examined and/or treated by Dr. Kerry, a general practitioner, Dr. Steven Cathey an orthopedic surgeon, Dr. Saer, a surgeon, Dr. Kevin Collins, a pain management specialist, Dr. Short, a general practitioner, Dr. Chakales, an orthopedic surgeon, Dr. Bowen, Patricia Knott and William Ackerman, pain management specialists.

Dr. Cathey's report of June 28, 1993 indicates the claimant gave a history of a prior back injury with surgery. Dr. Cathey interpreted an MRI scan as showing mild preexisting degenerative changes at L2-L3 with a midline bulge. There was no neurological defect (herniation, stenosis or nerve root entrapment). A myelogram on July 15, 1993 confirmed Dr. Cathey's diagnosis of a "strain superimposed on preexisting degenerative lumbar disc disease at L2/L3 without neurological

deficits.”

The claimant then saw Dr. Saer for a second opinion. His report of August 18, 1993 diagnoses a soft tissue injury. The claimant did not respond to medication, physical therapy, a TENS unit, or epidural steroid injections. The claimant complained that her symptoms were worsening to involve her legs, so a bone scan was conducted which proved normal but a discography showed an annular tear at L2-L3. The three lower discs were normal even though the claimant complained of pain at every level.

Dr. Saer performed an anterior interbody fusion at L2-3 in January 1994. The claimant continued to have back pain and difficulty walking after the surgery. By April 1994, she was complaining of left hip pain. A follow-up MRI scan and EMG study proved normal. The claimant continued to complain of pain despite the use of a back brace. Dr. Saer commented, “this really would indicate that instability at the fusion site may not be causing her problem... I really cannot identify any focal problem that we need to correct at this time.” Dr. Saer recommended pain management, rehabilitation and a psychological evaluation in his report of May 31, 1994.

Dr. Reginald Rutherford saw the claimant on June 6, 1994, summarizing her medical treatment, educational background and work history. The claimant complained of left arm pain secondary to overuse of the computer. Dr. Rutherford commented there is “significant psychological turmoil and dysfunction complicating her medical picture.” Dr. Rutherford was also concerned about the claimant’s reliance on prescription medication which provided no pain relief. Dr. Rutherford recommended myofascial therapy as well as a change in her medication which Dr. Saer implemented.

The claimant was unhappy that her medication was changed and she was unhappy with Dr. Rutherford. She saw Dr. Collins on June 14, 1994. He recorded a history of two previous back injuries in 1974 and 1988 with surgery. Dr. Collins recommended physical therapy and weaning her off narcotics.

The claimant returned to Dr. Saer in July 1994. He recommended another opinion from a

different doctor. He declined to prescribe her medication, referring her to Dr. Collins. His report of July 20, 1994 indicates how unhappy and hostile the claimant and her husband were regarding her course of treatment. Dr. Collins recommended an inpatient program to wean her off narcotics and teach her biofeedback techniques. The claimant's husband threatened to "come up here with a gun to get her out."

Beginning in August 1994 the claimant was hospitalized at the direction of Dr. Patricia Knott who prescribed therapy in a swimming pool and decreased her medication.

The claimant was evaluated by a psychologist, Dr. Renee Planey in August 1994 and was diagnosed with anxiety and depression. She was prescribed anti-depressants and trained in relaxation and biofeedback techniques.

The case manager, Sharon Felkins, issued a report on August 4, 1994 indicating the claimant was screaming with pain. The claimant's husband demanded that the claimant's medication be reinstated and that she be seen by a physician at the Mayo Clinic. Dr. Saer passed along the claimant's request to the carrier. The claimant complained that no one had addressed her hip pain but Dr. Collins diagnosed a "flaccid hip muscle around the S1 joint which would not get better without exercise." Case manager Melinda Sain's report of December 7, 1994 indicates the doctor felt the claimant "was not motivated to improve and that she was very demanding and impatient with treatment options."

Dr. Saer released the claimant on January 10, 1995 with a diagnosis of chronic pain syndrome and a 15% impairment due to the L2-L3 surgical fusion. He commented, "I do not see anything that further surgery is going to help at this time."

The claimant then came under the care of Dr. Short, a general practitioner. It was necessary to monitor her liver function because of her usage of Toradol. Dr. Short also prescribed medication.

The claimant saw Dr. Ron Williams on May 25, 1995. Repeat x-rays, an MRI scan and an EMG/NCV study were normal. Dr. Williams' associate, Dr. Scott Schlesinger issued a report dated

May 31, 1995 recommending the claimant pursue an FCE or pain management therapy and return to Dr. Saer. He commented, "I don't think there is anything more from a surgical standpoint that I would offer her."

The claimant saw Dr. Scott Bowen on January 25, 1996 who recommended repeat diagnostic testing (MRI of the hip, EMG/NCV studies, rheumatology consult). Dr. Bowen administered epidural steroid injections and opined that her left leg pain was radicular. In a letter to Attorney Sandra Sanders, dated January 31, 1996 Dr. Collins assessed a 4% rating based on the claimant's neck and left arm pain.

On February 20, 1996, Dr. Ron Williams reviewed the MRI scan and disagreed with Dr. Bowen's assessment of radicular pain because there was no evidence of L5 nerve root involvement. The claimant continued to treat with Dr. Collins for pain management. His report of July 3, 1997 indicates the claimant had recently undergone a FCE which was interpreted as invalid. The examiner reported that the claimant was "pain-focused" and recommended additional physical therapy. Dr. Collins declined to return the claimant to work noting that it wouldn't be successful until the claimant resolves "these acute issues in her mind." Dr. Collins recommended evaluation for a pain pump.

The claimant then came under the care of Dr. William Ackerman who prescribed trigger point injections for myofascial pain syndrome trochanteric bursitis. Dr. Ackerman's report of July 30, 1997 indicates the claimant spent 90% of her time in bed, which contributed to her sleep disturbance. Dr. Ackerman also prescribed a muscle stimulator.

The claimant relies on Dr. Chakales' reports of January 2, 2006, February 6, 2006 and April 3, 2006. In these reports, the doctor summarized the claimant's medical treatment, explained the impairment rating and commented on her disability. Dr. Chakales assessed a 25% impairment for multilevel arthrodesis.

Dr. Chakales' report of 1-2-06:

...over the years she will most likely have chronic back and leg pain and will require intermittent

treatment in this office. I do not believe any further surgery is indicated at this time. She has reached maximum medical improvement. From a disability standpoint, she is permanently totally disabled and unable to work, and is a poor rehabilitative candidate. She also has chronic pain syndrome and requires low dose narcotic analgesics.

The claimant underwent an FCE on February 1, 2006 which was interpreted as valid. She was classified as able to work in the “light” category, lifting no more than 20 pounds. Her ability to bend and stoop was limited and it was recommended that she not perform repetitive bending and twisting. It was also recommended that the claimant be allowed to sit or stand as needed.

Dr. Chakales’ report of 2-6-06:

...there is some question in my mind as to whether she could be gainfully employed on a forty hour per week basis, which I believe would be standard for determination regarding rehabilitation. I am not sure anyone would hire someone who has had multiple back surgeries. Ms. Peacock definitely has a chronic back condition, and I am not sure she could perform many of the activities listed in the functional capacity evaluation.

I would point out that it is within the doctor’s prerogative to assess “anatomical impairment” but “disability” is assessed by the Commission based on the claimant’s age, education, work experience, motivation, and other matters that may affect the claimant’s ability to return to the work force. The rehabilitation specialist thought the claimant might be able to work from her home, typing medical records. I’m also aware that court reporters use typists and working at home would give the claimant the option to sit or stand and work at her own pace. This type of employment would fall within the claimant’s work restrictions and abilities.

FINDINGS AND CONCLUSIONS

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 claimant obviously has transferable skills based on her education, work experience, and ability to represent herself on this claim. Therefore I find she is not permanently and totally disabled.

However, the claimant has been out of the work force for fourteen years and she has chronic back pain from three surgeries. She will have great difficulty re-entering the work force. Therefore, I find she is entitled to wage loss disability benefits in excess of the impairment rating.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-claimant existed among the parties on May 25, 1993 at which time the claimant sustained a compensable back injury at a compensation rate of \$252.30/\$189.23. Medical expenses, temporary total disability benefits, and a 25% impairment rating to the body as a whole have been accepted.
2. The claimant has proven by a preponderance of the credible evidence of record that she is entitled to additional permanent partial disability benefits for wage loss equivalent to 70% in addition to the impairment rating of 25%.
3. The respondents are directed to pay the claimant's mileage expenses within thirty days. The expenses should include the outstanding balance of \$1,521.38. The mileage is to be calculated from the claimant's physical residence to the medical providers.
4. The respondents are directed to pay all reasonable and necessary medical and mileage expenses within thirty days of receipt pursuant to Rule 30.
5. Portions of this file have been transferred to the Medical Cost Containment Unit for an audit.
6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

7. Respondents are directed to provide the claimant with all surveillance reports and/or videos.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge

Entered: NUNC PRO TUNC SEPTEMBER 26, 2007