

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F403609

**EDDIE LEE TAYLOR,
EMPLOYEE**

CLAIMANT

**BEVERLY HEALTH CARE,
EMPLOYER**

RESPONDENT

**AMERICAN HOME
ASSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 22, 2007,

Pursuant to a hearing conducted October 24, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the extent of permanent disability resulting from an admittedly compensable injury to the claimant's cervical spine.

The claimant contended that he should be awarded benefits for wage loss disability, in addition to the benefits he has received for his anatomical impairment of 12% to the body as a whole.

An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant did not sustain wage loss disability exceeding the level of his anatomical impairment. They noted that he returned to work at light duty, earning similar wages, then left his employment and, further, has waived vocational rehabilitation proposed by Arkansas Rehabilitation Services, so that he is not entitled to disability benefits exceeding the level of his anatomical impairment, pursuant to Ark. Code Ann. §11-9-505.

The record, which included documentary evidence and the testimony of the claimant and his wife, Iredell Taylor, was closed at the conclusion of the hearing, pursuant to the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employee-employer-insurance carrier relationship existed at all pertinent times; the claimant sustained a compensable neck injury July 29, 2004; his average weekly wage was \$468.00, based on an hourly rate of \$7.35; his compensable injury required surgery, which was performed in April, 2004; the claimant reached the end of his healing period September 21, 2004; and his compensable injury has resulted in anatomical impairment of 12% to the body as a whole which has been paid by the respondents.

3. The preponderance of the evidence fails to show that the claimant is entitled to additional benefits for wage loss disability exceeding the level of his anatomical impairment.

DISCUSSION

The claimant, 47 years of age at the time of the hearing, suffered a compensable injury to his neck during his employment as a certified nurse assistant when he attempted to move a heavy patient. The respondents afforded medical care which included surgery to the claimant's cervical spine, performed by Little Rock neurosurgeon Dr. Scott M. Schlesinger who assessed the claimant's permanent impairment at 12% to the body as a whole and found that he had reached maximum

medical improvement September 21, 2004. As noted above, the 12% anatomical impairment has been accepted and paid by the respondents and the claimant now contends that he is entitled to additional permanent disability benefits for wage loss disability exceeding the level of his impairment.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

At the beginning of the hearing, before the witnesses were sworn, counsel and the administrative law judge again confirmed that this claim was not for permanent total disability, so that the Death & Permanent Total Disability Trust Fund had not been joined to defend a permanent total disability claim. Nevertheless, the claimant testified that he had not worked since the injury to his cervical spine and that his body will not let him work because of constant pain, even though it was his desire to work. Tr. at 21. He testified that following his surgery he found that several of his subjective symptoms had increased. For example, even though he had had problems with his

back before the injury, he felt that, following the surgery, his back problems occurred more often and were totally different. He testified that he now has sharp pain and weakness in his back and that his back goes out on him and, further, that he has sharp pain and weakness in his leg and his leg goes out on him. He also stated that he has headaches, dizzy spells, constant pain in his shoulder, back, neck, hands and arms, shortness of breath, and headaches. He testified that his symptoms interfere with his ability to sleep and his concentration and that he forgets a lot of things. He described his headaches as throbbing headaches which occur all the time.

He also testified that he was unable to do much around the house and was limited in his ability to drive a car. He stated that when he walks his leg gives out on him; that he has problems sitting because he is always in pain; and that he also has sharp deep pains running through his shoulder, as well as numbness in his hands, even after the surgery.

The claimant testified that he has not looked for employment on his own but has kept in contact with the unemployment office, although he feels like he cannot work. He has told the unemployment office that he is in constant pain. He said he could not do his old job as a CNA and that the employer never offered him light duty work. He testified that on a typical day he watches television and studies and sometimes visits with his family and has no hobbies.

The claimant also testified that his education included completion of the 12th grade and a ten-day course to become a licensed CNA. His previous work was generally physically demanding and included work on a farm in Mississippi picking and chopping cotton, work as a machine operator for Scroll Technologies, and work on the assembly line at the Vlastic Foods Plant where cucumbers were processed into pickles.

On September 2, 2004, a functional capacity evaluation was performed which found that the claimant's true functional limitations were unknown and that the claimant's very slow and deliberate movements placed him in the occasional classification with most activities. The report concluded that, although the claimant underwent the evaluation with unreliable results for effort and that his efforts were sub-maximal and do not represent his maximal tolerances, nevertheless, he had demonstrated the ability to work at least at the light physical demand classification for an eight-hour day and that his true functional tolerances are likely much higher.

On September 21, 2004, Dr. Schlesinger assessed the claimant's permanent impairment and released him, noting that the FCE indicated he could at least return to light duty capacity or probably higher level. On April 13, 2005, Dr. Schlesinger examined the claimant, noted his subjective complaints, and commented that the claimant unfortunately had not been able to go back to work as there was really nothing available for him with the limitations he has. He also found the claimant's examination to be unchanged.

The claimant underwent an evaluation by Arkansas Rehabilitation Services and was found to be eligible for rehabilitation services and would receive priority for paid-for services because of his status as a Category I (Most Severely Disabled) applicant. The letter advising the claimant of his selection for rehabilitation services stated that if he was listed in Category I or II he should contact the department immediately to plan his rehabilitation program. In the conclusion of the report, it was stated that extensive vocational guidance and counseling were recommended. The report also noted several problem areas that would likely be manifested in a vocational setting and noted that there was variability in some test scores but that the current test results should be viewed with caution as the claimant's emotional state, level of motivation and level of physical discomfort

likely affected his performance. The claimant seems to have understood the communication from Arkansas Rehabilitation Services to indicate that he is totally disabled and, at the hearing, the claimant testified that he did not follow up with vocational rehabilitation because he knew he was not able to drive and because of severe pain. Tr. at 30.

When the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity are considered, it appears that as the result of the compensable injury to his neck he has sustained an additional 15% in wage loss disability, exceeding the level of his anatomical impairment. The assessment of his disability, however, is complicated by his tendency to exaggerate his subjective symptoms and his reference to back and leg problems, which have neither been claimed nor proven to be either separate compensable injuries or compensable consequences of his compensable neck injury.

However, Ark. Code Ann. §11-9-505(b) provides that no employee who waives rehabilitation or refuses to participate and/or cooperate, without reasonable cause, with either an offered program of rehabilitation or job placement assistance, shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings. Here, the claimant declined to contact Arkansas Rehabilitation Services to plan his rehabilitation program, even though the letter of October 28, 2005, indicated that he would receive priority for paid-for services. It is unlikely that the Legislature meant for the claimant to avoid the effects of this statute by refusing to cooperate with the development of the details of a rehabilitation plan. Thus, the claimant's request for wage loss disability benefits exceeding the level of his anatomical impairment is barred by Ark. Code Ann. §11-9-505(b) and should be denied.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully,
denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge