

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F505401

JERRY F. BLACKLEDGE, EMPLOYEE	CLAIMANT
COOPER STANDARD AUTOMOTIVE, INC., EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 26, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in El Dorado, Union County, Arkansas.

The claimant was represented by HONORABLE FLOYD M. THOMAS, JR., Attorney at Law, El Dorado, Arkansas.

The respondent was represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 10, 2008, in El Dorado, Arkansas. A Prehearing Order was entered in this case on April 28, 2008. The following stipulations were submitted by the parties and are hereby accepted:

1. The employment relationship.
2. A compensable injury on May 20, 2005.
3. Payment of medical and 7% permanent partial impairment has been made.
4. The claimant's correct compensation rates are \$439 per week for temporary total disability and \$329 per week for permanent partial disability.

5. The claimant's workers' compensation benefits were underpaid by \$2.00 per week.
6. The Commission received the request for a hearing on this claim on January 17, 2008, when the Commission received a letter from Mr. Thomas, the claimant's attorney.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

Claimant:

1. The appropriate compensation rates. (Resolved by stipulation at the start of the hearing)
2. Whether the claimant has suffered wage loss disability in excess of his anatomical rating.
3. Attorney's fees.

Respondents:

1. Wage loss disability.
2. Statute of limitations.

The record consists of the July 10, 2008, hearing transcript and the exhibits contained therein. In addition, I have blue-backed to designate as part of the record (1) the eight page pay out history and cover letter filed by Mr. Dennis on July 15, 2008, and (2) the seventeen page

functional capacity evaluation and cover letter filed by Mr. Thomas on August 14, 2008.

DISCUSSION

The claimant sustained a compensable neck injury while employed by the respondent employer on May 20, 2005. After a period of conservative care, the claimant's treating physician, Dr. D'Orsay Bryant, assigned the claimant a 7% impairment rating on October 3, 2005.

The claimant returned to work at Cooper at some point after his injury and left his job at Cooper to draw unemployment along with a severance package from Cooper before the plant closed entirely. The claimant then completed truck driving school in approximately March of 2007 and went to work driving for Groendyke Transport earning more money than he earned at Cooper. At the time of the hearing on July 10, 2008, the claimant had very recently quit working for Groendyke in order to start driving for Martin Transport; however, he had not yet started driving for Martin. The claimant testified that at Martin Transport he will also make more money than he earned working for Cooper but will not have to spend as many nights away from home as he did with Groendyke.

At this time, the claimant seeks an award of permanent partial disability for wage loss in excess of the 7% permanent anatomical impairment accepted and paid by the respondents. The respondents have also raised the statute of limitations as an issue.

A. Statute Of Limitations

Arkansas Code Annotated Section 11-9-702(b) (Repl. 2002) provides that a claim for additional compensation must be filed within one year from the last payment of compensation or two years from the date of injury, whichever is greater. A timely filed claim for additional compensation tolls the statute of limitations until the claim is decided. Bledsoe v. Georgia-Pacific Corp., 12 Ark. App. 293, 675 S.W.2d 849 (1984); Arkansas Power & Light Co. v. Giles, 20 Ark. App. 154, 725 S.W.2d 583 (1987); Sisney v. Leisure Lodges, Inc., 17 Ark. App. 96, 704 S.W.2d 173 (1986). In addition, however, Act 796 of 1993 added the following provision codified at Arkansas Code Annotated Section 11-9-702(c) regarding what constitutes a claim for additional benefits:

A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation.

_____In the present case, the claimant filed a Form AR-C "Claim For Compensation" with the Commission on October 31, 2005, less than two years after his injury. Therefore, if the Form AR-C filed on October 31, 2005, is a "claim for additional compensation" within the meaning of Arkansas Code Annotated Section 11-9-702, then there appears to be no dispute that the AR-C would toll the statute of limitations through the present time under the reasoning of Bledsoe, Giles, and Sisney.

The parties stipulated that the claimant was receiving benefits before the Form AR-C was filed at the Commission. (T. 10) In addition, there is no dispute that three boxes were checked under the section of the AR-C for "additional benefits" and six boxes were checked under the section for "initial benefits." (R. Exh. 1)

As I understand the respondents' argument, the respondents contend that the statute of limitations ran on the claimant's request for permanent partial disability because the claimant did not check the box for permanent partial disability in the section for *additional* benefits in the Form AR-C filed on October 31, 2005. (T. 7-8)

I do not find the respondents' argument persuasive for two reasons. First, the claimant checked additional

temporary partial disability, rehabilitation, and attorney fees under the *additional* benefits section on the Form-C filed on October 31, 2005. Therefore, there can be no dispute that the claimant in fact requested additional benefits on the form filed in 2005. Second, as the Full Commission has previously noted, the plain language of Arkansas Code Annotated Section 11-9-702(b)(1) indicates that the statute of limitations runs against a "claim" for additional benefits, and not against specific benefits as the respondents seem to argue in the present case. Sharon Nicely v. Emerson Electric, Full Workers' Compensation Commission, Opinion filed March 1, 1994 (E016114).

Under the circumstance presented in this case, I therefore find that the Form AR-C filed in 2005 tolled the statute of limitations, so that the present claim for benefits is not time-barred.

B. Permanent Partial Disability

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which the worker was receiving at the time of the

injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair the worker's earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. 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).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

Arkansas Code Annotated Section 11-9-102(4)(F)(ii)

provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

_____In addition, Arkansas Code Annotated Section 11-9-522(b)(2) provides:

However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

_____In the present case, the claimant was 36 years old at the time of the hearing. He has a GED. He spent a short time in the Army National Guard. He has also worked for a moving company, in home construction, and worked

approximately eight years in Cooper's El Dorado manufacturing plant. In addition, after leaving work for Cooper he attended truck driving school in Pine Bluff in approximately March of 2007 and took extra tests to be qualified to drive tanker trucks.

The claimant drove tanker trucks for Groendyke Transport after truck driving school until approximately one and one-half weeks before the hearing. The route at Groendyke Transport was regional but required overnight travel. The claimant left Groendyke Transport to drive tankers for Martin Transport which will require less overnight travel and allow the claimant to spend more nights at home. The claimant had not yet started driving for Martin at the time of the hearing. The claimant testified that he made more money at Groendyke than he made at Cooper and that he will make more money at Martin than he made at Cooper. I find the claimant's testimony credible.

With regard to his injury at work, the claimant sustained a compensable neck injury. He did not undergo surgery for the injury. Dr. D'Orsay Bryant assigned the claimant a 7% anatomical impairment rating which the respondents paid. The claimant underwent a functional capacity evaluation on August 25, 2005, which indicated that

he is capable of safely lifting 40 pounds and can work in the light-medium category. His required accommodations include avoiding frequent or prolonged forward reaching, avoiding frequent lifting or forward bending, and avoiding deep forward bending or high overhead reaching.

The claimant does not perform any loading or unloading driving a tanker truck. He just does the driving. His primary restriction while driving is not looking down. He drives a truck with a sleeper, and he can take time to stop if he needs to lay down.

The claimant testified that he began treating with Dr. Davis after Dr. Bryant assigned his impairment rating in 2005. The claimant currently takes Methadone four times per day for his neck pain and also gets prescriptions for a muscle relaxer or a steroid pack when he aggravates his neck. At the time of the 2008 hearing, the claimant had not taken muscle relaxers for a few months. The claimant testified that his doctors register his medications through the Department of Transportation.

After reviewing the entire record, I find that the claimant at the time of the hearing had a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the

accident. I base this finding on the claimant's credible testimony which establishes that (1) he completed truck driving school after his injury at Cooper, (2) he then worked for Groendyke Transport driving a tanker for more money than he made at Cooper, (3) he left Groendyke Transport shortly before the hearing so he could work for Martin Transport with fewer nights away from home, (4) he will earn more money at Martin Transport than he earned at Cooper, and (5) at the time of the hearing he was in the process of moving to Martin Transport and would be driving for them in a couple of weeks.

Because the respondents established by a preponderance of the evidence that the claimant at the time of the hearing had a bona fide and reasonably obtainable offer to be employed at wages greater than his average weekly wage at the time of the accident, Arkansas Code Annotated Section 11-9-522(b)(2) states that the claimant cannot receive an award of permanent partial disability in addition to his 7% permanent physical impairment. This claim therefore must be respectfully denied on that basis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employment relationship existed on May 20, 2005.

2. The claimant sustained a compensable injury on May 20, 2005.
3. Payment of medical and 7% permanent partial impairment has been made.
4. The claimant's correct compensation rates are \$439 per week for temporary total disability and \$329 per week for permanent partial disability.
5. The claimant's workers' compensation benefits were underpaid by \$2.00 per week.
6. The Commission received the request for a hearing on this claim on January 17, 2008, when the Commission received a letter from Mr. Thomas, the claimant's attorney.
7. The claimant established by a preponderance of the evidence that the Form AR-C filed on October 31, 2005, is a claim for additional benefits.
8. Because the claimant's timely filed claim for additional benefits has tolled the statute of limitations since October 31, 2005, the claimant's present request for benefits for permanent partial disability is not barred by the statute of limitations.

9. The respondents established by a preponderance of the evidence that at the time of the hearing the claimant had a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident; therefore, Arkansas Code Annotated Section 11-9-522(b) (2) prohibits an award of benefits for permanent partial disability in excess of the claimant's 7% permanent physical impairment.
10. Because the statute of limitations has not run, the claimant is entitled to be paid the \$2.00 per week difference on the benefits previously underpaid by the respondents.

ORDER

For the reasons discussed herein, this claim for permanent partial disability over the claimant's 7% impairment rating must be, and hereby is, respectfully denied. However, with regard to the \$2.00 per week underpayment on prior benefits paid by the respondents, the respondents are directed to pay benefits in accordance with the findings of fact set forth herein. 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 (1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge