

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F305366

SHELDON CARTER, Employee	CLAIMANT
FRANKLIN ELECTRIC COMPANY, Employer	RESPONDENT #1
HELMSMAN MANAGEMENT SERVICES, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JANUARY 15, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by ADRIENNE KINCAID MURPHY, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by JAMES A. ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On December 19, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on October 24, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the claimant and respondent #1 at all relevant times.
3. The claimant sustained a compensable injury to his low back on April 7, 2003.
4. The claimant was earning sufficient wages to entitle him to compensation at the

rates of \$385.00 for total disability benefits and \$289.00 for permanent partial disability benefits.

5. The claimant's healing period ended on March 29, 2006.

6. Respondent #1 has accepted and is paying permanent partial disability benefits based on a 12% impairment rating.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent disability benefits in excess of the 12% impairment rating.

2. Attorney fee.

The claimant contends he is entitled to permanent total disability benefits or wage loss in the alternative. The claimant sustained a compensable injury to his lumbar spine on April 7, 2003. After receiving conservative treatment he underwent back surgery on August 13, 2003. He returned to work after recovering from the first surgery but began experiencing increased pain after two of the titanium screws in his back fractured. The last day he was able to work was in late January/early February 2004 due to the totality of his physical condition. On April 2, 2004 claimant underwent a second surgery to remove and repair the hardware in his lumbar spine. He has been unable to return to work in any capacity since.

Respondent #1 contends the claimant is not entitled to permanent disability benefits in excess of the 12% impairment rating assigned by Dr. Blankenship.

Respondent #2, the Death & Permanent Total Disability Trust Fund, defers to the outcome of litigation.

From a review of 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 made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 24, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury.

3. Claimant's attorney is entitled to the maximum fee on all permanent total disability benefits.

FACTUAL BACKGROUND

The claimant is a 53-year-old man who worked for the respondent approximately nine and one-half years as a lathe operator. Claimant suffered a compensable injury to his low back on April 7, 2003 when he developed back pain while in the process of moving a 55-gallon barrel of oil.

After some initial medical treatment the claimant came under the care of Dr. Vosburgh in Tulsa, Oklahoma. Dr. Vosburgh treated claimant conservatively with medication and epidural steroid injections before performing surgery in the form of a fusion on August 13, 2003. Following that surgical procedure Dr. Vosburgh released claimant to return to sedentary work for four hours per day beginning on January 5, 2004. Claimant returned to work for the respondent primarily performing a job which required him to sort small plastic funnels for various departments. Claimant performed this job for four hours per day. Claimant testified that his back pain increasing worsened and he returned to Dr. Vosburgh for additional medical treatment. On February 18, 2004, Dr. Vosburgh ordered x-rays which indicated that the screws from claimant's fusion surgery had fractured. On April 2, 2004, Dr. Vosburgh performed surgery to remove the broken hardware. Medical

notes from Dr. Vosburgh following the second surgical procedure indicate that claimant continued to suffer from pain and discomfort from his low back. Dr. Vosburgh continued to prescribe treatment in an effort to alleviate claimant's complaints of pain. On January 18, 2005, claimant began receiving treatment from Dr. Slater, Dr. Vosburgh's partner. Dr. Slater ordered additional testing and based upon those results ordered nerve root blocks and epidural steroid injections which provided little benefit. In a report dated July 7, 2005, Dr. Slater indicated that claimant's condition had stabilized. In a letter report dated March 9, 2006, Dr. Slater assigned claimant a permanent physical impairment rating in an amount equal to 25% to the body as a whole. Respondent subsequently had claimant undergo an evaluation by Dr. Blankenship who in a report dated March 29, 2006, opined that claimant had suffered a permanent physical impairment in an amount equal to 12% to the body as a whole. The respondent has accepted and paid permanent partial disability benefits based upon the 12% rating assigned by Dr. Blankenship.

Claimant has filed this claim contending that he is entitled to permanent total disability benefits as a result of his compensable injury.

ADJUDICATION

Pursuant to A.C.A. §11-9-519(e) in order to be entitled to permanent total disability benefits claimant has the burden of proving by a preponderance of the evidence that because of his compensable injury he has an inability to earn any meaningful wages in the same or other employment.

After my review of the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proof.

In considering whether claimant is entitled to permanent disability benefits in excess of his impairment rating, the Commission may take into account various factors including the percentage of permanent impairment, the claimant's age, education, work experience,

and all other factors reasonably expected to affect his future earning capacity. A.C.A. §11-9-522(b)(1).

In this particular case, the claimant is 53 years old. Claimant did not graduate from high school but did obtain his GED. Claimant testified that he received some vocational training in the form of appliance repair during his last two years of high school. Prior to beginning work for the respondent the claimant had worked for Arkansas Western Gas checking meters, dealing with customers, and performing some collection work for approximately 13 years. Prior to Arkansas Western Gas the claimant performed appliance repair work for an electric company for two years. As previously noted, claimant worked as a lathe operator for the respondent for nine and one-half years.

Claimant testified that his back condition continues to worsen. Claimant testified that he has to use a cane and take medication daily for pain. Claimant also testified that he is required to lay down once or twice a day for an hour or more to get relief. He testified that none of the treatment has improved his condition and that his back pain radiates from his low back to his hip and down to his knee. Claimant also testified that he cannot stand or sit for a very long period of time and that he is currently drawing social security disability benefits.

Claimant's testimony was corroborated by the testimony of Connie Carter, claimant's wife. Connie Carter is a nurse and testified that before claimant's injury he had no physical problems that impaired his daily activities. Carter testified that since the injury there are many activities that the claimant can no longer perform such as mowing the yard, helping with the housework, or cooking. Carter testified that claimant cannot even perform such activities as putting on his shoes and socks without help.

Claimant's primary treating physicians have been Dr. Vosburgh and Dr. Slater. Dr. Vosburgh performed two surgical procedures on the claimant's lumbar spine. Dr. Vosburgh's medical reports after the second surgery indicate that claimant continued to

have significant back pain which was not relieved by any treatment. In a report dated September 8, 2004, Dr. Vosburgh indicated that at that time the claimant could go back to work; however, he would be limited to purely sedentary-type work. Claimant had restrictions of no bending, stooping, or lifting, and no lifting more than five pounds. Dr. Vosburgh also indicated that claimant would have to begin working only four hours per day before gradually increasing his work to full time over a two-month period. When claimant returned to Dr. Vosburgh on December 1, 2004, he noted that claimant's symptoms remained the same. He also noted that at that time the claimant did not appear to be able to perform any type of work and stated that claimant was temporarily totally disabled.

Subsequent to December 1, 2004, claimant came under the care of Dr. Slater, Dr. Vosburgh's partner. Dr. Slater ordered a lumbar myelogram and CT scan. Based upon those results Dr. Slater also ordered nerve root blocks and epidural steroid injections which provided little benefit to claimant's symptoms. In a report dated July 7, 2005, Dr. Slater indicated that he and claimant discussed both operative and non-operative options. Claimant chose the non-operative option and Dr. Slater agreed with that decision. Accordingly, Dr. Slater opined that claimant's condition had stabilized and noted that claimant was on total disability from the standpoint of social security disability. He also noted that claimant and his wife understood the claimant's activity restrictions and limitations and his need for chronic pain medication prescriptions. In a letter dated March 9, 2006, Dr. Slater assigned claimant a permanent physical impairment rating in an amount equal to 25% to the body as a whole and again noted that claimant was on total disability from the standpoint of social security.

Subsequent to the rating from Dr. Slater, respondent referred claimant to Dr. Blankenship for an independent medical evaluation. Dr. Blankenship indicated that he would not state that claimant could never work again and indicated that he would recommend that claimant undergo a functional capacities evaluation. Apparently, this

evaluation was not performed and Dr. Blankenship has assigned claimant a permanent physical impairment rating in an amount equal to 12% to the body as a whole.

I find based upon the evidence presented that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. I find that the testimony of the claimant and his wife regarding claimant's condition and his inability to engage in any meaningful activities to be credible and entitled to great weight. I also find that the medical opinions of Dr. Vosburgh and Dr. Slater are entitled to great weight. Even in September 2004 when Dr. Vosburgh indicated that claimant might go back to work, he indicated that claimant's job activities would be limited to sedentary work with no lifting more than five pounds. Dr. Vosburgh subsequently indicated that claimant was not fit to perform any type of work in December 2004. Dr. Slater subsequently indicated that claimant was on total disability from the standpoint of social security. Dr. Slater's medical records do not contain any notation indicating that he was of the belief that claimant was capable of working even with restrictions. While Dr. Blankenship has not been willing to state that claimant is incapable of working, I find that the opinions of Drs. Vosburgh and Slater are entitled to greater weight. Dr. Vosburgh has treated claimant for a significant period of time and has performed two surgical procedures. In addition, Dr. Slater has treated claimant on several occasions. On the other hand, Dr. Blankenship has evaluated the claimant on only two occasions for the purpose of independent medical evaluations.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled. This finding is based upon the testimony of the claimant and his wife which I find to be credible and entitled to great weight. It is also based upon the medical opinions of Dr. Vosburgh and Dr. Slater.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in

2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

AWARD

_____ Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits as a result of his compensable injury. Claimant's attorney is entitled to a fee on all unpaid permanent total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

Respondent #1 is ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$248.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE