

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F007995

THOMAS W. LOWE

CLAIMANT

**BAPTIST HEALTH
(SELF-INSURED)**

RESPONDENT EMPLOYER NO. 1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

ORDER AND OPINION FILED SEPTEMBER 2, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DONALD C. PULLEN, Attorney at Law, Hot Springs, Arkansas.

Respondent No. 1 represented by the HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This matter comes on for a hearing in Hot Springs, Arkansas on July 11, 2008, to determine the issues of a permanent impairment rating, permanent and total disability, the end of the healing period and attorney's fees. A prehearing conference was held on May 27, 2008 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection. At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable June 20, 2000, injury to the right upper extremity.
2. The compensation rates are \$394/296.
3. Temporary total disability benefits were paid

through June 15, 2003.

The claimant contends he is entitled to a 30% permanent impairment rating as assigned by Dr. William Ackerman, entitled to permanent and total disability benefits and attorney's fees. The claimant further contends that the end of his healing period is December 16, 2005.

Respondent No. 1 contends that the claimant does not have a valid impairment rating and is not entitled to any permanent benefits. Respondent further contends it is entitled to an offset for some benefits paid through a group disability policy. Respondents also contend the end of the healing period is April 22, 2003.

Respondent No. 2 defers to the outcome of litigation on the issues of impairment rating, permanent and total disability, end of the healing period and attorney's fees. Respondent No. 2 contends the end of the healing period is April 22, 2003.

ISSUES TO BE LITIGATED

1. Permanent impairment.
2. Permanent and total disability.
3. End of the healing period.
4. Offset for group benefits.
5. Attorney's fees.

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, and to include the record from the first hearing, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a compensable June 20, 2000, injury to the right upper extremity.

2. The compensation rates are \$394/296.

3. Temporary total disability was paid through June 15, 2003.

4. The claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable injury.

5. The claimant has proven by a preponderance of the evidence that he sustained some permanent impairment as a result of his compensable injury, although a percentage certain could not be identified; therefore, a permanent impairment rating is not assigned.

6. The preponderance of the evidence provides that the claimant's end of the healing period was December 16, 2005.

7. Respondents are entitled to an offset for group benefits paid in this matter.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

DISCUSSION

The claimant, now 42 years old, was 34 years old on June 20, 2000, when he worked as an emergency room nurse for the respondent employer. The claimant was

assisting a patient from the wheelchair to the car when she started to fall and the claimant had to help her down. He felt a twinge in his right shoulder but continued to work for a while until he started having burning and numbness in his right arm and hand. The claimant's right hand, arm and shoulder continued to have pain and problems. The claimant sought treatment with a variety of doctors and eventually was referred to Dr. William Ackerman and was diagnosed with RSD, reflex sympathetic dystrophy, now renamed as complex regional pain syndrome. Initially, the claimant testified that his problems were with his right shoulder, arm and hand and he had developed a tremor in the right hand. The claimant testified that he started having problems with his left foot, ankle and leg where he had pain and burning. The claimant described swelling and discoloration of the extremities. The problems moved from his left leg to the left arm and eventually down the right leg. Dr. Ackerman left the state and the claimant was referred to Dr. Mahmood Ahmad and he remains under the care and treatment of Dr. Ahmad. The claimant has a pain pump and a new drug is being tried called Prialt and that has helped. Before he was using the drug Prialt, he used a scooter and a wheelchair and now only uses a cane to get around.

The claimant described his symptoms as purplish, blue or red color on his feet, hands and legs, swelling in his feet, temperature changes in his extremities and pain all the time and a tremor in the right hand.

The claimant was an RN for the respondent since 1994 and was an emergency medical technician from 1989 until 1994. The claimant has a BA in psychology and a Bachelor of Science in nursing with EMT school and nursing classes. The claimant was also an officer for eight years in the Arkansas National Guard. The claimant had some

minor strains and scrapes before the instant injury and also had a broken arm at one time. The claimant did yard work before his work injury and also taught karate, scuba dived, hunted, fished and other physical activities. The claimant has not worked since the injury on June 20, 2000.

The claimant has previously litigated his condition of RSD/CRPS and he sustained his burden of proof that his condition is work related and compensable. Dr. William Ackerman's treatment and opinions were given great weight at the claimant's hearing.

ADJUDICATION

The claimant is contending he is permanently and totally disabled as well as entitled to a 30% permanent impairment rating, as assigned by Dr. William Ackerman on April 22, 2003. The claimant is also contending that he did not reach maximum medical improvement until December 16, 2005, while respondents are contending the claimant reached maximum medical improvement on April 22, 2003.

Ark. Code Ann. §11-9-519(e)(1) provides: "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment."

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

The claimant in the present case is contending that he is permanently and totally disabled. While the claimant contends that he is entitled to the 30% permanent impairment assigned by Dr. Ackerman, he relies on the Arkansas Court of Appeals' decision in *Rutherford v. Mid-Delta Community Services* (CA 07-1175) May 28, 2008,

where the Court held that Ark. Code Ann. §11-9-519 does not require a permanent impairment rating or ratable condition. The Court expressly stated that it “impermissibly expanded the meaning of Section 11-9-519 in *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W.3d 657 (2003), to require such a rating in a claim for PTD.” The Court held that *Wren* involved a claim for PTD and the cited authority for this statement was *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000), which addressed a claim for permanent partial disability. *Wren* was overruled on that particular point.

In the present case, I find the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable work injury. The claimant is a 44 year old man who sustained a compensable injury involving initially his right shoulder and subsequently affecting his right upper extremity. The claimant has now been diagnosed with complex regional pain syndrome in all four extremities by Dr. Mahmood Ahmad. Dr. William Ackerman’s December 14, 2004, report states, in part:

The patient returns today. He has been seen in Lubbock by Dr. Gabor Racz the world’s authority on reflex sympathetic dystrophy. He feels that there is a spread of the Complex Regional Pain Syndrome. It is also felt by the physicians at Lubbock that he may have a nerve injury related to his work related injury. Various modalities have been proposed to Mr. Lowe. His pain today is 8 ½. He is not doing therapy. He is disabled and unable to work.” Cl. Exh. No. 1, p. 4.

On January 12, 2005, Dr. Ackerman again opined that the claimant has a spread of his reflex sympathetic dystrophy and opined that he had not reached maximum medical improvement. Dr. Ackerman left the area and the claimant was referred to Dr.

Ahmad, who has continued his care and treatment. Dr. Ahmad opined on December 16, 2005, that the claimant had reached maximum medical improvement and will require continued medical management. Dr. Ahmad further stated: "The precipitating event was the work related injury, which led to his myelopathy (spinal cord sensitization and windup)." Dr. Ahmad further opined: "In my medical opinion, it is unlikely that his (the claimant's) condition will improve. The condition has progressed over the years and it is likely to progress further." Cl.'s Exh. No. 1, p. 24.

The claimant was evaluated by Bob White, a vocational specialist, who evaluated the claimant on December 9, 2005 and wrote a report recapping his findings and opinion on December 13, 2005. Mr. White opined that his evaluation revealed that the claimant does not have the physical ability to perform even sedentary work. Mr. White said the claimant had a need to lay down frequently, alternately sit and stand and his ability to lift and carry do not meet the criteria of sedentary work. Mr. White observed the claimant had a hard time with concentration and attention and ability to focus. The claimant has sustained several falls resulting in broken ribs and other injuries. The claimant utilizes a wheelchair, a scooter and a cane as warranted. Mr. White noted that the claimant's injury was five years out and his condition had progressively deteriorated and he opined that he saw no indication that the claimant could work in any capacity or that he would ever be able to work.

The claimant testified very credibly about his work injury, his current condition and his day-to-day activities. He described his life before the injury as being active with a solid career in the medical profession and his activities now are to simply get about. He described his skin discoloration, swelling and sensitivity to temperature changes and

his hands and feet having distinct temperature changes from the rest of his body. A listing of the medications the claimant took in January 2008 was provided on Claimant's Exhibit No. 1, page 40. The claimant continues to take most of these drugs. The claimant has a spinal pain pump that provides continuous medication to him along with the other medications he takes daily. The claimant presented credible testimony and made every attempt to answer factually.

Respondents had Dr. Barry Baskins evaluate the claimant regarding the claimant's diagnosis, objective medical findings which support the diagnosis and treatment recommendations. On February 28, 2005, Dr. Baskins issued his report and findings and opined that he did find it extremely difficult to pin all of the claimant's symptoms and complaints on reflex sympathetic dystrophy. Dr. Baskins discussed some repeat testing to confirm the diagnosis of RSD. While Dr. Baskins' report was given consideration, greater weight was given the opinions of Dr. Ackerman, Dr. Ahmad and Dr. Racz of Lubbock. Drs. Ackerman, Ahmad and Racz all have expertise in pain management with an emphasis in RSD; therefore, their opinions were given greater weight. Certainly, Dr. Ackerman and Dr. Ahmad had many more contacts with the claimant and had a greater opportunity to follow him in his care and treatment. The finding of permanent and total disability relies on the *Rutherford, supra*, case where the Court held that a permanent impairment rating was not required by Ark. Code Ann. §11-9-519.

The end of the healing period is another issue to be decided. The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. If the underlying condition

causing the disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. *Nix. v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Whether an employee's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995). Respondents contend the healing period ended on April 22, 2003, when Dr. Ackerman assigned the permanent impairment rating. Claimant contends the healing period ended on December 16, 2005, when Dr. Ahmad opined the claimant had reached maximum medical improvement.

Dr. Ackerman did assign the 30% permanent impairment rating on April 22, 2003 and he did a qualified maximum medical improvement prognosis by saying, "I feel that he (claimant) has reached max. med. improvement if he does not have RSD in both lower extremities." Resp. Exh. No. 1, p. 111. On December 14, 2004, Dr. Ackerman saw the claimant again and opined at that time that he was disabled and unable to work. On January 12, 2005, Dr. Ackerman opined the claimant was not at maximum medical improvement. Finally, Dr. Ahmad opined on December 16, 2005, that the claimant had reached maximum medical improvement. The claimant continued to treat with a variety of doctors between Dr. Ackerman's April 22, 2003, visit and finally, Dr. Ahmad's December 16, 2005 visit. After reviewing the various medical reports submitted into evidence and hearing the credible testimony of the claimant, I find the claimant has presented proof by a preponderance of the evidence that he remained in his healing period until December 16, 2005. By December 16, 2005, the physicians providing care seemed to have exhausted the testing and active treatment to get the claimant stabilized.

The claimant also contends that he is entitled to a 30% permanent impairment rating as assigned by Dr. Ackerman on April 22, 2003. Dr. Ackerman, in his July 6, 2004, deposition, discussed his 30% permanent rating and stated that the *AMA Guides* with respect to RSD bases the rating on range of motion and loss of sensation but it also encompasses pain. He concurred that pain was a necessary component for RSD. Dr. Ackerman opined that he based part of his rating on loss of function of the extremity and he stated the claimant cannot write with his right hand, cannot comb his hair, has trouble holding objects, cannot use his wheelchair with the right hand and essentially has no use of the right hand. With all the problems with both upper extremities, as well as the lower extremities, he based the rating on the body as a whole.

Dr. Ackerman took into account the loss of function; however, he was at a loss on how to remove the pain element in terms of percentage. While some permanent impairment can be assessed, RSD is more difficult to assign an impairment rating than many other condition. Relying on the Court of Appeals holding in *Rutherford, supra*, that a claim for permanent and total disability does not require an impairment rating, I will forgo further discussion of the permanent impairment rating. See. Ark. Code Ann. §11-9-519.

Respondents request an offset for any group benefits paid to the claimant pursuant to Ark. Code Ann. §11-9-411. I find that respondents are entitled to a dollar-for-dollar offset for any group benefits paid in this matter.

ORDER

The claimant has proven by a preponderance of the evidence that he is

permanently and totally disabled as a result of his compensable injury. The claimant has proven by a preponderance of the evidence that he sustained some permanent impairment as a result of his compensable injury, although a percentage certain could not be identified; therefore, a permanent impairment rating is not assigned. The preponderance of the evidence provides that the claimant's end of the healing period was December 16, 2005. Respondents are entitled to an offset for group benefits paid in this matter.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, Arkansas Workers' Compensation Commission Rules & Regulations, Rule 099.10, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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.

IT IS SO ORDERED.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE