

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F605720

TROY PHIFER, Employee	CLAIMANT
GATES RUBBER COMPANY, Employer	RESPONDENT #1
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED DECEMBER 2, 2009

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On November 4, 2009, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 27, 2009, and a pre-hearing order was filed on August 28, 2009. 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 prior opinion of November 21, 2006 is final.
2. The claimant was earning an average weekly wage of \$588.41 which would entitle him to compensation at the weekly rates of \$392.00 for total disability and \$294.00 for permanent partial disability benefits.
3. Respondent has accepted and is paying permanent partial disability benefits based upon a 15% rating to the body as a whole assigned by Dr. Knox.
4. Claimant reached the end of his healing period on March 11, 2009.

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

1. Claimant's entitlement to permanent total disability benefits or, alternatively, wage loss in excess of his impairment rating.

2. Attorney fee.

The claimant contends he was awarded a 15% permanent partial disability rating as assigned by Dr. Knox as a result of his compensable injury of January 18, 2005. Claimant contends he is permanently and totally disabled or, alternatively, is entitled to wage loss disability and an attorney fee on all controverted benefits.

Respondent #1 contends the claimant is not entitled to permanent disability benefits in excess of the 15% anatomical impairment assessed by Dr. Knox.

Respondent #2 contends that if the claimant is found to be permanently and totally disabled the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits.

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 witness and to observe his 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 August 27, 2009, and contained in a pre-hearing order filed August 28, 2009, 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. Respondent #1 has controverted claimant's entitlement to permanent total disability benefits.

### FACTUAL BACKGROUND

\_\_\_\_\_The claimant is a 44-year-old man who began working for the respondent in 2001 on its "cure" line. After performing that job for approximately eight months the claimant began working as a "builder". A builder works at a machine where rubber belts are built by adding several layers of rubber and cord together. According to claimant the machine has a carousel that contains rows of rubber and cord stock. When a particular row empties there is an empty liner which must be removed. Claimant testified that an empty liner is approximately four feet wide and when it is empty it is taken off by hand and thrown into an empty bin liner. Claimant testified that depending upon the type of stock, the empty liner could weigh anywhere from 50 to 120 pounds or more. Claimant testified at a previous hearing conducted on October 25, 2006 that on January 18, 2005, he suffered an injury to his back after carrying an empty liner. Following that hearing an opinion was filed on November 21, 2006 finding that claimant had met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on January 18, 2005, and awarding claimant medical benefits as well as temporary total disability benefits. The respondent appealed that opinion to the Full Commission and the Full Commission eventually granted respondent's motion to dismiss its appeal in an order filed April 13, 2007.

Following the claimant's injury he was initially evaluated by Dr. Clemons and diagnosed as suffering from a low back strain. Dr. Clemons eventually referred claimant to Dr. Greenberg, a neurosurgeon, who performed surgery to repair a herniated disc at the L4-5 and L5-1 levels in March 2005.

Following his surgery Dr. Greenberg released claimant to return to light-duty work. Claimant testified that he did return to the respondent performing light-duty work for approximately thirty days as a trainer. After that 30-day period of time claimant was informed that no additional light-duty work was available.

Apparently, Dr. Greenberg quit practicing in this area and claimant came under the care of Drs. Danks and Knox. Both of those physicians are neurosurgeons. In a report dated March 29, 2007, Dr. Knox ordered a lumbar myelogram to determine whether there was compression on an exiting L4 nerve root.

According to Dr. Knox's report of May 22, 2007, the myelogram and post-myelogram CT scan showed no evidence of compressive pathology and Dr. Knox referred claimant to Dr. Ennis for a dorsal column stimulator trial. This trial was apparently successful and Dr. Ennis eventually inserted a spinal cord stimulator into the claimant. Claimant has continued to receive medical treatment from Dr. Ennis which has included some pain medications, injections, and the use of the stimulator.

In a report dated March 11, 2009, Dr. Knox assigned the claimant a 15% impairment rating. This rating was accepted and permanent partial disability benefits in accordance with that rating are being paid by respondent #1.

Claimant has filed this claim contending that he is permanently totally disabled as a result of his compensable injury or, alternatively, that he is entitled to wage loss benefits in excess of his 15% impairment rating.

#### ADJUDICATION

\_\_\_\_\_ Claimant contends that he is permanently totally disabled as a result of his compensable injury. Permanent total disability is defined in A.C.A. §11-9-519(e)(1) as the inability because of a compensable injury to earn any meaningful wages in the same or other employment. In determining whether a claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled, various factors may be taken into account. These factors include the percentage of permanent physical impairment, the employee's age, education, work experience, and any other matters reasonably expected to affect his future earning capacity. A.C.A. §11-19-522(b)(1).

After my review of the relevant wage loss factors in this case, I find 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.

First, I note that as a result of his compensable injury the claimant has been assigned a permanent physical impairment rating in an amount equal to 15% to the body as a whole by Dr. Knox. The evidence also indicates that claimant is 44 years old and that he is a high school graduate. According to claimant's testimony, he was an average student and he has no education or special training beyond the high school level. Claimant testified that he does not have any typing or computer skills and that his use of a computer is limited to playing solitaire. Claimant considers himself to be an average reader, but does not keep up with any finances or a checkbook at home. Claimant testified that he can drive for a short period of time and perform simple math.

Claimant testified that since the time of his injury he has taken a number of pain medications. He testified that these pain medications work for a period of time before they are no longer effective. Claimant testified that with respect to his stimulator, he had eventually turned the stimulator all the way up without any benefit. Accordingly, Dr. Ennis turned the stimulator off at the time of his last visit some two or three months ago. Dr. Ennis gave claimant a steroid injection at that time and intends on turning the stimulator back on at the time of the next visit in November 2009.

Claimant testified that he currently has pain in his low back and upper right leg. He testified that he can only walk 20 to 30 minutes before sitting down and can sit some 30 to 45 minutes before having to stand. Claimant testified that he has been able to attend only one of eight of his son's football games this year because he cannot stand and he has a difficult time getting up and down in the bleachers. Claimant also testified that he and his wife had to purchase a higher sitting bed because he had difficulty getting out of the lower one they slept in before. He also testified that they had to purchase taller dining

room chairs and he has his recliner sitting on bricks to raise it in order to get in and out of it easier. Claimant testified that he is no longer able to engage in various activities he participated in before the injury such as hunting, fishing, camping, yard work, or performing routine household chores. Claimant testified that he can no longer perform any yard work or household chores other than putting food in a crock pot. Claimant testified that his wife has to put his socks on because he cannot bend and that he cannot wear long pants because he cannot stand to have anything touching his leg.

Finally, claimant testified that he is currently drawing social security disability benefits in the amount of approximately \$1,253.00 per month.

After having the opportunity to observe the claimant and his demeanor during the hearing, I find him to be a credible witness and find his testimony regarding his physical limitations persuasive. Also, significant in this case are the medical reports from Drs. Knox and Ennis. As previously noted, Dr. Knox in a report of March 11, 2009, assigned the claimant a permanent physical impairment rating in an amount equal to 15% to the body as a whole. Dr. Knox also indicated that any permanent restrictions would be defined by a functional capacities evaluation. Apparently, this evaluation was not performed. However, in that same report Dr. Knox also indicated that it was very likely that claimant was permanently totally disabled as a result of his compensable injury.

I believe there could be a very likely component of a permanent and total disability due to his injury.

As previously noted, claimant has most recently been treated by Dr. Ennis for his complaints of pain. In a letter dated July 27, 2009, Tanya Owen, a certified rehabilitation counselor, wrote Dr. Ennis and asked him whether the claimant could work eight hours per day. In response, Dr. Ennis indicated that claimant was not capable of working eight hours per day because he suffers from post-surgical pain for which he receives various therapies

including a spinal cord stimulator and that his pain would limit his ability to consistently perform work. When asked whether claimant had any limitations, Dr. Ennis indicated that claimant could not perform repetitive pulling and that lifting more than 10 to 20 pounds would cause pain in the lumbar spine. Dr. Ennis also indicated that claimant would need future medical care which included management of the stimulator, possible injections, physical therapy, and medication. This corresponds to Dr. Knox's statement in his March 11, 2009 letter that he was concerned that claimant would need to consider further surgical procedures.

Claimant has the burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. After consideration of the relevant wage loss factors presented in this case, I find that claimant has met his burden of proof.

#### AWARD

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. Respondent has controverted claimant's entitlement to 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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$334.00.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE