

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F311969

LOYCE SHAFFER, Employee

CLAIMANT

LTL, INC., Employer

RESPONDENT

TRAVELERS INSURANCE COMPANY, Carrier

RESPONDENT

OPINION FILED JULY 8, 2009

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

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

Respondents represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 10, 2009, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 11, 2009, 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 claimant sustained a compensable injury to her back on September 26, 2001.
3. The claimant was earning sufficient wages to entitle her to compensation at the maximum rate.
4. The prior opinion in this case is final.

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

1. Additional medical treatment.
2. Wage loss.

3. Attorney fee.

At the time of the hearing the parties had resolved the issue of claimant's entitlement to additional medical treatment. Therefore, the only remaining issue is claimant's entitlement to benefits for wage loss and a controverted attorney fee.

The claimant contends that she is entitled to permanent partial disability benefits for wage loss as a result of her compensable injury.

The respondents contend that claimant is not entitled to any permanent partial disability benefits for wage loss.

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 March 11, 2009, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that as a result of her compensable injury she has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole.

FACTUAL BACKGROUND

_____The claimant is a 63-year-old woman who began working part time for the respondent in 1993 and became employed full time in March 1994 as a bookkeeper.

Claimant testified that her job duties were those of a general office manager. She was responsible for payroll, time cards, accounting, accounts receivable, accounts payable, quarterly reports, and working with tax preparers.

The parties have stipulated that claimant suffered a compensable injury when she was involved in a motor vehicle accident while working in September 2001. After that injury the claimant was treated for various complaints including pain in her cervical and thoracic spines. Initially, the claimant was treated conservatively with medication, injections, and physical therapy. When claimant's condition did not improve, Dr. Knox performed surgery on her cervical spine on August 22, 2006. After her surgery the claimant initially returned back to work but her condition continued to worsen. Eventually, claimant was able to work only part time before she was able to work only a little bit each month. In October 2007 claimant married Mike Lewis, the sole owner of the respondent.

Lewis testified that he eventually shut down his business due to his own physical problems as well as the fact that the claimant was not able to perform her job or help other individuals perform theirs.

Since the time of her surgery the claimant has continued to be treated and evaluated by Dr. Knox and other physicians including her family physician, Dr. Scott Stinnett. That treatment has included injections and continuing medication.

A prior hearing was conducted in this case on November 8, 2005 and an opinion was filed by Administrative Law Judge Danielson on November 10, 2006. In that opinion Judge Danielson found that claimant had a permanent physical impairment rating in an amount equal to 12% to the body as a whole. The parties have stipulated that the prior opinion is final.

Claimant has filed this current claim contending that she is entitled to benefits for a loss in wage earning capacity as a result of her compensable injury.

ADJUDICATION

When considering claims for permanent partial disability benefits in excess of the employee's permanent physical impairment the Commission may take into account various factors. These factors include the percentage of permanent physical impairment, the claimant's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has suffered a loss in her wage earning capacity in an amount equal to 50% to the body as a whole.

The claimant is a 63-year-old woman who graduated from high school. In addition, she has also taken some college courses and has received a certificate from secretarial school. Claimant also testified that she has taken some bookkeeping and CAD drafting courses. Claimant testified that throughout her lifetime her primary work has been office-type work using adding machines, typewriters, and things with keyboards.

As previously noted, Judge Danielson in an opinion filed January 10, 2006 found that the claimant had a permanent physical impairment rating in an amount equal to 12% to the body as a whole. It should be noted that this impairment rating was actually assigned by Dr. Knox prior to the claimant's surgery. Nevertheless, the parties have stipulated that the prior opinion and that finding are final.

Claimant and Mike Lewis, claimant's husband and the owner of the respondent, testified that after the accident claimant initially returned to work for the respondent and that her condition progressively worsened. Lewis testified that up until the time of claimant's surgery the claimant did occasionally miss some work but that she still tried to perform her job. In fact, he continued to pay her her regular salary on a weekly basis. After the claimant's surgery she attempted to return to work for the respondent but her condition continued to deteriorate until in 2007 claimant performed only part-time work.

Lewis testified that by 2008 he paid the claimant \$500.00 per month and claimant would only come in and pay bills and prepare reports. Lewis testified that claimant's inability to perform her job was a factor in his decision to close the respondent.

Claimant's testimony corroborated that of Lewis. Furthermore, claimant testified that she currently suffers from stiffness and burning in her neck and back. Claimant also testified that she has burning pain in her upper back which radiates down her arms and that she has difficulty even holding up her arms.

The medical evidence with regard to claimant's ability to work is somewhat confusing. Dr. Knox performed surgery on claimant's cervical spine in August 2006. In a report dated August 23, 2007, Dr. Knox indicated "She is still able to work at least half a day." There are various medical reports from Dr. Knox subsequent to August 23, 2007 wherein he recommends additional treatment such as acupuncture and pain management. However, Dr. Knox did not address the claimant's ability or inability to work in those reports.

Subsequent to her surgery the claimant has received medical treatment from her family physician, Dr. Scott Stinnett. Dr. Stinnett's treatment has primarily consisted of prescription medication. Dr. Stinnett has also completed several forms entitled "Workers' Compensation Report". That form requests various information and it lists various activities with a box to be checked indicating that the claimant either can perform the activity or that they cannot perform the activity. The form also contains several questions such as whether any permanent disability is expected, whether claimant may return to the same work, or whether the claimant may return to modified work.

The parties have submitted into evidence four of these reports from Dr. Stinnett. I believe it is impossible from reviewing Dr. Stinnett's reports to make a determination as to his opinion regarding the claimant's permanent work restrictions. Perhaps Dr. Stinnett is not giving an opinion as to claimant's permanent work restrictions because each of the

reports is labeled a progress report as opposed to a final report. This conclusion would seem to be corroborated by the fact that each of the four reports is different with regard to limitations and claimant's ability to return to modified work. For instance, in the report dated March 11, 2008, Dr. Stinnett indicated that the only activity claimant could perform was pushing or pulling. At the same time, he indicated that no permanent disability was expected and he also indicated that claimant could return to modified work.

In the next report dated November 5, 2008, Dr. Stinnett indicated that the claimant could climb, perform repetitive movements, use her right or left arm and hand, and use her right or left foot or leg. Dr. Stinnett again indicated that no permanent disability was expected and that claimant could not return to her same work. However, he again indicated that claimant could return to modified work and specifically indicated that claimant was able to resume work as of November 5, 2008.

There is also a report from Dr. Stinnett which is physically located in the documentary evidence after the November 5, 2008 report of Dr. Stinnett. However, that report of Dr. Stinnett is undated. There is no way of knowing whether this report from Dr. Stinnett was either before or after the November 5, 2008 report. Claimant testified that this report was written in either late 2008 or 2009. A finding that the undated report was written after November 5, 2008 would be speculation.

Finally, Joint Exhibit Number 1 is another progress report from Dr. Stinnett which the parties have stipulated is dated April 21, 2009. Much of that report is illegible due to the poor quality of the copy. In that report, Dr. Stinnett did not list any activities claimant could perform but instead drew a line down the column indicating that claimant could not perform any activities. However, Dr. Stinnett again indicated that no permanent disability was expected and that claimant could return to modified work.

In short, it is impossible to tell from a review of Dr. Stinnett's reports whether he believes claimant's condition is permanent and if so the extent of her permanent

restrictions. In three of the four reports completed by Dr. Stinnett including the most recent report Dr. Stinnett has opined that claimant could return to modified work.

In summary, claimant has the burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits for wage loss over and above her permanent physical impairment rating. Here, the claimant is a 63-year-old woman with a high school education and some college credit. In addition, claimant has some training in secretarial work and CAD drafting. Claimant has been assigned a permanent physical impairment rating in an amount equal to 12% to the body as a whole. The last time Dr. Knox addressed the claimant's ability to return to work, he indicated that she was capable of working at least half a day. Subsequent to that report from Dr. Knox claimant has continued to seek medical treatment from Dr. Stinnett, her family physician. It is unclear from a review of Dr. Stinnett's report as to whether he believes claimant's condition is permanent and any specific permanent work restrictions. However, even in his most recent report Dr. Stinnett indicated that claimant could perform modified work.

The burden of proof is on the claimant to prove by a preponderance of the evidence that she is entitled to compensation benefits. Based upon the evidence which has been presented in this case which is confusing and contradicting at times, I find that claimant has met her burden of proving by a preponderance of the evidence that she has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to permanent partial disability benefits for wage loss disability in an amount equal to 50% to the body as a whole. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole.

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.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$328.50.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE