

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F700094

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| MICHAEL MOFFETT, EMPLOYEE | CLAIMANT |
| WHEELINGTON ROOFING CO., INC., EMPLOYER | RESPONDENT NO. 1 |
| COMMERCE & INDUSTRY INS. CO. C/O AIG CLAIMS SERVICE, INSURANCE CARRIER/TPA | RESPONDENT NO. 1 |
| SECOND INJURY FUND | RESPONDENT NO. 2 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 3 |

OPINION FILED MARCH 8, 2010

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Simmons, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 was represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas, and waived appearance.

STATEMENT OF THE CASE

On December 10, 2009, the above captioned claim came on for a hearing in Little Rock, Arkansas. A prehearing conference was conducted in this matter on October 15, 2009, and a Prehearing Order was filed on that same date. A

copy of the Prehearing Order was marked as Commission Exhibit "1", and made a part of the record herein without objection, subject to any modifications made at the full hearing.

The parties stipulated to the following at the December 10, 2009, full hearing:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including December 23, 2006.
- 3) On December 23, 2006, the claimant sustained a compensable lumbar spine injury.
- 4) The claimant's average weekly wage of \$440.00 per week would entitle him to compensation rates of \$293.00 per week for temporary total disability and \$220.00 per week for permanent partial disability.
- 5) Respondent No. 1 has accepted a 12% anatomical rating to the body as a whole.
- 6) All parties agree that claimant reached maximum medical improvement on November 28, 2007.
- 7) The parties all agree that the claimant has child support arrearages in the State of Texas that must be taken into account before any award, if any, is distributed in this claim.

The parties agreed at the full hearing to litigate the following issues:

- 1) Whether the claimant is permanently and totally disabled; or in the alternative entitled to wage loss disability benefits in excess of the stipulated whole body impairment rating.
- 2) Second Injury Fund liability.

At the full hearing, the claimant contended that he sustained an admitted compensable injury on December 23, 2006, and that he has been rendered permanently and totally disabled. In the alternative, claimant contends he is entitled to determination with respect to the extent of wage loss disability over and above the permanent impairment rating. Claimant contends these matters have been controverted for purposes of attorney's fees. The claimant reserved the right to pursue other benefits to which he may become entitled in the future. Claimant's attorney requested that the attorney's fees owed by the claimant on the controverted benefits paid by award or otherwise be paid by separate check.

Respondent No. 1 contended at the full hearing that if the claimant is entitled to an award of wage loss disability that the Second Injury Fund has liability for payment of those benefits. Alternatively, if the Second Injury Fund is not liable for those benefits, then the claimant is not permanently and totally disabled. Respondent No. 1 has accepted liability for a 12% permanent physical impairment rating to the body as a whole and benefits for that rating are being paid. Respondent No. 1 contended that claimant reached maximum medical improvement no later than November 28, 2007. Respondent No. 1 contended that all medical benefits owed have been paid, and that respondents asked leave to be permitted to make additional contentions if needed.

Respondent No. 2, Second Injury Fund, contended that the last injury

standing alone is the cause of the claimant's current disability and there is no combination of injuries as required by Mid-State. Respondent No. 2 further contended that if there were any previous injuries or conditions prior to December 23, 2006, they were latent.

Respondent No. 3, Death and Permanent Total Disability Trust Fund, contended at the prehearing conference that pursuant to A.C.A. § 11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. That if the Second Injury Fund is found to not have liability and 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 contends that it has not controverted the claimant's entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein

are reasonable and are hereby accepted as fact.

- 3) The claimant sustained stipulated compensable lumbar injury while working for Respondent No. 1 on December 23, 2006. When the claimant's age, education, work history, permanent restrictions, physical limitations, and all other relevant factors are considered, the evidence preponderates that the claimant has been rendered permanently and totally disabled within the meaning of the Arkansas Workers' Compensation Act. The claimant's December 23, 2006, stipulated compensable injury is the major cause of the claimant's current disability status.
- 4) Respondent No. 2, Second Injury Fund, has no liability in this claim.
- 5) Respondent No. 1 has controverted the claimant's entitlement to permanent total disability benefits and are therefore directed to pay the maximum statutory attorney's fees.

DISCUSSION

The claimant, age 45, worked for the respondent-employer as a commercial and residential roofer. The claimant testified that he had a high school degree and had worked for the respondent-employer for approximately fifteen years prior to his stipulated compensable lumbar injury on December 23, 2006. The claimant testified as follows regarding the December 23, 2006, incident which caused his stipulated compensable injury:

Q Okay. Now, what happened on December the 23rd of 2006 to cause you to be hurt? How did you hurt yourself?

A I was picking up some shingles and they feathered out on me. I tried to re-grip them and something blew in my back.

Q Okay. When you say, "in your back," your lower part of your back?

A In my lower back.

Q What sort of sensation did you have? How did it feel?

A Very sharp.

(T. p. 45, lines 16-24)

Following the claimant's compensable injury, he treated with Dr. Phillip Kravetz who directed the claimant to undergo physical therapy and epidural steroid injections. With no benefit from the physical therapy or steroid injections, Dr. Kravetz discussed the possibility of surgery and the claimant then went to see Dr. Eric Akin, a neurosurgeon, for a second opinion. Dr. Akin also recommended surgery and on April 10, 2007, performed a left L4-5 microdiscectomy for decompression on the claimant. (R1. Ex. 1, p. 55)

Still with continuing pain after the surgery, the claimant, with the recommendation of two doctors, received a dorsal column stimulator implant. The claimant was implanted with a trial stimulator but received no benefit. With no help from the dorsal column stimulator, the claimant next treated with Dr. Thomas Hart who conducted a fluoroscopy procedure. Dr. Hart performed a nerve block but claimant still had pain. Shortly after treating with Dr. Hart, the claimant returned to Dr. Akin who rated the claimant with a 12% whole body impairment but still recommended a DREZ lesioning procedure. The claimant

testified that the workers' comp insurance carrier would not pay for the DREZ lesioning procedure. On December 14, 2007, the claimant underwent a functional capacity evaluation which is found at Respondent No. 1, Exhibit No. 1, page 109, and it found the claimant could perform sedentary type work. The claimant then was recommended for a pain pump by Dr. Mocek and Dr. Calhoun. On March 20, 2009, the claimant had a trial for the pain pump, but testified that the pain pump made him sick. Thereafter, the pain pump was immediately removed.

The claimant testified that the workers' comp insurance carrier then referred him to Dr. Garlapati. The claimant treated with Dr. Garlapati who ultimately gave the claimant permanent restrictions and limitations on his functional abilities. (R1. Ex. 1, pp. 145-147) The claimant testified that since his admitted compensable injury he has been unable to work. The claimant testified that despite the numerous procedures and treatments that he has undergone he continues to have severe pain associated with his compensable injury. The claimant testified that on most days he spends indoors lying on the couch. The claimant testified that he does not know of any employment in which he could perform. The claimant contends that due to his compensable injury he is now permanently and totally disabled, or in the alternative entitled to wage loss disability.

ADJUDICATION

“Permanent total disability” means inability, because of compensable injury or occupational disease to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). The burden of proof should be on the employee to prove inability to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(2). The same factors that are considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. § 11-9-519(c); Cross v. Crawford Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Some factors in determining permanent and total disability include, but are not limited to, the following: 1) age, 2) education, 3) work experience, 4) medical evidence, 5) motivation, 6) credibility, 7) post-injury income, 8) permanent restrictions, 9) physical limitations, 10) all other relevant factors.

The claimant, age 45, is a high school graduate. The claimant testified that the majority of his work history involved manual labor. For the last fifteen years, the claimant worked as a commercial and residential roofer for Respondent No. 1. For well over three years, since the claimant's stipulated compensable injury, the claimant has undergone numerous medical procedures, including but not limited to surgery. As evidenced by the numerous medical reports contained in the record herein, the claimant has undergone L4-5 surgery, epidural steroid injections, physical therapy, dorsal column stimulator, pain pump, nerve blocks, and numerous other recommendations that were not approved by respondents.

Even with all the medical efforts, the claimant credibly testified that he still suffers from severe pain associated with his stipulated compensable injury and credibly testified that he can perform no type of work at this time.

When analyzing all the factors to be taken into account when determining whether one is permanently and totally disabled, perhaps the most telling evidence is the August 21, 2009, report from Dr. Garlapati. (R1. Ex. 1, p. 147) In Dr. Garlapati's August 21, 2009, report, he specifically states that the claimant is unable to return to work. Dr. Garlapati goes on to specifically outline extremely strict permanent restrictions regarding the claimant's physical abilities. Dr. Garlapati states that the claimant is restricted permanently from the following activities: 1) permanently restricted from ever carrying or lifting more than 10 pounds, 2) permanently restricted from pushing or pulling more than 10 pounds, 3) permanently restricted from reaching above the chest, 4) permanently restricted from reaching overhead, 5) permanently restricted from reaching away from the body, 6) has limitations in walking/standing and sitting, 7) required to wear a splint at all times, 8) permanently restricted from performing more than 20 repetitive movements in a four hour period, 9) permanently restricted from operating machinery, 10) permanently restricted from crawling, 11) permanently restricted from kneeling, 11) permanently restricted from squatting, 12) permanently restricted from ever driving any vehicle, 13) permanently restricted from ever climbing, 14) permanently restricted from ever bending, 15)

permanently restricted from ever stooping.

Needless to say, Dr. Garlapati, whom the claimant was referred to by Respondent No. 1, sets down some of the most permanent restrictions and limitations one could imagine. Dr. Phillip Kravetz even seemed to indicate as much as far back as February 2, 2007, when he stated, "Clearly, at this point, the patient cannot return to his normal job; and even, it would seem, that a sedentary type of job is going to be awfully difficult." (Cl. Ex. 1, p. 15) Dr. Kravetz went on to classify the claimant with, "Severe limitations-incapable of secretarial activities. No work at this time." (R1. Ex. 1, p. 33)

When the claimant's age, education, work experience, permanent restrictions, physical limitations, credibility, and all other factors are considered the evidence preponderates that the claimant has been rendered permanently and totally disabled within the meaning of the Arkansas Workers' Compensation Act. I further find that the claimant's stipulated compensable injury of December 23, 2006, is the major cause of his current disability status. Respondent No. 1 has controverted the claimant's entitlement to permanent total disability benefits and therefore are directed to pay the maximum statutory attorney fees to the Honorable Gary Davis. In making the determination that the claimant is rendered permanently and totally disabled as a result of his stipulated compensable injury, I do not totally disregard the functional capacity evaluation contained in the record herein found at Respondent No. 1's Exhibit 1, page 109.

I do note that the functional capacity evaluation found the claimant with the ability to perform sedentary type employment. However, when weighing the functional capacity evaluation against the voluminous medical records contained in the record herein, the claimant's credible testimony, and the permanent restrictions outlined by Dr. Garlapati, I find that the greater weight of the evidence shows that the claimant has been rendered permanently and totally disabled as a result of his stipulated compensable injury.

Second Injury Fund liability determination has been requested. The Arkansas Supreme Court identified the requirements for Second Injury Fund liability as follows in Mid-State Const. Co. v. SIF, 295 Ark. 1, 746 S.W.2d 539 (1988):

It is clear that the liability of the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

In the present case, the claimant clearly sustained a compensable injury at his last place of employment. The parties stipulated to a compensable injury on December 23, 2006, and the parties stipulated that the claimant sustained a 12% whole body impairment rating as a result of the December 23, 2006, compensable event. The claimant did testify that he did have a back strain in the early 90s where he lost a week to ten days or so from work. (T. p. 62, lines 23-

45, and p. 63, lines 1-14) The claimant testified that as a result of his back strain in the early 90s he missed about two weeks of work but that he fully recovered from that injury. The claimant testified that he never received any type of permanent impairment rating regarding his back. The claimant also testified that in 2005 he had a knee injury but that his knee injury did not cause him to have any problem performing his work at the time of his stipulated compensable back injury in December of 2006. Based on the medical records contained herein and the claimant's credible testimony, I cannot find that the claimant had a permanent partial disability or impairment prior to his stipulated injury of December 23, 2006. In addition, even if the claimant did have some sort of disability or impairment prior to December 23, 2006, I further specifically find that any disability or impairment did not combine with the claimant's recent compensable injury to produce the current disability status. In the present claim, the evidence does not show that the claimant's present disability status is the product or the combination of any prior disability or impairment with the December 23, 2006, compensable injury. Accordingly, the Second Injury Fund does not have liability in this claim, and are respectfully dismissed.

AWARD

Respondent No. 1 is herein ordered and directed to pay permanent and total disability benefits to the claimant at the rate of \$293.00 per week, as a result

of the claimant having been rendered permanently and totally disabled as a result of the December 23, 2006, stipulated compensable injury. Respondents are herein directed and ordered to pay the benefits awarded per the findings of fact and conclusions of law outlined herein. Said sums shall be paid in a lump sum without discount. Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable Gary Davis, pursuant to A.C.A. § 11-9-715. This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809 until paid. Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb