

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G305958

BRIAN O. BIRTCHER, EMPLOYEE	CLAIMANT
CITY OF MENA WATER UTILITIES, EMPLOYER	RESPONDENT NO. 1
ARKANSAS MUNICIPAL LEAGUE, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JUNE 1, 2015

Hearing before ADMINISTRATIVE LAW JUDGE AMY GRIMES, in Fort Smith, Sebastian County, Arkansas.

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

Respondent No. 1 represented by J. CHRIS BRADLEY, Attorney, North Little Rock, Arkansas.

Respondent No. 2 represented by CHRISTY KING, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 10, 2015, the above captioned claim came before the Workers' Compensation Commission in Fort Smith, Arkansas, for a hearing. A pre hearing conference was conducted on January 20, 2015, and an amended pre hearing order was filed on January 26, 2015. A copy of the pre hearing order has been marked as Commission's Exhibit No. 1 and with modification and no objection is made part of the record. The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee-employer-insurance carrier relationship existed at all relevant times on July 28, 2013.
3. The date of the compensable injury is July 28, 2013.
4. The rates of compensation are \$469 for TTD and \$352 for PPD.

5. The claimant's healing period ended on March 3, 2015.
6. Respondent No. 1 accepted liability for permanent partial disability in the amount of 33% impairment rating to the body as a whole.
7. The parties agree the claimant cannot be permanently and totally disabled prior to his last day to work.
8. Respondent No. 1 has accepted 10% wage loss.

The issues to be litigated are:

1. Whether claimant is entitled to permanent total disability.
2. Alternatively, whether the claimant is entitled to wage loss.
3. Attorney's fees.

The claimant contends he sustained a compensable injury while working for the respondent on or about July 28, 2013. At that time, claimant was within the course and scope of his employment with respondent when he sustained a head injury and a broken leg. Respondent No. 1 contends it has paid or is paying all medical and appropriate benefits; that the claimant is not permanently and totally disabled; and, that the claimant has a wage loss disability of 10% to the body as a whole. Respondent No. 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.

The above stipulations are hereby accepted as fact. From a review of the record as a whole to include medical reports, documents, and having heard testimony and observed the demeanor of all witnesses, the following decision is rendered.

FACTUAL BACKGROUND

The claimant in this matter is a 42-year-old male. He began working for the respondent in 2006. The claimant worked on the sewer maintenance crew and earned \$15.75 per hour. Prior to working for the respondent, the claimant worked on a drilling rig, and worked as a deputy, a bouncer, and as a machine operator. The claimant testified that he sometimes worked two jobs, but that none of his prior jobs were desk jobs. He added that the jobs all required heavy lifting and none required computer skills. The claimant has no computer training and is not very good at math. On July 28, 2013, the claimant was performing job duties that included shutting off water meters for failure to pay. On that day, the claimant was attacked while attempting to shut off a water meter. The claimant suffered compensable injuries to his head and leg. The claimant suffered a broken leg as well as a stroke and left vertebral artery dissection. The claimant suffered permanent injuries. He has difficulty swallowing, and experiences numbness in the left extremity. He cannot sit or drive for an extensive period of time or drive in bright light. The claimant suffers from vertigo upon descending stairs and has problems judging distance when driving and parking. The claimant further has difficulty handling paper or money due to decreased sensation in his right hand. He has problems breathing at night and suffers from depression. The claimant testified that due to the vertebral artery dissection, overexertion could lead to death. The claimant has been prescribed Coumadin for the rest of his life. The claimant also has limited educational abilities. Testing revealed that the claimant has a sixth grade math ability and a seventh grade spelling ability.

Subsequent to his injury, the claimant was provided work in the office for the respondent. He worked an eight-hour day. The claimant testified that while working in the office, he occasionally took money at the drive-up window. He stated that he had issues with the feel of the money and was nervous working in that position. The claimant stated that he had no real responsibilities while working

in the office and worked between there and the shop. Once the claimant's restrictions became permanent, he was terminated. He stated that he was terminated in December of 2014. The claimant was not offered a permanent position once his restrictions became permanent.

Dr. Shafizadeh treated the claimant and placed him on generalized permanent restrictions. Dr. Shafizadeh noted, “. . . given his decreased sensation of the right hand, right leg, and alterations in vision, I do not recommend him to do any machinery or any driving at work or otherwise.” The doctor further recommended that the claimant only return to work as long as he returned to a desk job. He added that the claimant should not be in any situation where he was in danger of falling or using any machinery. Respondent No. 1 had an independent medical examination performed on the claimant. The examination was performed by Dr. Carle. He also placed permanent restrictions on the claimant. Dr. Carle noted that the claimant was not eligible to operate a commercial vehicle due to persistent symptoms of vertigo. He stated that the claimant should only engage in ground level work, not lift, push or pull beyond 20 pounds of force. Dr. Carle restricted the claimant to 10 pounds of force on a frequent basis and noted that he should not use heavy machinery, such as a backhoe or forklift.

The claimant called two of his co-workers as witnesses. Roddy Strother testified that after the accident the claimant was not the same. He added that he tired quickly, got winded quicker, and often got dizzy and needed extra breaks. Larry Gross also testified for the claimant. He stated that the claimant could not do the work he had done prior to his injuries. He added that they had to “make up things” for the claimant to do. He added, “It was hard to find a lot of things that he [the claimant] could do.” Mr. Gross stated that the claimant was terminated on December 3, 2014. He added that the company did not have work for the claimant that was within his assigned permanent restrictions. The witness further stated that the claimant was given office work to do, but that he was not trained to work in the office and that the job was not intended to be permanent.

Heather Taylor testified on behalf of Respondent No.1. She testified that she recommended jobs for the claimant, but most were more than an hour from the claimant's home. She stated that she was only able to find two jobs at most in the Mena area. Ms. Taylor stated that the claimant could not perform any of his previous jobs. She stated that if he was hired, an employer would have to hire the claimant to do a job for which he was untrained. The witness further stated that jobs in the Mena area were not readily available for the claimant and that he would be at a competitive disadvantage due to a lack of skill sets that other applicants might possess. Ms. Taylor also stated that based on hearing the claimant's testimony regarding the sensation issues with his hand, he was not qualified for any administrative clerk positions. She further stated that he would not be qualified to be an invoice or billing clerk.

DISCUSSION

The Commission has been asked to determine if the claimant is permanently and totally disabled as a result of his admittedly compensable injury of July 28, 2013. Permanent and total disability is defined in Arkansas Code Annotated §11-9-519(e)(1). That statute defines permanent and total disability as the inability, because of compensable injury, to earn any meaningful wages in the same or other employment. The Commission may take into account various factors when determining the extent of permanent disability in excess of the percentage of permanent physical impairment. A.C.A. §11-9-522(b)(1) sets forth the factors to be considered. These factors are the claimant's age, education, work experience and other matters that are reasonably expected to affect the employee's future earning capacity.

There is no question that the claimant, here, had been a good worker prior to his injury. Both witnesses called on behalf of the claimant stated that he had been a hard worker with a good attitude. He was willing to do anything asked of him at work. The claimant suffered admittedly compensable

injuries to his head and leg on July 28, 2013. These injuries resulted in permanent injuries. The parties stipulated that the claimant's healing period ended on March 3, 2015. The parties have further stipulated that Respondent No. 1 accepted liability for permanent partial disability in the amount of 33% to the body as a whole. Respondent No. 1 also accepted 10% wage loss.

The record in this matter is clear. The claimant suffered several permanent injuries as a result of his July 28, 2013 incident. He has been placed on permanent restrictions such that he cannot participate in heavy or physically demanding work. Both doctors who treated or reviewed the claimant's medical information concurred on the claimant's restrictions. Both physicians also opined that the claimant should do no work more strenuous than desk work. The claimant testified that he had no computer or office skills, and had worked physically demanding jobs for all of this work life. Furthermore, the claimant testified that any overexertion could cause a dislodging of the vertebral artery dissection and death. Respondent No. 1's vocational expert testified that the claimant was unable to do any of the occupations in which he was previously engaged. She further noted that the claimant was at a competitive disadvantage for work positions because he lacked the skill sets to find a job within his restrictions. The claimant has a sixth grade math ability and a seventh grade spelling ability. The Commission must consider the claimant's physical limitations and also his age, education and work experience. Given those considerations, it is clear that it is extremely unlikely that there is any employer that could hire the claimant for work in a position within his restrictions.

The claimant has the burden of proving by a preponderance of the evidence that he is permanently and totally disabled as a result of his admittedly compensable injuries to his head and leg. The claimant has met that burden. The claimant has a 33% impairment rating to the body as a whole. The claimant cannot lift, push or pull beyond 20 pounds and cannot exceed 10 pounds of force on a frequent basis. The claimant has no prior experience with office or computer work, having done

manual or heavy labor all of his work life. Furthermore, due to his educational and physical limitations, he is not a candidate for further education or retraining. Based on the relevant wage loss factors in this case, I find that the claimant is permanently and totally disabled as a result of his admittedly compensable head and leg injuries sustained on July 28, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The claimant has proven by a preponderance of the evidence that he is permanently and totally disabled as a result of his admittedly compensable injuries sustained on July 28, 2013.
2. Claimant has proven that he is unable to earn meaningful wages in the same or other employment as a result of his compensable injury.
3. The claimant's attorney is entitled to an attorney fee and Respondent No. 1 is responsible for that attorney fee. Respondent No. 2 has not controverted the claimant's right to benefits.

ORDER

The claimant has proven his entitlement to permanent and total disability benefits. The respondents shall be responsible for the payment of permanent and total benefits to the claimant. The claimant's attorney is entitled to an attorney fee based on the above findings.

IT IS SO ORDERED.

AMY GRIMES
ADMINISTRATIVE LAW JUDGE

June 1, 2015

Mr. Jason Hatfield
Attorney at Law
300 North College Avenue Ste 309
Fayetteville, AR 72701

Mr. J. Chris Bradley
Attorney at Law
P.O. Box 38
North Little Rock, AR 72115-0000

Ms. Christy King
Attorney at Law
P. O. Box 950
Little Rock, AR 72203

RE: Brian O. Birtcher v. City of Mena Water Utilities
WCC No.: G305958

Counselors:

Enclosed you will find a copy of the Opinion rendered on today's date in above referenced case along with instructions and information for an appeals process.

Sincerely,

Deborah Rollins

Deborah Rollins
Legal Support Specialist/
Amy Grimes, Administrative Law Judge

dr

Enclosure
Certified Return-Receipt

c: Brian O. Birtcher
5050 Hwy. 8 W
Mena, AR. 71953