

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E905523

KENNETH McDONALD, EMPLOYEE	CLAIMANT
BATESVILLE POULTRY EQUIPMENT, EMPLOYER	RESPONDENT
FREMONT COMPENSATION INSURANCE, CARRIER	RESPONDENT

OPINION FILED JUNE 17, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE RONALD L. GRIGGS, Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals the decision by the Administrative Law Judge finding that the claimant was entitled to permanent and total disability benefits. Based upon our de novo review of the record, we would reverse the decision of the Administrative Law Judge.

The claimant is 46-year old man who, with the exception of having broken his arm several times as a youth, has had no significant prior injuries or disabilities. The claimant has some functional problems with reading and writing, but he was able to graduate from high school. The claimant served four years in the Army National Guard after high school. The claimant also has had various jobs such as

grooming and stabling horses on a ranch; conducting oil exploration surveying, using seismographic equipment; and performing construction work on poultry houses for various companies. During the course of his experience building poultry houses, the claimant developed proficiently in carpentry, acquiring and utilizing skills such as taking measurements, using saws and other equipment, as well as plain-sighting and placement of materials using the construction process. The claimant became skilled in the installation of large ventilation fans in poultry houses.

On May 5, 1999, the claimant was running some wires down a catwalk to install a large ventilation fan in a chicken house. One of the gangplank boards broke and the claimant fell through, injuring his left leg. The claimant was initially treated conservatively, but was later referred to Dr. Greg Massanelli for orthopedic care.

Dr. Massanelli performed surgery on the claimant's knee on May 26, 1999. He performed a medial meniscectomy, debridement and chondroplasty to repair the knee and also noted that the claimant had an attenuated ACL. In July 1999, Dr. Massanelli performed a second surgery to repair the ACL, installing hardware to secure the tibia and knee.

After the second surgery, the claimant returned to light duty work for the respondent-employer. The claimant

primarily drove a forklift. The claimant reported continued problems with his leg and he was placed back on temporary total disability status. The claimant was subsequently referred to an orthopedist, Dr. Jay Lipke, for further care.

In the summer of 2000, the respondents arranged for the claimant to undergo a vocational evaluation with the vocational consultant, Ms. Heather Naylor, MRC, CRC. On or about June 2, 2000, Ms. Naylor personally met with the claimant. She interviewed the claimant about his education, prior work history and transferrable skills, prior medical history, current medical history and most recent employment experience. Ms. Naylor also personally met with Dr. Lipke to discuss the claimant's work capacity at that time. Based upon statements made by Dr. Lipke, Ms. Naylor anticipated that the claimant would be able to work in a light duty capacity six weeks after the meeting.

Ms. Naylor prepared a written vocational transferrable skills analysis assessment report. She also performed a labor market survey and located seven different employment positions, within the claimant's physical and mental abilities, that were available within his locality. On August 22, 2000, Ms. Naylor performed a second labor market survey, which indicated some additional, available employment positions for the claimant.

On August 29, 2000, Dr. Lipke declared the claimant had reached maximum medical improvement and released him with a 50% impairment rating to the left lower extremity. Dr. Lipke also opined the claimant could return to sedentary capacity employment. On September 22, 2000, Ms. Naylor performed a third labor market survey for the claimant. She included local employment positions at both sedentary and light duty capacities.

In the latter part of 2000, the claimant was able to do such activities as fishing from a boat and deer hunting. In December of 2000, the claimant decided he needed some money for Christmas, so he applied for work at a local K-Mart. He was turned down for the job. Other than applying at K-Mart, the claimant has made no effort to seek employment, pursue any of the positions identified by Ms. Naylor or otherwise attempt to return to the workforce since his August 29, 2000 release.

In the spring of 2001, the claimant returned to Dr. Lipke for treatment. On March 13, 2001, Dr. Lipke evaluated the claimant's knee and found protruding hardware in the left knee and left tibia. The claimant had the hardware removed on April 2, 2001. After a brief period of temporary total disability, during which the respondents

paid appropriate benefits, Dr. Lipke again released the claimant from his care on April 17, 2001.

On May 9, 2001, in response to an inquiry from the respondents' counsel, Dr. Lipke opined that the claimant reached maximum medical improvement again on April 17, 2001, had no change in permanent impairment and was again able to return to sedentary capacity employment.

Ms. Naylor conducted a fourth labor market survey and located fourteen different, local employment positions, only five of which were at a light duty capacity - - the remaining nine being sedentary. Since the claimant had indicated that he was not aware of the extent of employment positions previously located by Ms. Naylor, the respondents' counsel mailed each of the labor market survey reports to the claimant's counsel, so that the claimant would have the information to proceed with a job search. The claimant made no effort to seek any of the employment positions located by Ms. Naylor.

The claimant sought no additional medical treatment for his leg after his release from Dr. Lipke on April 17, 2001. He managed his residual symptoms with Vioxx for arthritis and over-the-counter medication. The only known additional medical treatment the claimant received after April 17, 2001, was on July 21, 2002, when he was

treated in the emergency room of a local hospital for a dislocated shoulder, reportedly smelling of alcohol, after having fallen down a flight of stairs at home.

In August of 2002, at the request of his Social Security attorney, the claimant enrolled in a vocational rehabilitation program at the Hot Springs Rehabilitation Center. The claimant received psychological evaluation, vocational counseling, medical evaluation and an opportunity to receive additional physical therapy for his leg. The claimant failed to attend any of the four therapy visits scheduled for him at the Hot Springs Rehabilitation Center.

The claimant was able to work during the days through an adjunct work program called Abilities Unlimited. While he was in that program, the claimant performed line/manufacturing-type work, assembling pieces for carburetor and gas caps of gas-powered law care accessories, as well as loading the products into boxes. He worked there eight hours a day for several weeks, with lunch and four shorter breaks in his work schedule each day. He was paid piece-rate and was rotated from position to position on weekly intervals.

The claimant voiced discontent with the program at Abilities Unlimited, specifically with the pay he was earning while there. On or about September 23, 2002, the

claimant receive news that a friend had committed suicide, so he took a two-week leave from Abilities Unlimited as well as from the Hot Springs Rehabilitation program. Shortly after the two-week leave period expired, the claimant voluntarily dropped out of the program. He has since begun receiving Social Security disability, and has admittedly made no effort to seek suitable employment or otherwise return to work.

Based upon our de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled and even if he was, he would not be entitled to benefits because he has a scheduled injury.

Ark. Code Ann. § 11-9-704(c)(3) provides that "Administrative Law Judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly." It is undisputed that the claimant sustained a schedule injury under the Act. Ark. Code Ann. § 11-9-521(g) specifically provides:

Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in §11-9-519(b).

Ark. Code Ann. § 11-9-519(b) states:

In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.

Prior to Act 796 of 1993, the Workers' Compensation Act did not have a statutory provision allowing for permanent and total disability benefits for a scheduled injury. The award for a scheduled injury has always been limited to the schedule unless the claimant established by a preponderance of the evidence that he scheduled injury rendered him permanently and totally disabled under Ark. Code Ann. § 11-9-519. Moser v. Arkansas Lime Co., 40 Ark. App. 108, 842 S.W.2d 456 (1992), Supp. Op., 40 Ark. App. 114, 846 S.W.2d 188 (1993). Act 796 now provides a specific section addressing a claimant's entitlement to benefits in excess of the schedule. Ark. Code Ann. § 11-9-521(g). Accordingly, strictly construing the Act as the Commission is mandated to do, we find that we are guided and limited by the Act in awarding any benefits for a scheduled injury over and above the amount set forth in the schedule.

Ark. Code Ann. § 11-9-521(g) specifically states that a claimant is not entitled to benefits over and above the schedule except as provided in Ark. Code Ann. § 11-9-519(b). This provision only provides for permanent and total

disability benefits in limited circumstances. A claimant must have lost "both hands, both arms, both legs, both eyes, or any two (2) thereof" in order to be deemed permanently and totally disabled. The Act does not provide for any other circumstances in which a claimant with a schedule injury may be permanently and totally disabled. While we recognize that there may be circumstances in which a claimant with only one scheduled injury who does not satisfy the multiple losses set forth in Ark. Code Ann. § 11-9-519(b) may be permanently and totally disabled, the Act does not allow for an award of benefits greater than the schedule. Ark. Code Ann. § 11-9-1001 prohibits this Commission from adding coverage or expanding the scope of the statute; accordingly, we find that we cannot look to other factors beyond the loss of the extremities listed in §519(b) in determining whether a claimant with a scheduled injury is permanently and totally disabled.

When we analyze this claim under the provisions of Ark. Code Ann. § 11-9-519(b), we cannot find that the claimant has proven that he is permanently and totally disabled. First, the claimant did not lose a combination of any of the two extremities listed. In fact, the claimant has not lost any extremity whatsoever. The claimant has a 50% permanent impairment to his left leg. Further, the claimant

did not lose both of his eyes, nor did he lose any combination of the hands, arms, legs, or eyes that would constitute permanent total disability under §11-9-519(b). In short, a wage-loss determination on a scheduled injury is contradictory to the statutory interpretation.

Moreover, even if we were to find that the claimant was able to recover permanent and total disability benefits under the statute, a finding we do not make, we would find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent total disability benefits under the facts of this case. The claimant has failed to establish by a preponderance of the evidence that he is entitled to permanent and total disability benefits.

The medical reports from Dr. Lipke, the vocational consultation notes from Ms. Naylor and even the claimant's own testimony support the fact that the claimant can work in at least a sedentary capacity. As early as June 29, 2000, Dr. Lipke indicated that he believed the claimant was able to work in a sedentary work capacity, which is defined as "exerting up to 10 pounds of force occasionally and/or a negligible amount of force frequently to lift, carry, push, or pull. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of

time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." Additionally, Dr. Lipke initially indicated that he expected the claimant to be able to work in a light duty capacity within six weeks of his June 20, 2000.

The vocational consultant conducted a vocational assessment of the claimant and analyzed his physical restrictions, age, formal educational level, demonstrated educational level, as well as past and present work history. She compiled the information she collected into a Transferrable Skills Analysis report, after having met personally with the claimant on two occasions and with Dr. Lipke himself on one occasion. Using that information, Ms. Naylor was able to compile, on four separate occasions, Labor Market Survey Reports, which indicated suitable work available to the claimant in his community. With the exception of four or five of the jobs she located, each of the available employment positions was within the claimant's physical abilities, and (with the exception of a few jobs potentially requiring on-the-job training) within the claimant's mental and educational abilities as well.

In the past three years since his release from Dr. Lipke in August of 2000, the claimant has made only one attempt to seek employment; he has otherwise made no

effort whatsoever to find work or otherwise attempt to return to the workforce. After his release to sedentary work in August of 2000, the claimant spent the next several months doing essentially nothing. Finally, in December of 2000, the claimant decided he needed some Christmas money, so he went and applied for work at a local K-Mart. Though he did not get hired, his attempt to work was yet another indication of his ability to do so.

Dr. Lipke performed surgery to remove the hardware from the claimant's leg on April 2, 2001. The claimant was released back to sedentary work restrictions and declared that the claimant has reached maximum medical improvement on April 17, 2001. The claimant admittedly made no attempts to return to the workforce prior to his vocational rehabilitation in August of 2002.

When the claimant finally did decide to get active after his April 17, 2001, release, rather than searching for suitable employment, he made attempts to go fishing from a boat with a friend and to go deer hunting with another friend. Although the claimant claimed he was unable to get out and look for work, he admittedly had the physical wherewith-all to attempt to climb up into an eight foot deer stand during his hunting excursion in December of 2001.

In August of 2002, the claimant enrolled in the vocational rehabilitation program at Hot Springs Rehabilitation Center. He was provided medical and psychological evaluation, aptitude testing and opportunity for additional physical therapy recommended to him. The claimant never went to any of his scheduled physical therapy sessions.

The claimant was also provided with what was essentially a full-time, sedentary duty job through Abilities Unlimited. Despite those opportunities, the claimant reportedly complained of the low pay and grew dissatisfied with the program.

When the tragic occurrence of a friend's suicide interrupted the claimant's progress at the program, he left for two weeks, returned briefly, and then voluntarily quit the program in October of 2002. The claimant has admittedly made no subsequent efforts to seek suitable employment or otherwise return to the workforce. Since he is now receiving Social Security disability benefits, he has even less of a motivation to seek employment than before. Nevertheless, the claimant's underlying condition has not changed, and the evidence demonstrates he is at least able to work in a sedentary work capacity, earning meaningful wages, and that there are jobs within his capacity available for him

locally. The claimant has not proven by a preponderance of the evidence that he is permanently totally disabled. Accordingly, the decision of the Administrative Law Judge is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.