

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001905

SCHADE WALKER,
EMPLOYEE

CLAIMANT

MERIT ELECTRIC COMPANY,
EMPLOYER

RESPONDENT

CYPRESS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 23, 2004

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

Claimant represented by HONORABLE JEFFREY SLATON, Attorney
at Law, Springdale, Arkansas.

Respondents represented by HONORABLE WILLIAM FRYE, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The Respondents appeal part of an Administrative Law
Judge's opinion, filed July 3, 2003, which held that the
Claimant was entitled to wage-loss disability of 15%. After
a de novo review of the case, the Full Commission agrees
with the Respondents that the additional 15% in wage-loss
disability, on top of a 10% disability rating for an
unscheduled back injury, is not supported by a preponderance
of the evidence. Therefore, we deny the Claimant's claim
and dismiss.

This is the second time this case has been heard before
an Administrative Law Judge. The first order, filed
February 6, 2000, has become final and is considered *res*

judicata of all issues raised in and addressed therein. By agreement of the parties, the issues that were litigated and resolved in the present round of litigation were limited to the Claimant's entitlement to his current proposed program of rehabilitation, the Claimant's entitlement to permanent "functional" disability benefits should the proposed program of rehabilitation be denied, and the appropriate attorney's fee. In the instant case, the Administrative Law Judge denied the Claimant's proposed plan for rehabilitation, and that order was not appealed.

On or about February 6, 2000, the Claimant was involved in an accident that resulted in two permanent injuries to different portions of the Claimant's body. One of these injuries was to the Claimant's foot/ankle. The Administrative Law Judge found that this involved a portion of the Claimant's anatomy which is scheduled under Ark. Code Ann. § 11-9-521 (Repl. 2002). The other injury was to multiple levels of the Claimant's lumbar spine. This would be an unscheduled injury that would be controlled by Ark. Code Ann. § 11-9-522. The Claimant's unscheduled permanent injury resulted in a 10% permanent physical impairment to the body as a whole. The Respondents do not challenge that 10% disability rating.

In his July 3, 2003 opinion, the Administrative Law Judge stated that the majority of the Claimant's physical limitations are the result of the permanent scheduled injury to his right ankle and foot. However, the Administrative Law Judge also found that the Claimant has some limitations as a result of the unscheduled permanent injuries, among them: restrictions against repetitive or prolonged bending or twisting at the waist, heavy lifting, and prolonged standing or walking. The Administrative Law Judge stated that these physical restrictions "in and of themselves would preclude the Claimant from engaging in any type of heavy manual labor and many assembly line positions."

We are not convinced that such a position is supported by the evidence. At the hearing, there was this exchange between the attorney for the Respondents and the Claimant:

- Q. At the deposition, I asked you, "You had two distinct injuries, ankle and the back?" Are you with me so far?
- A. Yes.
- Q. You told me at your deposition that your back, just your back, would not keep you from returning to work at the job that you had at Merit Electric?
- A. No, it would not.
- Q. And I think you've indicated that as far as your back, you don't have any functional

restrictions on you that would keep you from working?

A. Correct.

Q. The back. Okay. Now, it's the ankle, actually, is the one that's keeping you from being able to go back to Merit Electric and those kinds of jobs?

A. Yes, it is.

(T. at 14-15)

The Claimant underwent a CT scan on his lower back on February 6, 2000. The radiologist's report stated that, while it was not demonstrated on the axial CT images, "I do believe this patient has very subtle superior end plate compressions at L2 and L3 which I believe are acute."

Also, on May 21, 2001, Dr. Carl M. Kendrick, a Fayetteville orthopaedist, noted that the Claimant's x-rays show a less than 25% compression fracture involving the anterior portions of L2 and L3, which the doctor stated were well-healed, but noted that they were both compressed. Dr. Kendrick stated, "I think he has an additional 10% permanent partial disability to his body as a whole as a result of these compression fractures that is outside and not related to his disability of his ankle. This is on a permanent nature. This is according to the AMA Guides to the Evaluation of Permanent Impairment, 4th ed."

Furthermore, Dr. Tom Patrick Coker, a Fayetteville orthopaedist, noted on June 8, 2001 that the Claimant was having problems with his ankle, specifically with weight bearing, and added that the Claimant needed a job where he could sit down, and that he should no longer be working on his feet. These comments were made in the context of the Claimant's broken ankle/foot, which Dr. Coker noted at the time would probably need an ankle fusion at some time in the future.

Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause.

Ark. Code Ann. § 11-9-102(14).

The record is void of any evidence that the Claimant suffers any more than the 10% disability rating tendered by Dr. Kendrick on May 21, 2001. The greater weight of the evidence seems to indicate that the Claimant's work restrictions are more as a result of his scheduled ankle/foot injury, and not the unscheduled back injury.

Thus, in our opinion, the ankle/foot injury is the major cause of the Claimant's impairment.

In determining wage-loss disability, the Commission may take into consideration several factors, such as the worker's age, education, work experience, medical evidence, and any other matters that may reasonably be expected to affect the worker's future earning capacity. See Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). While the Administrative Law Judge states that he considered those factors, he did not apply those factors to the facts of the instant case and gave virtually no analysis of how those factors affected his decision. The Claimant turned 30 years of age in January 2004. It is true that he has done mostly manual labor most of his working career. At the time of the latest hearing on April 21, 2003, the Claimant was enrolled at the University of Arkansas at Fayetteville with the intent to pursue an education degree that would allow him to teach junior high or high school mathematics. While his grades at the university are not stellar, he is certainly not, at the present time, in danger of failing out.¹

¹ The Administrative Law Judge made note of the Claimant's grades in school as part of the reason for denying his program of rehabilitation under Section 505(b). There, however, the Administrative Law Judge was less than confident of the Claimant's ability to obtain the degree that the Claimant has initially chosen, thus, he denied the Claimant's rehabilitation program under that section.

In looking at the evidence in the record, and considering such factors as the Claimant's age, education, work experience, and medical evidence, it is the opinion of the Commission that the Claimant has failed to prove by a preponderance of the evidence that he is entitled to an additional 15% functional disability rating for wage loss over and above the 10% already agreed upon by the Respondents.

In light of the foregoing, the Claimant's claim is hereby denied and dismissed for his failing to have proven by a preponderance of the evidence that he is entitled to an additional 15% functional disability rating for wage loss.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.