

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F008725

ROBERT CLEARY, EMPLOYEE	CLAIMANT
CLOUDY'S TRUCKING, LLC, EMPLOYER	RESPONDENT
PROTEGRITY SERVICES, INC., INSURANCE CARRIER	RESPONDENT
ARKANSAS GUARANTY FUND, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 13, 2005

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

Claimant represented by the HONORABLE JASON WATSON, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed

OPINION AND ORDER

Respondents appeal the decision of the Administrative Law Judge finding that the Claimant proved by a preponderance of the evidence that he was permanently and totally disabled. Based on our de novo review of the record, we find that the opinion of the Administrative Law Judge should be affirmed.

The Claimant is 52 years old, with a tenth grade education and a GED. The Claimant's job history consists of working for McDonald's, doing odd jobs, working on a dock unloading and loading trucks until the

age of twenty-one, when he started driving trucks. The Claimant testified that for the past twenty-five years he has worked for five or six different trucking companies driving trucks cross country. He testified that his duties required sitting for long hours, crawling over the inside and outside of trucks for inspections, as well as securing loads and maintaining the truck. On June 29, 2000, while working for Respondent, Claimant had just finished securing a load on his trailer when he stepped down, twisted, and fell on his left side. He testified that he broke several bones in his foot and leg and was taken by ambulance to the hospital where he received medical treatment, including surgery. Claimant testified that he was in the hospital for approximately one week and in rehabilitation another three weeks before he went home to North Carolina. When he was released to fly home, Claimant still had a hole in his leg right below his knee. He stayed at his sister's home where he received nursing care twice a day to change the dressings, as well as in-home rehabilitation and assistance with his daily care. He testified that after three weeks his knee became infected and he was referred to a neurosurgeon. He was admitted to the hospital for six weeks in isolation due to a Mercer strep infection which

is highly contagious. Due to the infection, Claimant nearly lost his leg and was required to undergo rehabilitation to learn to walk again. He was also required to use a wheelchair and now uses a cane to aid in walking, about 90% of the time. Claimant now uses a brace for stability when he has to be out for extended periods of time. As a result of his leg problems, Claimant testified that he has developed bad calluses on the bottom of his feet which hurt and that his hip and back also hurt when he walks. He also testified that he has trouble standing because he has to put all of his weight on his right leg.

The Claimant was assessed with a 53% impairment rating to his lower left extremity in March of 2001 by Dr. Zettl. At that time, the Respondent began paying permanent partial disability benefits and also employed a vocational rehabilitation specialist to try and determine if there were jobs that Claimant could perform. The Claimant testified that he can no longer climb into his truck or operate a clutch, so truck driving is not a viable option. The Claimant worked with Dawn Ellis, a Rehabilitation Specialist, who suggested that he go to the Employment Security Division to apply for a job. Claimant testified that he followed her direction, but since he did not have a release from

his physician there were no jobs that he could perform. Ms. Ellis then recommended other positions for Claimant, one of which was a shipping/receiving manager. However, the job required a large amount of lifting which Claimant was unable to do. The Claimant then took placement tests at Carteret Community College with the hope of learning computer skills. However, his English scores were so low that he was placed in a remedial class before he was allowed to begin the computer classes. At that point, Ms. Ellis was removed from Claimant's case. Claimant testified that he had difficulty attending school and that sitting at a desk cut off the circulation in his leg, causing swelling.

The Claimant testified that his symptoms have not improved and that they have, in fact, worsened. He explained that he has continual swelling in his left leg and that he is not able to climb stairs and that his right leg is painful because he has to use it for support when going up and down stairs. He testified, "My back, my hip, the leg itself and my ankle is in constant pain now."

The Claimant was assigned to a new rehabilitation specialist, Rosie Pasour. He met with Ms. Pasour to undergo a functional capacity evaluation, but this test was never administered. The Claimant

understood, however, that his restrictions were to avoid steps, crawling, restricted use of vehicles, a 10-pound lifting restriction and no bending. He received a letter from Ms. Pasour after her meeting with Dr. Zettl indicating that his case would be closed. The Claimant testified that Ms. Pasour did not recommend any job placement or vocational training for him.

Ms. Pasour, a vocational case manager for Rehabilitation Management, Inc., filed a report on February 16, 2004 regarding the Claimant. The report set forth that she visited with Claimant's physician, Dr. Zettl, and that he confirmed that his note indicated that he had a permanent impairment rating of 53% to the lower extremity. Her report also stated that Dr. Zettl did not think that the Claimant would be able to get a job because he would have to have a completely sedentary job that would require no lifting. Dr. Zettl also stated that he did not believe that Claimant could work full-time at a sedentary job. Dr. Zettl did not recommend a functional capacity evaluation for the Claimant because he felt that it would be too dangerous for him to participate in such an evaluation. Dr. Zettl recommended that the Claimant work five hours a day, five days a week.

The medical records and the Claimant's testimony reveal that he sustained a comminuted intra articular proximal fracture which was initially treated by Dr. Kresge at the Providence Hospital in Sandusky, Ohio. The records state that Claimant underwent open reduction internal fixation, with a Mercedes star incision to gain adequate access to the proximal tibial. The medical records also set forth that he underwent extensive medical treatment and complications, some life threatening. On August 22, 2000, the Claimant's treating physician noted that he discussed with the Claimant the seriousness of his wounds and explained that he was at risk of losing his leg if things did not improve. Additional surgery was recommended, as well as close medical management in order to save his leg. The Claimant underwent extensive follow-up care, as well as rehabilitation following this surgery. On January 21, 2001, Dr. Zettl assessed the Claimant with a 53% impairment rating to his left lower extremity due to his compensable injury. Dr. Zettl continued to treat the Claimant for his complaints of pain and associated medical problems resulting from his injury. Due to Claimant's instability with walking, he was fitted with a brace on July 6, 2001. Dr. James Craigie wrote on March 13, 2002, that due to the Claimant's compensable

injury and his extensive medical treatment, he is unable to walk or commute to a job. Also, Claimant's medications have impaired his ability to drive and concentrate. Claimant then underwent a resection of an exotosis on his left patella on January 8, 2003. During a follow-up visit on January 16, 2004, Dr. Zettl noted that the Claimant is ambulatory without assistive devices, but that he has chronic pain. Dr. Zettl wrote on February 13, 2004, that Claimant has a very severely compromised functional capacity in his left leg due to his knee problems. The doctor noted that the Claimant essentially has no patella tendon although he is able to walk without a brace as long as he is using a cane in his right hand. He continued by stating that the Claimant is at high risk of falling because of the abnormal mechanics of his knee and that he has rather severe intra articular changes radiologically related to the old fracture and has post-traumatic arthritis of the knee.

In light of the Court of Appeals recent decision in McDonald v. Batesville Poultry Equipment, \_\_\_ Ark. App. \_\_\_ (April 13, 2005), we find that Claimant is entitled to permanent and total disability benefits. For the reasons set out below, we find that the ALJ's opinion should be affirmed.

In McDonald, the Court rejected the Commission's holding that a scheduled-injury claimant is barred from seeking permanent and total disability benefits:

Here, the Commission ignored the clear language of Ark. Code Ann. § 11-9-521(g) that a scheduled-injury claimant "shall not be entitled to *permanent partial disability benefits* in excess of the percentage of physical impairment set forth above except as otherwise provided in § 11-9-519(b)" (emphasis ours). In finding that a scheduled-injury claimant is prohibited from entitlement to *permanent total disability benefits* in excess of the percentage of his physical impairment and that such a claim must meet the multiple-loss requirements, the Commission impermissibly expanded the statutory prohibition of a claim for permanent partial disability benefits except in a case of multiple losses. Thus, we hold that the Commission erred in finding that Ark. Code Ann. § 11-9-521(g) prohibits "benefits in excess of the schedule," and it erred in determining that McDonald, after sustaining a scheduled compensable injury, was statutorily prohibited from bringing his claim for permanent total disability under subsections 11-9-521(g) and 11-9-519(b).

In this case, Claimant has a 53% permanent impairment to his left leg. McDonald rejects the argument that a claimant must have sustained an injury to two limbs in order to be eligible for permanent and

total disability benefits. We, therefore, find that the Claimant is not statutorily prohibited under §§ 521(g) and 519(b) from requesting permanent and total disability benefits.

The Claimant may assert entitlement to permanent total disability benefits pursuant to Ark. Code Ann. § 11-9-519(c), which states that the determination of permanent and total disability is to be determined in accordance with the facts of the case. Section 519 (c) also provides a basis for permanent and total disability benefits in this case. Obviously, in juxtaposing Subsection b and c, the Arkansas Legislature was creating a presumption that certain multiple scheduled injuries would constitute permanent and total disability, but that all other cases would have to be determined based upon the facts of the case. Neither of those two sections was amended by Act 796 of 1993. If the Courts were to accept the respondent/employer position in this case, then they would not only be rewriting Subsection b, but they would be judicially repealing Subsection c. Obviously, this type of rewriting of the Workers' Compensation Act was what the legislature intended to prohibit when, also in Act 796 of 1993, they required the Courts to strictly construe the Workers' Compensation Act and forbade them from

attempting to rewrite its provisions through judicial interpretation. The Courts and the Commission have consistently held that the Workers' Compensation Act cannot be judicially amended by reference. That is, changes in one section of the Act cannot be interpreted to amend or otherwise change the language of different sections when the Legislature did not amend the sections in question.

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 Administrative Law Judge's decision was correct in finding that the Claimant had met his burden of proof as to whether or not he was totally disabled. The Claimant did not contend that he was entitled to permanent partial disability over and above the 53% assigned to his lower extremity. He argued that he is totally and permanently disabled, which he has proven by a preponderance of the evidence.

We further find that the ALJ's award of permanent and total disability benefits is overwhelmingly supported by the Claimant's medical record and other credible evidence and should be affirmed. When we consider Claimant's age; limited

education; work experience requiring physical capability beyond his current abilities; extensive limitations due to his physical condition including a 53% impairment to his left leg, almost constant use of a cane, inability to lift, inability to sit more than one hour or walk more than a short distance; work restrictions of sedentary work limited to no more than five hours a day for no more than five days a week; Dr. Zettl's assessment that Claimant is unable to engage in full time work and unable to return to his previous employment; and lack of transferable job skills and prior work in a sedentary position, we find that the ALJ's award of permanent and total disability benefits should be affirmed.

For the foregoing reasons, we find that Claimant is not statutorily barred from making a claim for permanent and total disability benefits and that he has proven by a preponderance of the evidence that he is entitled to those benefits.

All accrued benefits shall be paid in a lump sum without discount and interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the Claimant's injury occurred prior to July 1, 2001, the Claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, Claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

I 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 was provided vocational retraining but he decided not to pursue it for personal reasons. The claimant was given the restriction of working in a sedentary job that did not require lifting for five hours a day, five days a week, from his treating physician, Dr. Zettl.

The claimant testified regarding his abilities and level of education at the hearing:

Q. Mr. Cleary, you obtained your GED, you said, in 1974?

A. Yes, ma'am.

Q. Okay. And you're able to read and write okay.

A. Oh, yes.

Q. Okay. You don't have any problem doing paperwork, I think you said.

A. No.

Q. Okay. And you're able to take care of your own business, finances, things like that?

A. Yes.

Q. Okay. And - - and as we sit here today, you're - - you're pretty articulate - -

A. Oh, yes.

Q. - - as you are able to talk.  
Don't have a problem dealing with  
people, talking with them, anyway.

A. No.

Q. Okay. And - - and I believe  
you're computer literate. You told  
us about that in your deposition.

A. Well, to a certain extent. I - -  
it's what I've taught myself.

Q. Okay. Surfing on the Internet,  
stuff like that.

A. Yes. I can do that.

The claimant indicated that one of his  
interests would be to do web page design course at a  
community college. He testified about his attempt at  
retraining:

A. Okay. Okay. Were you the one who  
went to the college and found out  
the information on the web page  
[course]?

A. Yes.

Q. Okay. And, I believe, again, I'm  
looking at the reports here. I  
believe that you talked with a guy  
named Wayne Mayo, and maybe Sheila  
Wonns up at Protegrity about that?

A. Yes. Yes, I did.

Q. Okay. And it's my understanding  
that they had approved for you a 72-  
week program.

A. Yes.

Q. Okay. And that you initially went and got tested on April the 23<sup>rd</sup> of 2001. Does that sound about right?

A. That sounds about right.

Q. Okay. And that it was subsequent to that - - it looks like May the 11<sup>th</sup> of 2001 is when they approved the program, and you were going to start in the fall of 2001.

A. Yes.

Q. Is that right? Okay. Did you ever actually sign up for that program?

A. Never did.

Q. Okay, and they had indicated - - I think you said that you needed to take an extra English class, was it?

A. Yes, it was.

Q. Okay. You - - you've indicated, I believe, at one point that you are able to sit for 45 minutes at a time.

A. About.

Q. Okay. And you've sat here today for a little bit over an hour. Were - - were - - were the classes out at the college that we're talking about, were they longer than an hour?

A. They're - - they're approximately an hour long.

Q. Okay. And then you get a little bit of a break, and then you come back. Is that how it works?

A. Sometimes. Well, it depends on how - - it depends on your schedule.

Q. Okay. Is it like any other college where you might have a class and then skip an hour and then have another class?

A. Oh, yes.

Q. Okay, well I know - -

A. You could.

Q. - - some of those community colleges, they go from like eight to five - -

A. Yeah.

Q. - - and give you a break every so often. Do you know what their program was even like?

A. Oh, they have two or three - - two or three different programs. It depends on what you're going to.

Q. Okay. So you could have kind of picked and choose and set your schedule like you do in college, sort of?

A. Sort of - - well, no. It depends on when they're offering the classes.

Q. Right. But as far as - - if you wanted to take, for instance, English at eight o'clock in the morning and then a computer program that started at ten o'clock, you could - - if they had one that was offered, you would be able to choose that?

A. Well, no. First thing I had to do - - I had to take - - I had - - English had to be first, period.

Q. And get that over with?

A. Yeah. That had to be done before I could take any kind of computer classes at the school.

Q. Okay, you didn't - - didn't even go into that.

A. No.

Q. Okay. Excuse me. Now, you've told us here today that - - that you didn't feel like you would be able to do that college thing.

A. Uh-huh.

Q. Is that right?

A. That's right.

Q. And is that your - - your personal thought as you looked into it - -

A. That's - -

Q. - - figured it out, and just said, "No, this isn't for me"?

A. No, well, I didn't say it wasn't for me. I have to look at the - - the - - the implications. I go to a class and if my leg starts hurting I've got to get up. And I wouldn't want to be disturbed.

Q. So you were kind of thinking of other people in the classroom.

A. Yeah. I'm thinking of other people. I have to, you know - - I wouldn't want to be disturbed if - - if I was healthy and - - and people start - - gets up and walking around in class, that's no good.

Q. Well, I mean, if - - if - - if you had found out that it wouldn't disturb other people, that that

would have been a - - just an okay think for you to do, is that something you think you could have done?

A. Possibly.

Instead of looking into the possibility of sitting in the back of the room or making some other effort, the claimant just decided not to sign up for the class. He instead went on social security disability. When the claimant made the decision to pursue the web page design course, his vocational rehabilitation was concluded. Ellen Lee-Dudley, the vocational case manager who had been working with the claimant, indicated in her final report as follows:

On 5/11/[01], Mr. Cleary was contacted by telephone to confirm his appointment scheduled later that day. On 5/11, a meeting was held with Mr. Cleary at Carteret Community College Library. During the meeting, a sample job application was completed with Mr. Cleary along with a practice job interview. Mr. Cleary was coached on how to best answer interview questions, present a positive self-image, and prepare himself for job interviews. Overall, Mr. Cleary answered all questions clearly, concisely and effectively, appearing ready to begin the job search/interview process. According to Mr. Cleary, and based upon previous conversations he had with Wayne Mayo at Protegrity, Mr. Mayo has agreed to fund up to 72 weeks of training while continuing to pay Mr.

Cleary his workman's compensation benefits. Mr. Cleary stated, however, vocation services with CorVel Corp. would be terminated if he received job training. On 5/14, contact was made with Mr. Cleary to discuss contact with Wayne Mayo. Mr. Cleary was informed Protegrity could indeed authorize up to 72 weeks of training with a continuation of workman's compensation benefits if vocation services with the objective of job placement verses participating in training, and he elected to receive the training with a termination of vocational services.

The claimant in the present case has not established entitlement to permanent and total disability. The claimant has not made any effort to return to work that he has been approved to do. The claimant is receiving social security disability benefits and has no motivation to return to the workforce. Lists of jobs were provided to him within his restrictions, and he was given the opportunity to take a course on web page design, a pursuit he only feigned interest in initially.

Accordingly, I find that the claimant has failed to prove that he is entitled to permanent and total disability benefits. Therefore, I must respectfully dissent from the majority opinion.