

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H006548

KENTON LICONA-LOPEZ, Employee	CLAIMANT
HILBURN BUILDERS, Employer	RESPONDENT
ACCIDENT FUND INSURANCE, Carrier	RESPONDENT

OPINION FILED MAY 20, 2022

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by JAMES A. ARNOLD, II, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On February 2, 2022, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 19, 2022, and a Pre-hearing Order was filed on January 19, 2022. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 3, 2020, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his left eye on September 3, 2020.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$683.00 for temporary total disability benefits and \$512.00 for permanent partial disability benefits.
5. All prior opinions are final.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether claimant is entitled to payment of permanent partial disability for loss of his left eye, in the form of an anatomical impairment rating.

2. Whether claimant's attorney is entitled to an attorney's fee.

Claimant's contentions are:

"The claimant contends that he is entitled to payment of permanent partial disability for the loss of his left eye. The claimant reserves all other issues."

Respondents' contentions are:

"The claimant is not entitled to permanent disability benefits."

The claimant in this matter is a 47-year-old male who sustained a compensable injury to his left eye on September 3, 2020. As a result of that injury, the claimant's left eye became infected. The infection was quite severe and led to the removal or enucleation of the claimant's left eye. On September 17, 2020, the claimant underwent surgical intervention at the hands of Dr. Daniel Sines. Following is a portion of that medical report:

PROCEDURE PERFORMED: Enucleation of left eye with muscles attached with implant, dermis fat graft from the left side.

PREOPERATIVE DIAGNOSIS: Pseudomonal corneal ulcer nearing rupture with elevated pressure, blind painful eye, left side.

POSTOPERATIVE DIAGNOSIS: Pseudomonal corneal ulcer nearing rupture with elevated pressure, blind painful eye, left side.

The claimant has also asked the Commission to determine whether he is entitled to payment of permanent partial disability for the loss of his left eye in the form of an anatomical impairment rating. The claimant's eye injury and enucleation is considered a scheduled injury under the Arkansas Workers' Compensation Act and is controlled by ACA §11-9-52(a)(14) as follows:

(a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits

during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule:

(14) Eye enucleated, in which there was useful vision, one hundred five (105) weeks;

Clearly, the claimant's eye was enucleated due to his September 3, 2020, compensable left eye injury. The question at hand is whether the claimant had useful vision in his left eye prior to his September 3, 2020, compensable injury.

On September 28, 2020, the claimant was seen by Dr. Michael Waggoner at Boozman-Hof Regional Eye Clinic in Rogers, Arkansas. Following is a portion of that medical record:

HISTORY: The patient is a 45 year-old male who returns to the clinic for follow-up of corneal ulcer, left eye. The patient was last seen in the clinic today. This problem first began a week ago. Today the patient has blurred vision, pain, redness and tearing in the affected left eye. Since the last visit these symptoms seem to be steadily improving. He describes his vision as "very poor". Pt denies any cls use w/OS.. Pt reports possible happened at work. Pt did wear safety goggles, but would take off because would sweat and blur out vs. Pt says possible chemical that describes as glue to remove mold on aluminum might insert OS.. Pt states OD seems fine no pain or no discomfort W/od.. He has no other complaints today.

Next day Corneal Ulcer OS f/u

Os: unk pill for pain every 6 hrs as needed, Vancamycin, Q1h, and unk drop Q1H.

Impression:
Corneal ulcer; left eye.

Comment: No history of CTL use or injury.
Remote prior injury here has child.
No other prior eye surgery.
Culture ++Pseudomonas

Plan:
General:
Severe psudomonas ulcer total corneal necrosis and intraocular extension.

Aggressive infection worsening over the past two weeks.
On topical and systemic (IV Ceftriaxone in ER) treatment x48 hrs now.
Suspect occult perforation at some point.
There is no extrusion of intraocular contents.
The globe is firm to touch.
I personally confirmed NLP vision.
Historically, he has had a prior corneal injury as a child but reports blurry but functional vision prior to the corneal ulcer onset.

We discussed options here – heroic surgery vs topical meds vs enuc/evisc.

BScan unavailable today.
Will discuss with tertiary referral center – UAMS, DMEI, UMKC as to referral timing and consideration for surgical evaluation.

On September 14, 2020, the claimant was seen by Dr. Daniel Sines at Boozman-Hof Regional Eye Clinic in Rogers, Arkansas. Following is a portion of that medical record:

HISTORY: The patient is a 45 year-old male who returns to the clinic for a problem with his vision. He does not currently wear glasses or contact lenses. Pt states he was at work in Virginia. He felt that insulation went inside his left eye. Pt states OS was red and it was burning. Pt states 4 days later he was cleaning a laminate with chemicals. Pt states a drop of that chemical went into his left eye. Pt states that night he woke up in the middle of the night he woke up with severe pain. Pt states OS was completely shut and was having white discharge. Pt states he told his employer about the discomfort OS. Patient states when he arrived in Arkansas two days later after the chemical got into his left eye. Pt states that night he went Med Express then he was sent to Northwest Hospital. He is concerned about an episode of vision loss involving the left eye. The episode of vision loss involved the entire visual field. This episode was virtually incapacitating for him. The pain is a little better. He still has quite a bit of redness. He can see no light out of the eye. He has consulted with cornea who is concerned that the eye may have ruptured and is very thinned. He is not a good candidate for PKP, and they had discussed this possibility with UAMS. He is ready to have the eye removed and has come to terms with this.

EYE HISTORY: Corneal ulcer; OS; No history of CTL use or injury.
Remote prior injury here as child.
No other prior eye surgery.
Culture ++Pseudomonas.

IMPRESSION:

Corneal ulcer: left eye.

Comment: No history of CLT use or injury.

Remote prior injury here as child.

No other prior eye surgery.

Culture ++Pseudomonas.

Endophthalmitis (nonspecific): left eye.

Ocular pain: left eye.

PLAN:

General:

Enucleation/Evisceration: The patient has a history of a blind painful eye. This has failed medical therapy for treatment. This continues to cause significant symptoms. He has tried significant medical measures to save the eye, but it continues to worsen. Suspect rupture. Suspect endophthalmitis.

This is believed to more like than not be a work related injury as noted.

We discussed the differences between enucleation and evisceration. Enucleation requires removal of the sclera and muscles, which may result in some issues. Evisceration has a very low risk of continued pain or sympathetic ophthalmia, but likely has better movement and an extra layer of sclera to prevent extrusion or exposure.

We discussed implant sizing, volume loss, lid malposition (ptosis, ectropion), conjunctival or forniceal shortening, possible need for surgeries, need for a prosthetic maintenance, exposure or extrusion of implant (including infection).

Discussed either secondary implant placement vs dermis fat graft. There can still be infection that occurs in these cases. He would like to proceed with enucleation with dermis fat graft implant on the left side at NW.

We are able to answer questions following this discussion. There is low likelihood of improvement or symptoms given failure of previous treatments.

The claimant has continued to work for the respondent in this matter. Following is a portion of the claimant's hearing testimony about the work he has done for the respondent since his compensable left eye injury and how he believes removal of his left eye has affected him:

Q And during this last year, what kind of work have you been doing for them?

A Okay. Well, you know, I used to be the kind of person that I would do any kind of dangerous or risky job that they wanted me to do without any problem at all, but now I have to talk to the bosses and explain to them that there is just some things that I can't do anymore because I do have a fear now. It's like I get a fright.

Q What kind of things do you feel you can't do anymore?

A I can't drive the machinery anymore that they use to build the buildings because you have to sit way up high. On some of the machines it is 100 feet up. On others it is up to 140 feet in height where you sit.

Also, when you are building the buildings, sometimes you have to walk on the roof and it is really high up and that's -- there was one time that I was up high on top and it was like my vision went blank and I just froze. I couldn't move.

Q And what has made the difference from before your injury to now?

A Well, what affects me the most is the fear of height. You know, one side of my vision is dark, so anything on the left side I can't react to quickly. Sometimes I hit my head. It's just that concern that I am not going to see something. I don't have any peripheral vision anymore.

And my family life as well, this has really affected my son because sometimes he will be near me and I am concentrated on something else and I don't see him.

Q How old is your son?

A He just started walking. He is a year and a half now.

Q Okay. What things are you able to do at work still?

A Well, that is the part that -- that is why I am still working for them because the bosses -- At least the bosses that I work with are so understanding. I am mainly doing ground work, anything down on the ground, because that is where I feel comfortable. So a lot of times I am tying up the pieces of steel or iron that are going up, clean, pick up the trash. I am willing to do anything and I pretty much do anything on the ground and they say that's fine.

So sometimes there is an emergency situation at work, you know, we are understaffed, so every once in a while they need me to drive a machine and, you know, that requires me

going up high to drive it. So they will tell me when they need me to do that and they will say, look, jut do it as you can, so I do the best I can.

Q Before your injury in Virginia, did you have any trouble seeing out of your left eye?

A No, not at all. And at work they all know I had a good reputation. I did good work.

The deposition of Dr. Sines was also taken on March 30, 2021, and admitted into evidence. In his deposition, Dr. Sines discusses the state of the claimant's left eye prior to his September 3, 2020, injury as follows:

Q And he said quite clearly that he never -- sorry, let me find that -- he said that he had perfectly functional vision before this and that he did not have a problem with blurriness.

Now -- I'm sorry, that is wrong. He said he had blurry, but functional vision before this. Okay? That is what he said in his deposition.

So then Dr. Waggoner in his report of September 9th indicated under his plan under general, it says, "Historically he has had a prior corneal injury as a child, but reports blurry, but functional vision prior to the corneal ulcer onset."

So when you took his history, was that on the 5th/6th when you first saw him?

A Yes.

Q. Okay. And I know or I believe you said that you had a nurse translator in there with you?

A Correct.

Q But that you also understand a lot of Spanish; is that right?

A Correct.

Q We normally, like in a deposition, use a court certified interpreter because every single word is so important to have perfect. So I guess what I am asking you said he was, you said, in a lot of pain, very uncomfortable. Did you have the nurse translating or were you just kind of listening to a lot of it as well? Could this history be incorrect?

A I feel like the history is correct and I feel like the history he gave to Dr. Waggoner is probably also consistent with what

he is describing to me here because blurry is a very different thing to very different people.

So it goes back to what I was talking about before, you can have a loss of that center vision and be blurry; right? It may not be black. It may be just very blurry. Could he see the big E, which is 20/400? Could he see 20/100; right? But functional vision means that I still have my periphery and I can navigate around the room. I can see things in my periphery; right? So he is saying my eye was still functional. That fits. He didn't say my vision was black; right? You know, the question is how much periphery did he have so that he could still use that eye, even though it was blurry.

And for instance, I have people occasionally that come in to my clinic and they will have -- they will be the only person that came there themselves; right? So they drove themselves to the clinic and they have 20/400 vision in both eyes. Okay? Doctor, I can see fine to get here. I know where I am going.

Q I understand.

A And you are like you can't drive. You are 20/400; right? But they say, but I can see well enough to drive. So even at those levels people will still say, you know, it's not that bad.

Q Well, I understand that you already said you can't really know what his vision loss was except that perhaps it wasn't perfect. There was some blurriness there and we do not know. But Mr. Zuerker is trying to get you to say whether he is legally blind or whether he was legally blind before this happened and whether he's, you know, lost 80 percent of his vision.

A You know, a lot of these things are hypothetical. Certainly he has a history of an injury. He reports blurred vision. We don't know how blurred, but there is certainly some structural things related to an injury that were probably outside of this infection.

I wish we had some eye exam from ten years ago or five years ago that would suggest -- you know, even if they just had a measured visual acuity that would tell you what that was, whether that was on a driver's test, you know, something like that where he, you know, had some sort of an account of what the actual acuity was because they do assess peripheral vision and central acuity in some of those things. So we just don't -- we don't know what degree of vision he had.

Q Well, when he came in, he did not complain to you of prior to this injury not being able to see light, not being able to see. He said he could read some letters, I think. He said he could see, you know, things, I guess to work and function in his life.

A Correct.

Q So would you consider that to be useful vision, being able to see to the sides or being able to see light and dark and a step?

A Sure. Sure. And that's where you say, you know, even if by central acuity, when somebody says I was still able to see some letters, I could still see the big E; right? That's still legal blindness. It's 20/400, but you still have peripheral vision to work from that is useful. Okay. And we just don't know how much of that he had.

It sounds like he had a fair amount of vision, at least in the periphery, even though by legal standards it may have been legally blind if he is talking about seeing some letters, okay, but there is a lot of good that comes from having those parts of the vision still functional.

Q So the acuity is the straight on?

A Correct.

Q And the peripheral, of course, is around the edges?

A Correct.

Q So is that what makes up 100 percent, the 50 percent acuity and the 50 percent periphery?

A When we do an assessment for legal blindness, okay, it is based on the central acuity being worse than 20/200, okay, and the peripheral vision, either/or, being less than a particular degree. Okay. And so when we are making the determination does somebody meet the criteria for legal blindness, it's going to be using formal visual field testing to map how far out the visual field extends.

Q I understand.

A And so like we said before, he may have met a standard for legal blindness in primary gaze, but may not have with his peripheral vision. We don't know exactly how much periphery he had.

Based on what he says here with being able to see some letters, it sounds like it's not great vision, but still enough to navigate and do things and kind of, you know, was it the 9th that Dr. Waggoner had his conversations about that as well? Yeah. But reports blurry, but functional vision prior to that, so I think those are -- they are different ways of telling the same story. I

mean you are getting like two versions, but I don't think either one is telling something necessarily too different.

The claimant in this matter has, apparently, never been seen by an eye doctor or had any type of formal vision tests performed. Given the medical records admitted into evidence and the claimant's testimony, I do believe he had some form of deficiency in his left eye's vision. The surgical pathology report, performed on the claimant's left eye at Johns Hopkins reference laboratories in Baltimore, Maryland, by Dr. Charles Eberhart, found at Claimant's Exhibit 1 pages 35 and 36, does show evidence of prior damage to the claimant's left eye. However, it does not appear that the prior damage was severe enough to cause the claimant to lose usefulness of his left eye.

The claimant did have prior left eye vision difficulties, but the weight of the creditable testimony, medical evidence, and the deposition of Dr. Sines, points clearly to the claimant having useful or functional vision in his left eye prior to his September 3, 2020, compensable left eye injury, which was the major cause of his left eye enucleation. As the claimant had useful vision in his left eye prior to his compensable September 3, 2020, left eye injury, which was eventually enucleated due to his compensable injury, he is able to prove by a preponderance of the evidence that he is entitled to permanent partial disability for the loss of his left eye in the form of an anatomical impairment rating.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 19, 2022, and contained in a Pre-hearing Order filed January 19, 2022, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to payment of permanent partial disability for the loss of his left eye in the form of an anatomical impairment rating, which is valued at 105 weeks as a scheduled injury.

3. The claimant has proven by a preponderance of the evidence that his attorney is entitled to any attorney's fee in this matter.

ORDER

The respondent shall pay the claimant permanent partial disability benefits in the form of an anatomical impairment rating. That rating shall be paid with the value of 105 weeks at the permanent partial disability rate. The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one half of said attorney's fee to be paid by the respondent in addition to such benefits and one half of said attorney's fee to be withheld by the respondent from such benefits pursuant to Ark. Code Ann. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE