BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G708868

TIMOTHY MCELFISH, Employee	CLAIMANT
SUPERIOR FORESTRY SERVICE, INC., Employer	RESPONDENT #1
CNA INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED APRIL 7, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent #1 represented by KAREN H. MCKINNEY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although not present at hearing.

STATEMENT OF THE CASE

On March 8, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 21, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #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 the within claim.

2. The employee/employer/carrier relationship existed between the claimant and respondent #1 at all relevant times.

3. The claimant sustained a compensable injury to his low back while working for respondent #1 on May 4, 2017.

4. The claimant was earning sufficient wages to entitle him to compensation at the rates of $661.00 for total disability benefits and $496.00 for permanent partial disability benefits.

5. Claimant reached maximum medical improvement on October 8, 2020.

6. Claimant has sustained a 15% permanent impairment rating to the body as a whole. This rating has been accepted by respondent #1.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent disability benefits in excess of his permanent impairment rating.

2. Attorney fee on the rating as well as any wage loss benefits awarded.

At the hearing claimant acknowledged that his entitlement to pain management is not an issue, but has raised as an issue his entitlement to a dorsal column stimulator trial by Dr. Baker who is recommended by Dr. Blankenship.

The claimant contends that he is entitled to permanent disability greatly in excess of his impairment rating and that the Commission should determine the amount of permanent disability up to and including permanent and total disability. The claimant contends that his attorney is entitled to an appropriate attorney's fee. With respect to the dorsal column stimulator, claimant contends that Dr. Blankenship recommended that claimant see one physician for pain management and a second physician, Dr. Baker, for a dorsal column stimulator evaluation. Claimant requests approval for that evaluation.

Respondent #1 contends that the claimant has received or is receiving all benefits

to which he is entitled. Respondent #1 contends that temporary total disability benefits were paid from October 8, 2020 through November 11, 2020 for an overpayment of TTD benefits totaling $3,305.00 which have been applied to claimant's permanent partial disability benefits. Respondent #1 further contends that the claimant is not entitled to any additional permanent benefits over and above his anatomical impairment rating. Respondent #1 contends that it authorized pain management with Dr. Carlos Roman who addressed the dorsal column stimulator and determined that it was not reasonable. Therefore, respondent #1 contends that a dorsal column stimulator evaluation is not reasonable and necessary.

Respondent #2 defers to litigation on the extent of disability and does not owe an attorney fee. The Trust Fund waives its appearance at the hearing.

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 witnesses and to observe their 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 a pre-hearing conference conducted on January 21, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount

equal to 50% to the body as a whole for wage loss over and above his 15% impairment rating.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to an evaluation by Dr. Baker for a dorsal column stimulator.

4. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits. In addition, respondent #1 also controverted 1% of the claimant's 15% percent impairment rating attributable to his fourth and final surgery.

FACTUAL BACKGROUND

The claimant is a 49-year-old man who originally suffered an injury to his low back in 2013. As a result of that injury he sought medical treatment from a chiropractic physician, Dr. Notto, before being released and returned to work. Claimant subsequently sought additional chiropractic treatment from Dr. Underhill. In fact, claimant testified that before his most recent accident he and his wife would go to a chiropractor to get adjusted "whenever you get things out of place."

Claimant worked for the respondent performing maintenance on vans and trailers. This job required him to change tires, brakes, and perform some welding work. Claimant suffered an admittedly compensable injury to his low back on May 4, 2017, when he was moving some steel.

Claimant testified that he initially sought chiropractic treatment before he was referred to Dr. Allison for medical treatment. According to the medical records, Dr. Allison performed a decompression procedure at L4-5 on December 15, 2017. After this surgical treatment claimant was still having problems with his low back and he filed for and

received a change of physician to Dr. Blankenship. Dr. Blankenship has performed three surgical procedures on claimant's lumbar spine. On May 2, 2018, Dr. Blankenship performed a fusion at the L2-3, L3-4, and L4-5 levels. On October 31, 2018, Dr. Blankenship performed a fusion at the L5-S1 level. Finally, in March 2020, Dr. Blankenship redid the decompression at the L4-5 level, and also performed additional surgeries at the L2-3, L3-4, L4-5, and L5-S1 levels.

In a report dated October 8, 2020, Dr. Blankenship opined that claimant had reached maximum medical improvement. He also assigned claimant a permanent physical impairment rating in an amount equal to 15% to the body as a whole. While he released claimant from his care, he did note that claimant needed additional medical treatment in the form of pain management. Dr. Blankenship also ordered a functional capacities evaluation and subsequently referred claimant to Dr. Baker for a dorsal column stimulator evaluation.

Respondent #1 has accepted and paid permanent partial disability benefits based upon the 15% impairment rating assigned by Dr. Blankenship. Claimant has filed this claim contending that he is entitled to permanent disability benefits in excess of the 15% impairment rating up to and including permanent total disability benefits. In addition, claimant has raised as an issue his entitlement to an evaluation for a dorsal column stimulator by Dr. Baker as well as a controverted attorney fee.

ADJUDICATION

Claimant contends that he is entitled to permanent disability benefits in excess of his permanent physical impairment rating up to and including permanent total disability

benefits. "Permanent total disability" is defined by A.C.A. §11-9-519(e)(1) as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Furthermore, §(e)(2) states that the burden of proof is on the employee to prove the inability to earn any meaningful wage in the same or other employment. After my consideration of the relevant wage loss factors present in this case, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. However, I do find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

In considering claims for permanent disability benefits in excess of the impairment rating, the Commission may take into account various factors. These include the percentage of the physical impairment as well as the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. A.C.A. §11-9-522(b)(1). Here, the claimant is 49 years old. On direct examination, he testified that he did not graduate high school and did not remember how far he went in school. However, on cross examination, claimant acknowledged informing individuals at his functional capacities evaluation that he had an eleventh grade education. Claimant also acknowledged that he can read and write, perform simple math, and make change. He also testified that he has difficulty setting up a new cell phone, but can operate a cell phone. Claimant also acknowledged that he was able to use a computer at work in the performance of his job duties.

A review of claimant's prior jobs indicates that they have primarily been physical in nature. Claimant testified that his prior jobs have included work as a mechanic for

approximately a year where he was required to install motors, transmissions, and perform various mechanical work. Claimant also worked for a company in Russellville that manufactured metalwork such as conveyors for food companies. Claimant also performed that job for a year.

Claimant also worked as a millwright at various power plants and car plants. For instance, claimant testified that he spent approximately six months at a GM plant in Oklahoma City putting in new robots and tearing out old lines. He testified that this job required him to lift over 100 pounds with repetitive bending and stooping and that he often had to get in awkward positions to perform this job. He testified that he performed this job for approximately nine years. While working as a millwright, claimant also had some time off between jobs and during that time period he would perform construction work for his uncle, building homes and remodeling. This included framing, roofing, and concrete work.

Claimant also testified that he worked for Arkansas Electric on a line crew, installing new lines, trimming trees, and cutting with chainsaws. He testified that he performed this job for approximately three years.

Claimant testified that all of his prior jobs were more physically demanding than his job with respondent performing maintenance on vans and trailers.

Both claimant and his wife testified at the hearing that prior to his injury he was very active physically, with his physical activities including hunting, fishing, hiking, and vacations. Claimant testified that he does very little hunting now, and that it only consists of sitting in a ground blind in a chair which allows him to move inside the blind and permits him to alternate between sitting and standing at will.

Claimant testified that in the course of a typical day if it is cold he stays in the house, watches tv, plays with the dog, and sits in his recliner. Claimant testified that he is capable of placing laundry in both the washer and dryer, but does not fold laundry because he cannot stand for any significant period of time.

Specifically, claimant testified that he cannot sit for more than 10 to 15 minutes without moving, and that he has to alternate between sitting and standing about every 30 to 40 minutes. Claimant also testified that he wears a back brace which was given to him by Dr. Blankenship and that he uses a walking stick.

Both claimant and his wife testified that at times claimant's legs simply give out, causing him to fall.

Notably, claimant's treating physicians, specifically, Dr. Blankenship, have not opined that he is permanently totally disabled. While Dr. Blankenship did indicate that claimant was no longer able to return to his pre-injury job, he did not indicate that claimant was permanently totally disabled from working. Instead, Dr. Blankenship ordered a functional capacities evaluation which was performed on December 1, 2020. That evaluation indicates that claimant gave a consistent and reliable effort with 51 of 51 consistency measures within limits. The evaluation determined that claimant was able to perform work at the light physical demand level of work with an occasional lift/carry of up to 20 pounds and frequent lift/carry of up to 10 pounds. In contrast to claimant's testimony regarding his inability to sit or stand for any significant periods of time, I note that the evaluation addressed claimant's sitting and standing tolerance as follows:

> Mr. McElfish's ability to perform STANDING was assessed throughout the testing procedure and it was determined that he was able to Stand at the

> **Frequent** Level.
>
> Mr. McElfish's ability to perform SITTING was assessed throughout the testing procedure and it was determined that he was able to Sit at the **Constant** Level.

Thus, according to the evaluation which was determined to be reliable based upon claimant's effort, claimant's ability to sit or stand is not as restrictive as he indicated in his testimony. It is also significant to note the following notation in the evaluation:

> Mr. McElfish had a normal cardiorespiratory response throughout testing and he exhibited average cardio-respiratory conditioning throughout testing. No objective physiological sign of experiencing an acute pain exacerbation due to functional testing was observed or reported. (Emphasis added.)

Following the functional capacities evaluation, claimant returned to Dr. Blankenship on December 10, 2020. Dr. Blankenship placed a 20-pound weight lifting restriction on claimant after his review of that evaluation. Significantly, Dr. Blankenship did not indicate that claimant was permanently totally disabled or that he had any other physical restrictions.

Even though the evaluation determined that claimant was capable of performing work at the light physical demand level, and Dr. Blankenship only placed a 20-pound lifting restriction on claimant, claimant acknowledged that he has made no effort to look for any work. A claimant's lack of interest in returning to work is a factor which may be considered by the Commission. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984).

Finally, I note that although claimant continues to wear his back brace, Dr. Blankenship in his report of March 14, 2020 indicated that he informed claimant that he no longer has to wear his back brace.

In summary, after consideration of the relevant wage loss factors presented in this claim, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. However, I do find that claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. Claimant can no longer return to his job with the respondent or the jobs he has previously performed in the past due to his physical limitations. None of the jobs claimant has performed in the past would be considered at the light physical demand level. On the other hand, claimant is only 49 years old and he does have an eleventh grade education. In addition to his physical work while working for respondent, claimant was also a supervisor for the respondent, supervising three other employees. As previously noted, claimant was able to perform work on his computer at work and he also testified that he was capable of completing purchase orders while working for the respondent. Finally, it is important to note that claimant has made no effort to look for employment within his work restrictions. This is a factor which may be considered by the Commission.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 50% to the body as a whole for a loss in wage earning capacity.

The next issue for consideration involves claimant's request for an evaluation by Dr. Baker for a dorsal column stimulator. In his report of October 8, 2020 finding that claimant had reached maximum medical improvement and assigning a 15% impairment

rating, Dr. Blankenship indicated that claimant would need additional medical treatment. As a result, he referred claimant to Dr. Whatcott for further workup and evaluation. Claimant then underwent the functional capacities evaluation and returned to Dr. Blankenship on December 10, 2020, at which time Dr. Blankenship made the following recommendation with respect to further treatment:

> I have told him that I would recommend given the fact that he gave 51 out of 51 consistency measures that we get him in to see Dr. Baker for an evaluation of a possible dorsal column stimulator trial. *** I have again recommended that he get in to see a pain management physician and he will have to see a different physician than Dr. Baker for his pain management.

Claimant did not see Dr. Whatcott for pain management, but instead was referred by respondent to Dr. Carlos Roman for pain management. Dr. Roman evaluated the claimant on January 20, 2021, He indicated that he did not believe a spinal cord stimulator would be in claimant's best interest. Dr. Roman specifically stated that given claimant's MRI results, he did not believe a spinal cord stimulation would make an impression on the claimant's pain. Dr. Roman went on to reduce the claimant's opiates and encouraged use of over-the-counter medication.

Claimant has the burden of proving by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. *Dalton v. Allen Engineering Co.,* 66 Ark. App. 201, 989 S.W. 2d 543 (1999).

As previously noted, Dr. Blankenship referred claimant for both pain management and a dorsal column stimulator, but indicated that treatment would need to be from two different physicians. As a result, Dr. Blankenship referred claimant to Dr. Baker for a

dorsal column stimulator evaluation. While Dr. Roman has opined that he does not believe a spinal cord stimulator would be in claimant's best interest, I find that the referral of Dr. Blankenship is credible and entitled to great weight. Dr. Blankenship has been claimant's treating physician for the majority of his medical treatment. Based upon his opinion, I find that claimant is entitled to an evaluation by Dr. Baker for a dorsal column stimulator.

The final issue for consideration involves a controverted attorney fee. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole attributable to claimant's loss in wage earning capacity. In addition, claimant's attorney is also requesting an attorney fee on a portion of the 15% impairment rating accepted by respondent #1. During a discussion at the beginning of the hearing, the parties agreed that respondent #1 accepted and paid for the first three surgical procedures performed on the claimant. However, when Dr. Blankenship recommended a fourth surgical procedure, respondent #1 did not initially accept liability for that procedure, but instead referred claimant to Dr. Knox for an independent medical evaluation. As a result, claimant hired Mr. Walker as counsel and a pre-hearing order was filed on October 1, 2019, requesting additional medical treatment in the form of the surgery recommended by Dr. Blankenship. A hearing was scheduled on that claim for November 14, 2019. Respondent #1 subsequently accepted liability for that surgery and the hearing was canceled. Mr. Walker has agreed with respondent #1's contention that it was only the fourth surgery that was controverted.

Accordingly, I find that Mr. Walker is entitled to an attorney fee on that portion of the 15% impairment rating which is attributable to the last surgical procedure which was

controverted by respondent #1. In his report of October 8, 2020, Dr. Blankenship assigned claimant the 15% impairment rating. He initially assigned claimant a 9% impairment rating to the body as a whole for the fusion procedure, and then added an additional 3% for each adjacent segment that was operated on. He then noted that claimant had three surgeries which would also account for an additional 1% rating per surgery. According to Dr. Blankenship's fax to the adjuster dated November 25, 2019, he was performing a redo of the decompression at the L4-5 level. He was also requesting approval for additional procedures at the L2-3, L3-4, L4-5, and L5-S1 levels. Each of these levels had already previously been addressed in prior surgeries. Therefore, there were no additional levels which were addressed during Dr. Blankenship's most recent surgery. However, Dr. Blankenship did perform an additional surgery which according to his impairment rating entitled claimant to an additional 1% rating to the body as a whole. I find that that 1% additional impairment rating for the fourth procedure was controverted by respondent #1 and therefore Mr. Walker is entitled to an attorney fee on that 1% impairment rating.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. In addition, claimant is entitled to an evaluation by Dr. Baker for a dorsal column stimulator. Finally, respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 51% to the body as a whole. This includes the 50% attributable to wage loss and 1% attributable to claimant's

impairment rating.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum and without discount.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of $578.10.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE