

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
MIDDLE DIVISION

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CLAIMS COMMISSION
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JOHNNY MCBEE,)
) Claim No. 30090500023
 Claimant.)
v.) Workers' Compensation
)
STATE OF TENNESSEE)
) Regular Docket
 Defendant;)

FINAL JUDGMENT FOR CLAIMANT

This worker's compensation claim was tried before Robert N. Hibbett, Commissioner and Trial Judge of the facts and law, on June 30, 2014. The Honorable Matt McFarland, Esquire, appeared for the Claimant. Assistant Attorney General Joe Ahillen appeared for the State of Tennessee. The trial transcript was filed with the Commission on July 17, 2014. In support of their respective positions, the parties have filed the depositions of David A. West, D.O. and Melvin Law, M.D.

The Claims Commission has jurisdiction of this matter under Tenn. Code Ann. § 9-8-307(a)(1)(K), relative to workers' compensation claims by state employees. Pursuant to Tenn. Code Ann. § 9-8-403(i), the Commission makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Stipulations of the Parties

Defendant has paid to Claimant all temporary total disability benefits and medical benefits for his bilateral hip and lower back injuries. His workers' compensation rate for any permanent partial disability benefit is Four Hundred Ninety Seven and 44/100 Dollars (\$497.44). Lastly, because the Claimant is no longer employed by the State of Tennessee, the benefits are not capped at the 1.5 multiplier.

Although the State did not stipulate, it did not contest that on April 7, 2009, Claimant sustained an injury that arose out of and occurred in the course and scope of his employment with the State. Claimant provided notice of the injury to the Defendant on the same day and satisfied the notice requirement of the statute.

Claimant's Education and Training

The Claimant was fifty-one years old at the time of trial. Claimant graduated from high school and attended three and one-half years of college at Middle Tennessee State University when he joined the Navy. After he left the Navy, he received a Bachelor's Degree from Trevecca

University. He also has an Associate's Degree in computer networking technology from Nashville State Community College.

In the Navy, the Claimant was an aircraft technician. After discharge, he worked at computer related employment. He worked for a satellite dish installation company for a year and a half. He then worked for Wise Tech, a computer company, for another year and a half. Starting in 1997 until 2003, he worked for Xantus Health Plan of Tennessee until it closed. He worked for a year and a half at Mouse Pad, which was a computer software, training, and repair company until it closed. He then worked for a computer server company called Sungard until he started employment with the State in 2007.

His first job with the State was working as a help desk technician. He then transferred to the Treasury Department where he did computer and network support. He also did computer repair and worked on all the peripherals associated with computers. He was working in that capacity on the day of his injury on April 7, 2009.

Claimant's medical conditions prior to injury

While the Claimant was in the Navy, he injured his back and knees. He had a number of surgeries on his knees. When he left the Navy, he received a twenty percent disability rating on both his knees and a ten percent rating on his hearing. Since leaving the Navy, he has received an eighty percent disability rating from the government covering his knees, back, and hearing loss. Before the present injury, he was involved in a car accident that caused two bulging discs in his neck and he received a cervical fusion from Dr. Wesley L. Coker M.D.

Claimant's testimony concerning his work related injury

On April 7, 2009, Claimant was carrying boxes of toner cartridges down the stairs in the Andrew Jackson State Office Building where the Treasury Department is located. The boxes were blocking his view from the stairs and seeing where he was stepping. He thought he was finished with a flight of stairs so he took an extra-long stride. However, he had not come to the end of the stairs and the step was a long one to the floor. He probably missed two or three stairs. He caught himself with his right leg and jammed it into his hip. As he was falling forward, the boxes and the wall caught his fall, and he hit the wall very hard. His head was knocked

back by the boxes, and his neck was hurt. He reported his injury to his supervisor almost immediately after the incident.

His neck, back and hips hurt immediately after the incident. There was a sharp and tight pain in his back. Dr. Coker was his treating physician and eventually performed total hip replacement on both hips. Dr. Coker retired from practice and Dr. Melvin Law has treated him since then. Dr. Law performed a cervical fusion to another bulging disc in his neck.

Since his injury, the Claimant can no longer do any work outside. He cannot sit on a riding lawn mower because of the vibration. Inside his home, he cannot change light bulbs because he is unable to climb a ladder. He cannot move any furniture, run, or lift weights. He takes several kinds of prescription pain medication every day. The pain medication impairs his judgment and his driving. He also takes medication for depression. He does not believe he can work at a desk anymore because it would require him to sit down for long periods. He still has pain shooting from his back through his buttocks and down into his legs. He does not believe

he is able to do any work at all. The Tribunal accredits and believes the testimony of the Claimant.

Testimony of Dr. Melvin Law, Jr., M.D.

Dr. Melvin Law is an orthopedic surgeon with a subspecialty in spine surgery. He first saw the Claimant on June 26, 2012. In his physical examination of Mr. McBee, he found weakness in his left hip flexors as well as left quadriceps. He had severe difficulty with toe walking, heel walking and balance. He had decreased range of motion and pain in the facet joints of the spine. Dr. Law gave him a steroid injection in his back that gave him two weeks of relief. He eventually performed neck surgery on September 27, 2013 that consisted of a removal of a disc and a fusion at the C3-4 level of his neck. He noted that he had neck surgery at the C4-5 and C5-6 levels that was a result of his motor vehicle accident prior to his workplace injury. He performed the neck fusion because he had a herniated disc with spinal cord compression that was causing difficulties with walking and coordination. Dr. Law opined, within a reasonable degree of medical certainty, that the cause of the neck disc herniation was the workplace injury that occurred in April 2009. He testified that the

surgical procedure was medically necessary and the medical expenses associated were reasonable.

Dr. Law continued to treat the Claimant for back pain and he continued to have mild left leg pain and weakness radiating into his hip. His last visit with the Claimant was June 27, 2013. Although the Claimant continued to be in pain, there was no surgically correctable problem to evaluate at that juncture. Dr. Law recommended that he be evaluated for an electrical stimulator device. Although Dr. Coker performed the hip replacements on the Claimant, he confirmed that Mr. McBee had avascular necrosis in his hips that eventually necessitated the hip replacements.

Dr. Law's prognosis for Mr. McBee consists of sixty to seventy percent significant improvement with his lower back pain if he receives the dorsal column stimulator. He stated that the Claimant should avoid repetitive bending, lifting, twisting and any high impact activities. Dr. Law concluded that his injuries were caused by the incident that occurred in April 2009. He gave a 29 percent permanent impairment rating to the body as a whole for Claimant's hips and believes that he will have to have hip replacement again during his lifetime. Dr. Law gave a fifteen percent

permanent impairment rating to the body as a whole in relation to his cervical spine. He concluded that the permanent impairment rating for all injuries would be 40 percent. He agreed that the Claimant could no longer perform a sedentary desk job unless he had a good response to a dorsal column stimulator.

Testimony of Dr. David West, D.O.

Dr. David West is an orthopedic surgeon and is an expert in osteopathic medicine. Dr West was retained by the State of Tennessee to perform an IME of the Claimant. In performing the IME, he reviewed all of the Claimant's medical records from Doctors Coker and Law and performed a physical examination. He found the Claimant unable to do any heel or toe walking because of his balance. He did have good strength in both legs and had good reflexes. The sensory and motor examinations to both lower and upper extremities showed that they were intact. He opined that he had a work-related injury primarily and basically isolated to his low back. This included a sprain/strain to his low back and a sprain to his right hip. He did not feel that the hip replacements and spinal surgery were directly related to his workplace injury.

He did not believe that the hip replacements were related to his injury because avascular necrosis is an ongoing, pre-existing condition. It takes many years to show up on an x-ray. Before the injury, Mr. McBee already had signs of avascular necrosis because he has sickle cell trait. Sickle cell is the malformation of red blood cells that delays blood flow to many body regions, especially small capillaries. The avascular necrosis in Mr. McBee's hips could not have been caused by the low impact injury received on the steps, even if he landed in a certain way. There would have been fracture in the socket or hip joint. Dr. West did not believe the incident aggravated the avascular necrosis because this was a small impact caused by one or two steps.

He also did not see any correlation between the incident and the injury to Claimant's neck. Again, it was small impact that certainly did not cause disc disease to the level above the previous spine fusion. He felt that the condition of the spine (C3, C4) was an advancement of a preexisting, underlying condition. He had already had a fusion and it has been well documented that you can have problems with levels above and below previous fusions. He did not believe that the spine surgically fused by Dr.

Law was caused by trauma. He qualified his opinion by stating that there was a better than fifty percent chance that the neck injury was a natural progression of the problems existing prior to his workplace injury.

As far as permanent impairment from the injury to the low back and right hip, Dr. West calculated a combined three percent to the body as a whole. He concluded that his work related injuries would prevent Mr. McBee from bending, squatting and climbing.

CONCLUSIONS OF LAW

The Workers' Compensation Act is a remedial statute that shall be given an equitable construction by the courts, to the end that the objects and purposes of this chapter may be realized and attained. Tenn. Code Ann. § 50-6-116 (1999). Therefore, the Court interprets workers' compensation statutes so "that these laws should be rationally but liberally construed to promote and adhere to the Act's purposes of securing benefits to those workers who fall within its coverage." *Allen v. City of Gatlinburg*, 36 S.W.3d 73, 75 (Tenn. 2001) (quoting *Lindsey v. Smith & Johnson, Inc.*, 601 S.W.2d 923, 925 (Tenn.1980)). In this case, the statutes shall be liberally

construed in favor of Mr. McBee to compensate him for his workplace injuries.

Claimant is entitled to permanent partial disability.

Anatomical disability ratings are one factor to consider when measuring vocational disability. The ultimate issue is “whether there has been a decrease in the employee’s capacity to earn wages in any line of work available to the employee.” *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672 at 678 (Tenn. 1991). Relevant factors include “lay and expert testimony, the employee’s age, education, skills and training, local job opportunities, and capacity to work at the types of employment available in his disabled condition.” *Id.* Workers’ compensation law does not compensate a worker for pain and suffering, “except to the extent that such pain causes inability to work. *Trent v. National Union Fire Insur. Comp.*, 01S01-9411-CH-00137, 1995 WL 572073 (Tenn. July 28, 1995) (attached hereto).

The Claimant offered a vocational expert, Patsy V. Bramlett, in its proof and she concluded that the Claimant has a vocational disability rating of 100 percent based on Dr. Coker’s, Dr. Law’s and her assessments.

The Tribunal finds that the Claimant may well be 100 percent disabled but this was not caused by his workplace injury on April 7, 2009. The testimony shows that the Claimant injured his lower back, right hip and neck in the incident. It does not follow that his hip replacements were caused by the incident.

First, the Claimant never fell to the floor. He caught himself with his right leg that jammed into his hip. The medical evidence is clear and convincing that he already suffered avascular necrosis in his hips. Jamming one leg into one hip could not have caused the replacement of both hips. The Tribunal accredits the testimony of Dr. West on this issue. Therefore, the Tribunal shall not award permanent impairment benefits for both hips. However, the Tribunal will use Dr. West's impairment rating of 3% to the whole body for the strain to Claimant's lower back and right hip.

The neck injury is another matter entirely. While Dr. Law testified the neck injury was caused by the workplace incident, Dr. West stated there was a better than 50% chance that the neck injury was a natural progression from the car accident neck injury and subsequent surgery. This is a close question for the Trier of Fact. However, it seems to the

Tribunal that the April 7, 2009 incident, at the very least, aggravated the prior injury and caused its progression. The Tribunal accredits Dr. Law's testimony and accepts his rating of fifteen percent to the body as a whole for the neck injury.

Finally, the Tribunal must combine Dr. West's impairment rating to the back and right hip and Dr. Law's impairment rating to the neck. The Tribunal finds that the Claimant suffers an eighteen percent permanent impairment rating to the body as a whole and shall use this figure in the final analysis.

Because the Claimant has left State employment and cannot work for the Treasury Department again considering his medical condition, the Tribunal must choose a multiplier. It is apparent that the Claimant's neck issues are not the primary cause of his inability to work. Therefore, the Tribunal feels that a multiplier of 2.5 should be used to calculate his final rating of 45%. Thus, the Claimant shall receive permanent partial disability benefits of \$89,539.20.

The Tribunal further finds that the past, present and future costs of the Claimant's neck injury concerning the specific level that was fused is compensable and shall be paid by the State of Tennessee.

As for the costs of Dr. Law's deposition, the State of Tennessee is not liable for the fee charged by an expert utilized for trial, unless they are a treating physician or a specialist to whom the employee was referred for giving testimony by oral deposition relative to the claim. *Phillips v. Tennessee Technological University*, 984 S.W.2d 217, 219 (Tenn. 1998). The Claimant would not have prevailed in this claim except for the oral deposition of Dr. Law, his treating physician. The deposition charge is taxed to and payable by the State of Tennessee.

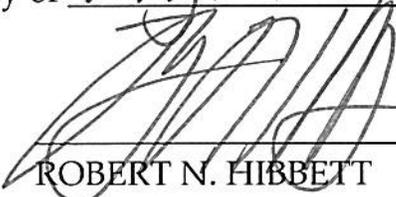
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. The Tribunal finds that the Claimant retains a 18% permanent partial impairment to his body as a whole as a result of his injury multiplied by 2.5 entitling the Claimant to receive \$89,539.20 in permanent partial benefits
2. The Claimant shall receive statutory lifetime future medical treatment pursuant to the Tennessee Worker's Compensation Law.

Said future medical treatment must be provided by an authorized physician and must be demonstrated to be reasonable and necessary for the treatment of the injury that occurred on April 7, 2009.

3. Claimant's Attorney is awarded 20% of the award.
4. Claimant's Attorney is awarded his statutory costs for Dr. Law's deposition.
5. The court costs, if any, are taxed to the State of Tennessee, including the costs of the trial court reporter.

ENTERED this 18 day of August, 2014.



ROBERT N. HIBBETT
Claims Commissioner

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 19th of August, 2014.



PAULA SWANSON
Administrative Clerk
Tennessee Claims Commission