

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113089

RUSTY CRAIG

CLAIMANT

BEATY LOGGING COMPANY,
UNINSURED

NO. 1 RESPONDENT

BEAN LUMBER COMPANY,
SELF INSURED

NO. 2 RESPONDENT

COMPENSATION MANAGERS,

THIRD PARTY ADMINISTRATOR

OPINION FILED AUGUST 22, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,
Sebastian County, Arkansas.

Claimant represented by ROBERT BLATT, Attorney, Fort Smith, Arkansas.

Respondent No. 1 not represented by counsel.

Respondent No. 2 represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 3, 2003, in Fort Smith, Arkansas. The deposition of Lavoyne Craig was taken on January 22, 2003, and has been admitted as Respondent's Exhibit No 7. The deposition of Dr. Anthony Capocelli, Jr. was taken on May 8, 2003, and has been admitted as Respondent's Exhibit No. 8. The deposition of Pam Shulick was taken on May 13, 2003, and has been admitted as Respondent's Exhibit No. 9.

A pre-hearing order was entered in this case on October 9, 2002. This pre-hearing order set out the stipulations offered by the parties, and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, there was a change in the stipulated compensation rates. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On November 16, 2001, the relationship of employee-statutory self insured employer-third party administrator existed between the claimant, Bean

Lumber Company and Compensation Managers, Inc.

2. The appropriate weekly compensation rates are \$171.00 for total disability and \$154.00 for permanent partial disability.
3. On November 16, 2001, the claimant sustained various compensable injuries to his head, neck, back, and arm.
4. The respondents have accepted liability for a permanent physical impairment of 25% to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Extent of permanent disability, including permanent total disability.
2. Attorney's fees.

In regard to these issues, the claimant contends that he sustained a compensable injuries while in the employment of the respondent on November 16, 2001, when a tree fell on him and that some of these injuries are permanent in nature. As a result, he maintains that he is entitled to permanent disability benefits.

In regard to these issues, the respondents contend that the claimant has been provided all reasonable and necessary medical treatment and benefits. The respondents specifically deny that the claimant is entitled to any permanent disability benefits for loss of wage earning capacity.

DISCUSSION

_____ The sole issue to be addressed at the present time, is the extent of permanent "disability" or loss of wage earning capacity. This would be in addition to the permanent physical impairment produced by the claimant's admittedly compensable injuries. As the claimant's permanent injuries are to "unscheduled" portions of his body, this issue is controlled by the provisions of Ark. Code Ann. §11-9-522. The burden rests upon the claimant to prove the existence and extent of any permanent "disability", attributable to

these “unscheduled” compensable injuries. He must also prove that these injuries are the “major cause” of any such permanent “disability”, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

Clearly, the claimant received extensive severe injuries in the employment related incident on November 16, 2001. These injuries included a partially depressed skull fracture with a small epidural hematoma, a displaced fracture of the right radius requiring open reduction and the use of internal fixation devices, a stab wound to the orbit of his eye, an anterior avulsion fracture of the C2 vertebra, a compression fracture of the T6 vertebra, and a severe “burst” fracture of the T5 vertebra that resulted in a subluxation and dislocation with retropulsion and scoliosis of the T5 and T6 vertebrae. The fractures of the T5 and T6 vertebral bodies required surgical intervention to decompress the spinal cord and exiting nerve roots and a three level fusion with the use of internal fixation devices, in order to stabilize these vertebral segments.

These various fractures to the claimant’s vertebral bodies at C2, T5, and T6, together with the resulting multi-level fusion, have resulted in permanent injuries to the claimant’s spine. The permanent physical impairment produced by these permanent injuries has been assessed to be 25% to the body as a whole by Dr. Anthony L. Capocelli, Jr., (a neurosurgeon and the claimant’s primary treating physician). The respondents have conceded the accuracy of Dr. Capocelli’s assessment and have voluntarily accepted liability for permanent partial disability benefits attributable to this degree of permanent physical impairment.

The greater weight of the credible evidence further proves that these permanent injuries have produced substantial restrictions on the claimant’s potential employment activities. Dr. Capocelli has medically restricted the claimant from engaging in any employments requiring frequent or extended bending of his neck, particularly in “looking up”. He has also restricted the claimant to only occasional lifting up to 20 pounds, frequent lifting up to 10 pounds, and constant lifting up to 7 pounds. A physical capacity assessment

was performed on the claimant at Dr. Capocelli's request. This assessment was interpreted as "valid" and indicated that the claimant can occasionally squat, reach up, bend, climb, stand and can frequently reach out, walk, and sit. The claimant is fortunate in that the fusion and resulting loss of spinal mobility involved his thoracic spine, rather than lumbar spine. Thus, his restrictions, particularly against bending and twisting at the waist, are not as severe.

In determining both the existence and extent of permanent "disability" the nature and magnitude of the claimant's permanent injuries together with the resulting permanent physical impairment and permanent physical restrictions, must be considered in light of the claimant's age, education, prior work experience, and all other matters which would be reasonably relevant to his employability. In this regard, the evidence shows the claimant to be of a relatively young age, only 22 years old. He has a high school education, but no particular technical or vocational training. His only prior work experience is in the "logging" field and farm work

After consideration of the evidence presented, it is my opinion that the claimant has failed to prove that his compensable injuries have rendered him permanently totally disabled. As previously noted, the claimant is of a relatively young age with essentially an average education. Although he has no particular technical or vocational training, and his prior work experience is limited, there would still remain a number of types of potential employment that would meet his physical limitations and for which he would otherwise be qualified. These jobs would primarily consist of lighter duty factory work and various sales or clerical positions. These possible employment exist in sufficient numbers, in the claimant's geographical area, to provide him with a reasonable expectation of obtaining regular gainful employment.

However, the physical restrictions produced by his compensable injury have substantially limited the number of potential employments, which would otherwise be

available to the claimant. He can no longer perform the position he held at the time of his compensable injury. He would also be prevented from holding any type of heavy manual positions, such as in construction. He would also be precluded from many factory or assembly line positions, which require constant standing and heavy lifting. Based upon the claimant's age, education, and previous work experience, these excluded types of employment positions comprise the majority of the potential employments that would have previously been available to the claimant in the general area of his residence. It is my opinion that this substantial reduction in the number of employments that would have otherwise been available to the claimant, has resulted in a substantial permanent partial "disability" or loss of wage earning capacity. I find this loss to be in the amount of 20% to the body as a whole. This permanent partial "disability" would be in addition to his permanent physical impairment of 25% to the body as a whole.

The remaining matter to be discussed is the respondents' contention that the claimant is currently barred from reaching compensation or benefits for this permanent partial "disability" or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-522 (b)(2). It is the respondents's argument that the proceeds or income from the farm, inherited by the claimant from his father after his compensable injury, should be considered as "wages" under the provisions of this subsection and that these current "wages" equal or exceed the average weekly wage earned by the claimant at the time of his compensable injury.

Clearly, the terms "income" and "wages" are not synonymous. Interest on investments, retirement benefits, and other annuities, and the occasional sale of assets (particularly, assets which have appreciated in value) can generate "income". However, these types of "income" are not generally considered as "wages". The term "wages" is generally limited to "income" that is received by an individual in exchange for that individual's labor or services. This is, in fact, the definition of the term "wages" give by Ark.

Code Ann. §11-9-102(19).

Had the claimant elected to sell his father's farm, the proceeds of that sale would obviously not constitute "wages", as that term is used in the Act. Had the claimant elected to lease or rent the farm, the proceeds of such a lease or rental agreement would not constitute "wages", as that term is defined by the Act. However, it appears that the claimant has elected to keep his father's farm, and to run or oversee its operation. Thus, the income he would derive from actually providing labor or services necessary to run or oversee the farm's operations would constitute "wages", as that term is generally defined and as it is expressly defined by Ark. Code Ann. §11-9-102(19).

The burden still rests upon the respondents to show that any "wages" the claimant has or is receiving from running or overseeing the farm's operation equals or exceeds the average weekly wage he was earning at the time of his compensable injury, Ark. Code Ann. §11-9-522(c). After consideration of the evidence presented, it is my opinion that the respondents have failed to meet their burden.

The records introduced by the respondents and the claimant's testimony, indicates that the egg producing portion of the claimant's farm operation grosses between \$50,000.00 and \$60,000.00, annually, for egg production. However, the evidence presented also shows substantial expenses are incurred, in order to maintain this egg production operation. The claimant's testimony also indicates that the farming operation receives some income from the occasional sale of cattle. However, the evidence again shows that substantial expenses have also been in maintaining this aspect of the farm operation. The income tax forms submitted by the claimant on the farming operation, during his tenure as farm manager, show a less than substantial profit on the entire farming operation. His personal income tax statement for this period indicates an income substantially less than the wages he was earning at the time of his compensable injury. The claimant's testimony also indicates wages less than his average weekly wage at the

time of his compensable injury. There is no evidence to show that the figures on these tax statements are inaccurate. I can not simply assume that since the farm operation grosses between \$950.00 to \$1,150.00 per week, the claimant's income as the farm manager must equal or exceed \$265.50.

Therefore, I find that Ark. Code Ann. §11-9-522(b)(2) is not applicable to the present claim. The claimant would be entitled to additional permanent partial disability benefits for permanent "disability" or loss of wage earning capacity herein awarded in the amount of 20% to the body as a whole.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 16, 2001, the relationship of employee-self insured statutory employer-third party administrator existed between the claimant, Bean Lumber Company, and Compensation Managers, Inc.
3. On November 16, 2001, the claimant earned an average weekly wage of \$265.50 which would entitle him to weekly compensation for total disability in the amount of \$171.00 and permanent partial disability in the amount of \$154.00.
4. On November 16, 2001, the claimant sustained compensable injuries to his head, cervical spine, thoracic spine, right arm, and face.
5. There is no dispute, at the present time, over the payment of expense incurred for reasonably necessary medical services for these compensable injuries.
6. There is no dispute, at the present time, over the claimant' entitlement to temporary disability benefits.
7. The respondents have conceded a permanent physical impairment of 25%

to the body as a whole and have accepted liability for permanent partial disability benefits attributable to this loss.

8. The claimant has failed to prove by the greater weight of the credible evidence that his compensable injuries have rendered him permanently totally disabled.
9. The claimant has proven by the greater weight of the credible evidence that his compensable injuries, specifically the compensable permanent injuries to his cervical and thoracic spines, were the “major cause” of a permanent partial disability for loss of wage earning capacity in the amount of 20% to the body a whole. This permanent partial disability is in addition to the 25% permanent partial disability to the body as a whole for permanent physical impairment. In all, the claimant has sustained a permanent partial disability of 45% to the body as whole, which includes permanent disability for both permanent physical impairment and loss of wage earning capacity.
10. The respondents have controverted the claimant’s entitlement to any permanent partial disability benefits in excess of 25% permanent partial disability to the body as a whole.
11. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on the permanent partial disability benefits herein awarded, which are in excess of 25% to the body as a whole.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a permanent partial disability of 45% to the body a whole. This includes permanent partial disability due to both permanent physical impairment and loss of wage earning capacity. The respondents are entitled to credit for all such benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory

attorney's fee on the additional controverted 20% permanent partial disability herein awarded. One-half of this fee shall be the obligation of the respondents in addition to such an award. The remaining one-half of this fee shall be withheld by the respondents from these benefits.

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.

MICHAEL L. ELLIG
Administrative Law Judge