

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105127

LAMAR FREEMAN

CLAIMANT

NUCOR YAMATO STEEL

RESPONDENT EMPLOYER

WAUSAU

RESPONDENT CARRIER

ORDER AND OPINION FILED SEPTEMBER 8, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on July 8, 2003. A prehearing conference was held on September 11, 2002 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a March 17, 2000, compensable injury.
2. The compensation rates are \$394/296.

The claimant contends that the March 17, 2000, injury has rendered him unable to perform any work, or, alternatively, that he has sustained wage loss beyond his impairment rating. The claimant also contends that he is entitled to a 32% permanent impairment rating, as assigned by his authorized treating physician, Dr. George Wood.

At the prehearing conference, the claimant also requested benefits for a permanent impairment rating for the urological problems.

The respondents contend it has accepted an 8% permanent impairment rating, as assigned by Dr. Ronald Terhune. The respondents contend that Dr. Wood's 32% permanent impairment rating does not utilize the *4th Ed., AMA Guides*. The respondents contend that there is no wage loss, since there are jobs the claimant can perform.

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 Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a March 17, 2000, compensable injury.
2. The compensation rates are \$394/296.
3. The claimant has proven by a preponderance of the evidence that he is entitled to a 54% permanent impairment rating following his compensable March 17, 2000, injury.
4. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

5. The claimant has proven by a preponderance of the evidence that he is entitled to 35% in loss of wage earning capacity benefits.

DISCUSSION

The claimant, 47 years old, was working on March 17, 2000, when a forklift hit him from behind, pinning him against a trash bin. The claimant was immediately taken by helicopter to the hospital in Memphis. Dr. Wood was the initial treating physician while he remained in intensive care and the claimant continued to see Dr. Wood at the Campbell Clinic. Dr. John Crockarell provided a second opinion on the claimant and Dr. John Lochemes provided a third opinion. The claimant also saw Dr. Ronald Terhune, a family physician. The claimant described his injuries:

My understanding is I broke my ribs, I broke my ribs in the front on my right side, front on the left side, and some on, I think, the right and the back side. I crushed my pelvis. The sacrum or sacral joint was, one of the plates was fractured and another one, I think, was cracked or had come loose or something. I got injury to my head. I lost three teeth up front. I have no bladder control. I have no male/female type function. I, I, I don't have any of that. I have problems, I guess, you know, resulting from that, you know, as far as like standing and walking, you know, because of injury in my back and my, and my pelvis area. (T., p. 21, lines 13-21.)

The claimant testified that Dr. Wood released him to return to work on sedentary duty. The claimant testified that he has to catheterize himself twice daily as he has no bladder control. The claimant testified that he has constant lower back pain and is unable to sit longer than 30 minutes without pain.

The claimant's sole source of income is his long term disability benefits of approximately \$2,900 per month. The claimant has filed for social security disability benefits. The claimant testified that he attempted to return to work for his employer

performing the same type job he was working before his injury. The claimant testified he worked one day and could not make it through the second day and returned to the doctor and was taken off work another eight weeks. According to the claimant, he returned to work and worked hit or miss until February 2002.

Under cross examination, the claimant verified that he worked as a cooling bed inspector where he inspected metal as it came out. The claimant verified that before he returned to work, he underwent a functional capacity evaluation. The claimant described his pain as down the middle of his behind, pain in the front of the right leg and the lower part of the back. The claimant is currently seeing a urologist and, in addition to his back pain, he has sexual dysfunction. The claimant testified he has not applied for other jobs.

The claimant testified that before his injury, he had no problems emptying his bladder nor problems walking, bending, lifting and doing physical things.

Rodney Washington, a co-employee, testified that as a cooling bed inspector, this requires a lot of walking, running, climbing on beams and lift steel at times. According to Mr. Washington, depending on the pace that the steel is running, the inspector has to sometimes physically run up and down elevated grating.

The claimant contends he is entitled to a 32% permanent impairment to the body as a whole pursuant to a rating assigned by Dr. George Wood at the Campbell Clinic. The claimant also requested an impairment for the urological problems at the prehearing conference but did not have a rating as assigned by a doctor for his neurogenic bladder condition. The respondents have accepted an 8% permanent impairment rating.

In order to be compensated for permanent partial disability benefits, the claimant must prove:

1. the compensable injury is the major cause of the permanent impairment, Ark. Code Ann. §11-9-102(4)(F) and (14) (Repl. 2002);
2. the impairment rating must be established by medical evidence, supported by objective findings, Ark. Code Ann. §11-9-102(16) (Repl. 2002), WCC Rule 34;
3. that the medical evidence must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16) (Repl. 2002); and,
4. that the AMA Guidelines be used as a guide in determining impairment ratings, Ark. Code Ann. §11-9-522(g) (Repl. 2002), WCC Rule 34.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality, which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine

whether the evidence shows the presence to produce the permanent physical impairment alleged by the injured worker. *Crow, supra*.

Ark. Code Ann. §11-9-704(c)(1) (Repl. 2002) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Act 796 of 1993 amended the Arkansas Workers’ Compensation Law to define objective findings as “those findings which cannot come under the voluntary control of the patient.” Ark. Code Ann. §11-9-102(16) (Repl. 2002). In addition, as amended by Act 796, medical providers, Administrative Law Judges and the Commission cannot consider complaints of pain when determining physical or anatomical impairment. *Id.* Furthermore, the amended law provides that, “for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings.” With regard to the medical findings other than those which are specifically precluded by the amended law, a medical finding is not objective if it is the product of a diagnostic procedure which comes under the voluntary control of the patient. *Dept. of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

The Commission has the authority and the duty to weigh medical evidence to determine its medical soundness and has the authority to accept or reject medical evidence. *Reeder, supra*; *Mack v. Tyson Foods, Inc.*, 28 Ark. App. 299 [28 Ark. App. 229], 771 S.W.2d 794 (1989); *Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984); *Farmers Ins. Co. v. Buchheit*, 21 Ark. App. 7, 727 S.W.2d 391 (1987).

Likewise, the Commission is entitled to examine the basis for a physician’s opinion, like

that of any other expert, in deciding the weight to which that opinion is entitled. *Reeder, supra*. However, as with any evidence, the Commission cannot arbitrarily disregard the testimony of any witness. *Reeder, supra; Wade, supra*. In making determinations regarding the existence and extent of anatomical loss of use, the Commission is not limited solely to medical evidence. *Id.*

On January 4, 2002, Dr. George Wood responded to claimant's counsel with his assessment of the claimant's orthopedic problems and arrived at a combined value of 32%. Dr. John Lochemes evaluated the claimant and on February 26, 2001, arrived at an 8% permanent impairment rating for the orthopedic problems. Dr. Lochemes utilized the *AMA Guides, 5th Ed.*; however, the 4th Edition of the *Guides* are in agreement with the rating. Dr. Wood's assessment in the rating dealt with right knee flexion and hip flexion as well as a substantially higher rating for the thoracic spine. Dr. Wood utilized the diagnosis related estimates (DREs) rather than referring to Table 75, page 113. After a review of the *AMA Guides, 4th Ed.*, I found that Dr. Lochemes' permanent impairment rating assessment more closely followed the *Guides* for the claimant's orthopedic problems and I concur with his 8% permanent impairment rating. The respondents have accepted the 8% permanent impairment rating.

The claimant had a more serious problem resulting from his compensable crush injury and this was diagnosed as a neurogenic bladder. The claimant testified that he has no bladder control and has to wear a condom catheter and must catheterize himself twice daily in order to more completely empty the bladder as to prevent infections. The claimant continues to need treatment related to his urological concerns

and has treated with Dr. Ragi D. Wiygul, Assistant Professor of Urology. While Dr. Wiygul did not assign a permanent impairment rating for the claimant's bladder problems, the bladder problems present some serious limitations and life altering changes for the claimant. A review of the *AMA Guides, 4th Ed.*, under Chapter 11.3, "Bladder", provides an impairment rating for a diagnosis of neurogenic bladder impairment and provides on page 255:

Class 4: Impairment of the Whole Person, 40% to 60%

A patient belongs in class 4 when there is no reflex or voluntary control of the bladder, that is, there is continuous dribbling of urine.

Impairment: 50% impairment due to total loss of urinary control.

The preponderance of the evidence provides the claimant's neurogenic bladder condition is considered a 50% permanent impairment to the body as a whole. If the combined value charts in the *Guides* are used to convert both the urological and the orthopedic ratings to a combined body as a whole rating, the total body as a whole rating would be 54%. See page 322 of the *AMA Guides, 4th Ed.* I find the preponderance of the evidence supports a permanent impairment rating of 54% to the body as a whole.

The Court of Appeals held in *Polk County v. Jones*, 74 Ark. App. 259, 47 S.W.3d 904 (2001):

Thus, in all cases where entitlement to a permanent impairment is sought by the claimant but controverted by the employer, it is the Commission's duty to determine, using the *AMA Guides*, whether the claimant met his burden of proof. This being the case, we hold that the Commission

can, and indeed, should, consult the AMA Guides when determining the existence and extent of permanent impairment, whether or not the relevant portions of the Guides have been offered into evidence by either party.

The claimant next contends that he is entitled to permanent and total disability benefits or alternatively, wage loss benefits. The claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522 (Repl. 2002). Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitates the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 664 S.W.2d 946 (1984). *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In the present case, the claimant is a 47 year old with a high school diploma, a two year stint in the Marine Corps where he trained to work on aircraft and another six to eight months vocational school work in auto mechanics as well as an associate degree in business management. The claimant has experience driving trucks and then his experience with the respondent employer as a cooling bed inspector. The claimant verified that he made \$81,036.77 in 1999 while working for the respondent employer. The claimant returned to work for the respondent employer following his injury on or about October 2000 and worked until February 2002, when he self terminated. The claimant testified he was no longer able to handle the physical demands of the job. The claimant testified that he continues to hurt down in the middle of his behind, in the front of the right leg and the lower part of the back, in addition to having to self catheterize himself two times a day and wear a catheter.

The claimant underwent a functional capacity evaluation on June 8, 2001 and David Brick, OTR/L, stated that the claimant was presenting symptom magnification and his complaints were inconsistent. Due to the claimant's performance and inconsistencies, no restrictions were given. Dr. John Lochemes, an orthopedic specialist, opined on February 26, 2001, that the claimant reached maximum medical

improvement and assigned the orthopedic impairment rating of 8% to the body as a whole with no restrictions.

Dr. George Wood, orthopedic specialist, opined on May 23, 2002, that the claimant was assigned a 32% permanent impairment rating to the body as a whole and that he should do no work, basically restricted to sitting or walking short distances. Finally, C. Greg Cates, Ed.D. of Health & Rehabilitation Counseling, evaluated the claimant and opined on March 6, 2003, in part: "When comparing his world of work opportunities prior to his injury to his current potential, it is my opinion that Lamar has experienced a ninety percent (90%) loss of vocational opportunity as a result of his injury and limitations." (Cl. Exh. No. 1, p. 23.)

The claimant is drawing monthly benefits from a long term group disability policy from his employer and the amount is approximately \$2,900 per month and he has applied for social security disability benefits.

After considering all the credible evidence, to include the wage loss factors to consider, I find the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. I find the claimant has proven by a preponderance of the evidence that he has sustained a 35% diminished wage earning capacity in addition to his permanent impairment rating. The claimant did continue to work for a period of time following his injury but self terminated. I found the claimant's account credible that his job was physical and demanding and that he worked hit or miss after his injury without regularity because of his health. Rodney Washington, a fellow employee, corroborated the claimant's account that the cooling bed inspector job was very physical and demanding. The claimant has not looked for other employment.

The claimant did sustain a serious crush injury but has now reached maximum medical improvement and has sustained a permanent impairment rating for his orthopedic problems and has been diagnosed with a neurogenic bladder following his injury at work. While these are considerations for returning to work, I find the claimant also has a good education and is very articulate and has opportunities for lighter work available to him.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to a 54% permanent impairment rating following his compensable March 17, 2000, injury. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. The claimant has proven by a preponderance of the evidence that he is entitled to 35% in loss of wage earning capacity benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**