

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F107407**

**CALVIN HEMPHILL, EMPLOYEE**

**CLAIMANT**

**CENTURY TUBE CORPORATION, EMPLOYER**

**RESPONDENT**

**CROCKETT ADJUSTMENT COMPANY, CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 11, 2003**

A hearing was conducted on May 22, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

The respondent was represented by Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on May 22, 2003, at Pine Bluff, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's average weekly wage was \$717.70, resulting in a temporary total disability rate of \$410.00, and a permanent partial disability rate of \$308.00.
3. The claimant sustained a compensable low back injury on June 26 2001.
4. The claimant's permanent impairment rating of 12% to the body as a

whole was accepted and paid by respondents.

The issues to be litigated at the hearing were as follows:

1. Is claimant entitled to wage loss disability over and above the 12% permanent impairment rating he received for his admittedly compensable low back injury of June 26, 2001?

2. Is claimant entitled to an attorney's fee?

The claimant testified that he 39 years of age and a high school graduate. During his life, he has worked at a truck stop, for Tyson Foods, Inc., at a grocery store, at a lighting warehouse in Memphis, and for respondent, Century Tube Corporation. He began working for respondent in November, 1997. The claimant testified concerning his injury:

"A. We picked a pallet up off the floor and we was fixing to wrap some rolls up and some stuff fell off and I bent down to pick it up and it was- - My leg was hurting but at the time I didn't think it was hurting that bad so I didn't - - I reported it to my supervisor later on that night, say about 7:00; this happened probably about 1:00 that day, but I reported it about 7:00. I kept on catching cramps in it. I thought I was catching- - I just thought it was cramps in my leg and I was eating a lot of salt and stuff but that didn't do it, so when I told him, he told me let everybody get a break and then he will, you know, send me- - Send my paperwork out to send me to get it checked out.

Q. Where were you sent to get checked out?

A. I went to Jefferson Regional Emergency Room because it was at night."  
(T-8)

The claimant testified that prior to his injury he was making \$10.50 per hour, plus overtime. The claimant was referred to Dr. P. B. Simpson, a neurosurgeon. The claimant subsequently had surgery on his low back, but according to the claimant

the surgery did not alleviate his pain and discomfort. He experienced back pain, stiffness, soreness and numbness in his toes. The respondent sent the claimant to see Dr. Reza Shahim. After an MRI, Dr. Shahim performed surgery on the claimant in December, 2001. That surgery improved the claimant's condition immensely. He returned to work on January 31, 2002, in a light duty capacity. When he returned to work he was making \$10.85 per hour. He returned to work on regular duty on October 7, 2002, after he was given a 12% permanent impairment rating to the body as a whole. That permanent impairment rating was accepted and paid by respondents. The claimant testified as follows concerning his income:

"Q. Now, I want to show you something. This is Claimant's Exhibit Two, Calvin, and you and I have been over this beforehand. That purports to be a copy of your 1999 W-2 from Century Tube. Is that a correct copy of that form?

A. Yes, sir.

Q. And it shows wages for that year of \$27,876.17, is that correct?

A. Yes, sir.

Q. And at the bottom of the same page is the W-2 for the year 2000 and that shows \$32,932.14 in earnings, is that correct?

A. Yes, sir.

Q. Now, were you getting overtime or were these bottom line payments for straight pay?

A. Overtime.

Q. Now, on page three of Claimant's Exhibit Two is your W-2 for the year 2001, is that correct?

A. Yes, sir.

Q. And it shows earnings there of \$18,537.92, is that accurate?

A. Yes, sir.

Q. So were you getting a fair amount of overtime then?

A. Yes, sir.”  
(T-11, 12)

The claimant testified that he had no other injuries since his accident. He is performing the same kind of work that he performed prior to his injury. He testified as follows:

“THE WITNESS: Right now I am doing the same job that I got hurt- - That I was doing when I got hurt. When I first came back in 2002 they switched me to a- - You know, sort of, I am not going to say easy job, but it was an upgrade in job and then they switched us to a different line. **Now I am doing the same thing I was doing when I got hurt, swage operator now. I am on the same job, identical job.**

JUDGE CURDIE: **Are you able to do the job?**

THE WITNESS: **Yes, sir.”**  
(T-16)

As of the date of the hearing claimant was making \$11.16 per hour. He is working overtime and has no physical problems performing his job, including the overtime hours.

Mr. James Falls testified for the respondents. He is the claimant’s supervisor at respondent/employer’s business. He testified that the claimant is performing the same job he performed before he was hurt, with no limitations. He gets regular raises per the company policy, and volunteers for overtime.

\_\_\_\_\_ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed at all relevant

times.

2. The claimant's average weekly wage was \$717.70, resulting in a temporary total disability rate of \$410.00, and a permanent partial disability rate of \$308.00.

3. The claimant sustained a compensable low back injury on June 26 2001.

4. The claimant's permanent impairment rating of 12% to the body as a whole was accepted and paid by respondents.

5. The preponderance of the evidence reflects that the claimant is not entitled to wage loss disability, pursuant to A.C.A. 11-9-522 (Repl. 2000.)

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#### **DISCUSSION**

The claimant seeks wage loss disability benefits. After reviewing the testimony and the evidence in this record, the preponderance of the evidence reflects that the claimant is not entitled to any wage loss disability benefits. The claimant sustained an injury to that portion of his body which is not scheduled under the Arkansas Workers' Compensation law. Therefore, the claimant's entitlement to permanent disability benefits is controlled by A.C.A. § 11-9-522. 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 workers' anatomical disabilities effects his earning capacity, as well as other factors such as the workers' 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). When it becomes evident that the workers' 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 the 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).

It appears that the claimant felt capable of performing most kinds of work. The claimant is able to work as many hours as he did in the past, and the preponderance of the evidence reflects that he is working many hours of overtime.

The record is void of evidence in support of an award of wage loss disability benefits. The claimant is holding down employment at comparable wages and performing just as strenuous a job as he was prior to his injury. The preponderance of the evidence reflects that the claimant is not unable to work due to a physical inability to work. Under these circumstances there is no basis to make a finding of wage loss disability. The evidence in the record simply fails to support a finding of wage loss disability. The claimant is making more money now than he did when he was injured.

See: Kelley v. Buildings, Inc., 2003, AWCC 123, (E706966), Full Workers' Compensation Commission Opinion filed June 18, 2003. The preponderance of the evidence reflects that the claimant is not entitled to wage loss disability. He has suffered no loss of his wage earning capacity.

The claimant's claim is denied and dismissed.

**IT IS SO ORDERED.**

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DON N. CURDIE,  
Administrative Law Judge

DC