

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103941

MARK POLK	CLAIMANT
QUALITY RENTALS, INC.	RESPONDENT
AMERICAN STATES INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JAMES FILYAW, Attorney, Fort Smith, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 3, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on April 30, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On March 23, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his back on March 23, 2001.

4. Medical expenses have been paid to date.

5. Respondents have accepted a 14 percent whole body impairment.

6. The parties stipulated that the respondent is due a credit of \$1,275.00 as a result of an overpayment to the claimant.

7. The claimant is entitled to a compensation rate of \$195.00 for temporary total disability and \$154.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Wage loss over 14 percent.
2. Attorney's fees.

The claimant specifically reserves all other issues including the issue of permanent total disability or an enhanced impairment rating.

In regard to the foregoing issues the claimant contends that as a result of his back injury, he has suffered and is suffering temporary total disability. At the end of his healing period, the claimant anticipates that he will have suffered a long loss of earning capacity.

In regard to the foregoing issues the respondents contend that they overpaid temporary total disability benefits in the amount of \$11,754.52. Claimant's PPD rating is the equivalent of \$9,702.00. Respondents contend that the claimant is not entitled to any additional indemnity benefits or wage loss benefits.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The parties submitted a joint medical exhibit marked Joint Exhibit No. 1. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that he was thirty-one years old and had gone to but not completed the eleventh grade. The claimant testified that he currently is working on getting his GED but has had no other special training since high school. The claimant testified that when he dropped out of high school he worked in a variety of fast food establishments and has also done factory work through the temporary service. The claimant testified that he worked for T J Max as a janitor for approximately eighteen months and had worked for the respondent for about two and one half years before he worked at T J Max.

The claimant testified that while working for the respondent he arranged furniture, did lifting and cleaning of the furniture and helped load furniture. The claimant explained that the respondent's business is a furniture rental establishment. It has been stipulated by the parties that the claimant sustained a compensable injury to his back on March 23, 2001, and that the respondents have accepted and have or are paying a 14 percent whole body impairment as a result of this compensable injury. The claimant testified that once he learned that his treating physician had rated him with an impairment rating and released him from his care, he began looking for work. The claimant testified that on January 15, 2003, he began working for Bost Human Development Center taking care of a young man helping him to integrate back

into the community. The claimant testified that he worked at this job until he and his wife moved to Jackson, Tennessee in March 2003. The claimant testified that once he was in Tennessee he got a job through a temporary agency working for about three weeks escorting trash trucks to the land fill. The claimant testified that as soon as the warehouse was cleaned out that the trash trucks were hauling from this job ended. The claimant testified that in the Jackson area he has applied at fast food places and other temporary job services but to date has not found employment.

On cross examination, the claimant agreed that he was able to drive a car or truck and does have a valid drivers licence. The claimant further agreed that he can read and write. The claimant agreed that when he began working for Bost Human Development Center he worked on the weekends earning \$8.00 an hour and during the week his wife worked at Bost and he kept their two children, ages two years old and nine months old. The claimant testified that he and his wife moved to Jackson, Tennessee as a result of their involvement with a church in that area. The claimant testified that at the escort job which he had in Tennessee he was paid \$7.25 per hour and worked a twelve-hour shift. The claimant testified that the escort job consisted primarily of sitting in a car and following behind the trash truck and he was able to do this.

The medical records, which are extensive in this matter, indicate that the claimant began receiving treatment for his compensable injury in March 2001 and continued to undergo tests and physical therapy throughout the year 2001. The claimant's medical

testing reveal that he has bilateral disc herniation at L4-5 and L5-S1. Dr. Anthony Capocelli operated on this claimant on February 22, 2002, for these disc herniation. Dr. Capocelli performed a bilateral L4, L5, S1 laminectomy with bilateral diskectomy L4-5 and L5-S1 with interbody arthrodesis and posterior lumbar interbody fusion utilizing allograft, lateral arthrodesis and pedicle screw instrumentation L4-L5 and S1 bilaterally with Stealth computer assisted foraminal stereo tactic guidance. The claimant was discharged on February 27, 2002, from St. Edwards Mercy Hospital on routine pain medications and a follow up in ten days. On March 9, 2002, Dr. Capocelli writes that the claimant's lumbar fusion is progressing well but the claimant has good days and bad days. The doctor notes that the claimant's x-rays look perfect and he is recommending that he go to the Arkansas Strengthening Center for six weeks of physical therapy. The claimant underwent extensive physical therapy throughout 2002, although it is noted that he missed several of his appointments and even wanted to cancel some of his therapy prior to his functional capacity evaluation. The claimant underwent a functional capacity evaluation on August 7, 2002, as a result of this evaluation, it was determined that he demonstrated the ability to work in the heavy category of work for an eight-hour day but even though he was able to lift in the heavy category, he did not meet the maximum occasional demands required by the respondent. This test reveals that the claimant was unable to complete the positional tolerance test because his heart rate exceeded 85 percent and it is further noted that the claimant

demonstrated consistency of effort throughout his testing. Dr. Capocelli writes on September 17, 2002, that although the claimant's current x-rays look reasonably well he is going to go ahead and place the claimant in a nine-month bone growth stimulator for which they will need to obtain x-rays every three months. Dr. Capocelli writes that he thinks the claimant is able to return to work, although he does not feel the claimant is capable of returning to the type job he had with the respondent because of the lifting in excess of what he is capable of doing. The doctor notes that the claimant is able to work in a heavy category with a maximum lifting of 60 to 70 pounds occasionally. Based on the A.M.A. Guides, Forth Edition, Dr. Capocelli rated the claimant with a 14 percent whole body impairment rating.

Based on the evidence presented in this matter, I find that the claimant has proven by a preponderance of the evidence that he is entitled to wage loss in the amount of 7 percent over and above his 14 percent impairment rating. This will give the claimant a total disability rating of 21 percent to the body as a whole. This assessment of wage loss disability is based on the claimant's age, limited education, limited transferable job skills, his 14 percent whole body impairment rating and his motivation to return to work. It is noted that the claimant seems very interest in finding employment which he is capable of performing and although his functional capacity evaluation categorized him in the heavy labor category, the type of jobs and work he had previously been able to perform will no longer be suitable for him and with his limited

education and lack of sophistication, his job opportunities will be limited.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On March 23, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his back on March 23, 2001.

4. Medical expenses have been paid to date.

5. Respondents have accepted a 14 percent whole body impairment.

6. The parties stipulated that the respondent is due a credit of \$1,275.00 as a result of an overpayment to the claimant.

7. The claimant is entitled to a compensation rate of \$195.00 for temporary total disability and \$154.00 for permanent partial disability.

8. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss in the amount of 7 percent over and above his 14 percent impairment rating. This will give the claimant a permanent partial disability rating of 21 percent to the body as a whole. See discussion above.

9. The respondents have controverted this claimant's entitlement to wage loss over his 14 percent impairment rating.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to wage loss in the amount of 7 percent over and above his 14 percent impairment rating. Therefore, the respondents should pay an additional 7 percent permanent partial disability for this claimant's wage loss.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such 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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE