

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009367

NOLAN W. WILSON,
EMPLOYEE

CLAIMANT

CONAGRA FROZEN FOODS,
EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 11, 2003

Hearing conducted before ADMINISTRATIVE LAW JUDGE WILLIAM R. DANIELS, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by MR. EDDIE WALKER, Attorney at Law, Fort Smith, Arkansas.

The respondents were represented by MR. BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 8, 2003 in Little Rock, Arkansas. A prehearing order was entered in this case on November 8, 2002. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

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

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

2. The employee-employer-carrier relationship existed between the parties on all relevant dates.
3. The claimant sustained a compensable specific incident injury on [August] 14, 2000.
4. The claimant achieved maximum medical improvement as of July 2, 2001 and received a permanent partial impairment rating of 17% to the body as a whole, which the respondents have accepted and are paying.
5. The respondents have accepted this claim as compensable and have paid \$10,165.50 in indemnity benefits and \$26,905.83 in medical expenses as of May 21, 2001.
6. The claimant earned sufficient wages to entitle him to \$251.00 for temporary total disability benefits, and \$188.00 for permanent partial disability benefits.

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

1. Whether the claimant sustained permanent disability in excess of his 17% permanent impairment rating and whether the claimant is

permanently and totally disabled and entitled to wage-loss benefits pursuant to Ark. Code Ann. §11-9-522.

2. Whether the claimant is entitled to a controverted attorney's fee.

DISCUSSION

The claimant became employed by ConAgra in September of 1998. On August 14, 2000, the claimant became injured in a motor vehicle accident when the feed truck he was driving from the Atkins facility for delivery to a farm rolled over and he was ejected through the windshield.

As a result of injuries sustained in the motor vehicle accident, Dr. Anthony Russell performed a C6-7 diskectomy and fusion on September 11, 2000. Dr. Russell's subsequent February 7, 2001 report indicates that the claimant was "back to normal" in regard to his neck and upper extremities as of that time. However, Dr. Russell also performed an L5-S1 diskectomy on March 13, 2001, also for injuries sustained in the accident. Dr. Russell's April 11, 2001 report indicates that the claimant's pre-surgery severe shooting pain in his right leg had resolved, but that the claimant was still experiencing aching, throbbing pain in his right leg. On June 20, 2001, Dr. Russell released the claimant to

return to work half days for two weeks following guidelines established in a prior functional capacity evaluation performed on June 14, 2001.

The claimant took Dr. Russell's return-to-work release to the respondent employer's office in Atkins, but did not again drive a truck for the respondents after turning in the release to return to work. As discussed above, the claimant asserts that he is permanently and totally disabled as a result of his compensable injuries, or in the alternative that he has sustained a significant impairment in his wage-earning capacity in excess of the 17% anatomical impairment rating accepted and paid by the respondents. The respondents assert that the claimant has failed to establish that he has sustained any impairment to his wage-earning capacity as a result of his compensable injuries.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may

reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors; Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

In the present case, the claimant was 48 years old at the time of the hearing. He went to the eleventh grade in school, but left school to enter the Navy. He obtained a GED shortly thereafter in the Navy. He underwent some types of specialized training in the Navy, but did not use any of that specialized training in his subsequent civilian working life.

After leaving the Navy, the claimant worked for a period installing television cable as a subcontractor. He attended an eight-week trucking driving school in 1987, and has been a professional truck driver essentially ever since. After obtaining his CDL in 1987, the claimant was an over-the-road trucker for TLI. He drove a dump truck in approximately 1994 or 1995 after the Little Rock tornado, and he delivered concrete in a mixer truck for approximately

three years before becoming a driver for ConAgra in September of 1998.

After considering the claimant's relatively young age, his education, work experience, the nature and extent of his compensable injuries and impairment, and all other relevant factors, I find that the preponderance of the credible evidence fails to establish that the claimant is permanently and totally disabled as he asserts. In reaching this conclusion, I am particularly persuaded by the fact that none of the physician reports in the hearing record, nor the functional capacity evaluations in the record, conclude that the claimant is permanently and totally disabled from returning to work. Quite the contrary, the functional capacity evaluation performed on June 14, 2001 indicates that the claimant is capable of returning to work at the moderate work level, and Dr. Russell released the claimant to begin a phased-in return to work at that level on June 20, 2001.

In concluding that the claimant is not permanently and totally disabled, I am aware that the claimant testified at the hearing held on April 8, 2003 that he gets pain in his low back and numbness in his low back and left leg when he drives 45 minutes to an hour. Further, in a deposition

taken on February 18, 2002, the claimant indicated that he experienced dizziness whenever he gets up or sits down, and he indicated that his sister does most of his driving. Clearly, left leg numbness and persistent dizziness are symptoms which would severely hinder a return to work as a professional truck driver.

However, in considering the weight to accord this testimony, I note a significant absence of reports of either dizziness or left leg numbness recorded in the medical reports in the record. Furthermore, I note that in a deposition taken December 19, 2002, the claimant testified that he was at that time driving, and that the longest trips that he took were to Little Rock (70 miles each way) and to Fort Smith (85 miles each way). Notably, the claimant indicated in his February 28, 2002 deposition that the farthest he was driving one way for ConAgra was only 65 to 70 miles delivering feed. Notably, even the "FCE" signed by Dr. Russell on July 16, 2001 purports to place only "mild" restrictions on the claimant's driving.

I have concluded that the claimant's contention of permanent and total disability is also inconsistent with the business cards that he was apparently distributing in 2002

and 2003 which advertised the availability of hay baling work and machine work.

Along those same lines, Dr. Ackerman's January 27, 2003 office note indicates that the claimant was then working part time, and Ms. McNerlin, who was present during that office visit, testified that she heard the claimant tell Dr. Ackerman during that visit that he was working part time. The claimant has explained that he has been performing some administrative financial duties and has been overseeing his grandfather's farm - Kelly Farms. He testified that he has driven a tractor to distribute round bale hay to cattle, but has not bushhogged, baled any hay, or performed any other machine work as advertised on his business cards.

In light of the functional capacity evaluations which indicate that the claimant can return to work at a medium work level and that the claimant has only mild restrictions on his driving, the lack of any consistent medical documentation of either dizziness or left leg numbness in the record, the testimony indicating that the claimant is in fact driving, the evidence which I find credible indicating that the claimant had returned to work part time by January of 2003, and the evidence which I find credible that the claimant was offered a return to work by the respondents at

the end of June of 2001 which he declined to try, I do not find the claimant's testimony regarding his persistent pain complaints, his dizziness, or his left leg numbness, sufficient to persuade me that the claimant is permanently and totally disabled from returning to any type of employment whatsoever.

On the other hand, as discussed above, the claimant has undergone significant surgery to both his neck and lower back, combining to cause an undisputed 17% anatomical impairment. I also note that Dr. Ackerman ordered a CT Scan and later concluded that the claimant's problems include epidural scarring affecting the nerve root in the claimant's low back. There is no dispute that Dr. Ackerman was prescribing the claimant narcotics for a period and that Dr. Ackerman does not prescribe narcotic medication for people who are not in severe pain. In addition to the claimant's pain complaints, the claimant's functional capacity evaluation records in evidence contain lifting and movement restrictions which I find from the claimant's description of his past jobs will impair his ability to perform peripheral duties in some types of trucking employment, in addition to the pain caused by bouncing while driving, should the claimant ever decide to seek additional employment as any

type of truck driver. If the claimant should decide not to return to trucking, but to instead enter into farm administration, as he apparently began doing since the time of his injury, I again note that the claimant's lifting and movement restrictions will impair his ability to perform manual labor, and he would appear to have few transferable jobs skills from his previous employment in the Navy, in cable construction, and in trucking, which will benefit him in farm administration.

After considering the claimant's age, education, work experience, and all other relevant factors, I find that the claimant has sustained a 24% impairment to his wage-earning capacity in excess of his 17% permanent anatomical impairment accepted and paid by the respondents in this case. I also find that the claimant's attorney is entitled to the maximum statutory attorney's fee allowed by law on the benefits awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The employee-employer-carrier relationship existed between the parties on all relevant dates.

3. The claimant sustained a compensable specific incident injury on August 14, 2000.

4. The claimant achieved maximum medical improvement as of July 2, 2001 and received a permanent partial impairment rating of 17% to the body as a whole, which the respondents have accepted and are paying.

5. The respondents have accepted this claim as compensable and have paid \$10,165.50 in indemnity benefits and \$26,905.83 in medical expenses as of May 21, 2001.

6. The claimant earned sufficient wages to entitle him to \$251.00 for temporary total disability benefits, and \$188.00 for permanent partial disability benefits.

7. The preponderance of the credible evidence in the record fails to establish that the claimant is permanently and totally disabled.

8. The claimant has experienced a 24% impairment to his wage-earning capacity in excess of the 17% permanent anatomical impairment accepted and paid by the respondents.

9. The respondents have controverted the claimant's entitlement to wage-loss disability benefits.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715; and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge