

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F012942**

<b>JEFFERY W. ASHCRAFT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>HEADLEES INDUSTRIAL COMPANY, EMPLOYER</b>	<b>RESPONDENT</b>
<b>HIGHLANDS INSURANCE COMPANY, INSURANCE CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 26, 2004**

Hearing before Chief Administrative Law Judge David Greenbaum on February 23, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted February 23, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on January 28, 2004, and a Prehearing Order was filed on said date. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant times, including October 24, 2000; that the claimant sustained a compensable injury on said date; that he earned sufficient wages to entitle him to compensation rates of \$388.00 per week for temporary total disability and

\$291.00 per week for permanent partial disability; that claimant's healing period ended August 14, 2002, and that the respondents had paid appropriate temporary total disability, to date; that respondents had accepted and were in the process of paying a twenty percent (20%) whole body impairment; and that the respondents controverted claimant's entitlement to wage-loss disability.

The primary issue presented for determination concerned the extent of claimant's permanent disability.

At the prehearing conference, the claimant contended, in summary, that he was permanently totally disabled as the result of his admitted injury, or, alternatively, that he had sustained wage-loss disability substantially in excess of his permanent impairment. Conversely, respondents contended that the claimant was limited to his permanent impairment while maintaining that the claimant had not sustained any wage-loss disability. Respondents further contended that the claimant refused to participate in or cooperate in a recommended program of vocational rehabilitation, thereby limiting him to his anatomic impairment. In response, the claimant maintained that a program of rehabilitation was not reasonably necessary and that he had not unreasonably refused to participate in any specific program.

At the February 23, 2004, hearing claimant amended his contention by withdrawing any claim for permanent total disability while, at the same time, continuing to maintain that he sustained wage-loss disability as reflected by

two (2) vocational evaluations, one performed by respondents' vocational expert and a second performed by the claimant's vocational expert. The claimant further pointed out that he had never been offered a plan or program of rehabilitation and that no specific course was ever identified. Claimant's attorney asserted that the first time he learned about a plan having allegedly been offered was in a January 28, 2004, letter. Claimant contended that the respondents should be sanctioned pursuant to A.C.A. §11-9-717 maintaining it filed a pleading with the specific purpose to harass the claimant and cause a needless increase in the cost of litigation. The issue of sanctions was first raised at the hearing. (Tr. 5-7)

The claimant testified in his own behalf. Terry H. Owens, a vocational rehabilitation specialist, was called as a witness by the respondents. The record is composed solely of the transcript of the February 23, 2004, hearing containing numerous exhibits.

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. The Arkansas Workers' Compensation Commission has jurisdiction over

this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence that he sustained wage-loss disability in excess of the twenty percent (20%) anatomical impairment sustained as the result of his October 24, 2000, injury and subsequent surgery. The claimant has sustained an overall permanent partial disability of forty percent (40%) to the body as a whole, specifically, a twenty percent (20%) permanent impairment and a twenty percent (20%) wage-loss disability.
4. Sanctions, pursuant to A.C.A. §11-9-717 are not appropriate in this case.
5. Respondents have controverted claimant's entitlement to all wage-loss disability.

#### DISCUSSION

\_\_\_\_\_The claimant, Jerry W. Ashcraft, age thirty-one (31) has a seventh grade education. After dropping out of school, the claimant received a GED. It is undisputed that the claimant sustained a significant back injury as the result of a specific incident identifiable in time and place of occurrence on October 24, 2000. At the time of claimant's injury, he was working as a sandblaster and painter for Headlees Industrial Company. His duties required him to lift heavy equipment in excess of fifty (50) pounds on a regular basis.

In addition, the claimant was required to be on his feet all day long. The claimant required back surgery as a result of the injury. As reflected by the stipulations, claimant's healing period ended August 14, 2002, at which time he was released with a twenty percent (20%) impairment. In addition, significant physical work restrictions were imposed upon the claimant. The claimant has not returned to gainful employment, however, the claimant's failure to return to work, in part, was the result of health problems involving the claimant's father. The claimant candidly acknowledged that there were various jobs that he was physically able to perform, and that he had in fact applied for some work. Although the claimant did not appear to be highly motivated, he dismissed any claim for permanent total disability. The record reflects that the claimant has undergone a functional capacity evaluation indicating that he is able to perform medium-duty work. (Resp. Ex. A)

The record reflects that the claimant was earning \$14.00 per hour at the time of his injury while working some over-time. The claimant's prior work experience has consisted primarily of heavy, manual labor. The claimant has undergone two (2) separate vocational evaluations, one by his own vocational expert and one by respondents' vocational expert. Various jobs have been identified as being within the claimant's physical abilities, all of which have entry level, starting salaries significantly less than the claimant was earning at the time of his injury.

### WAGE-LOSS DISABILITY

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination concerning 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 a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass vs. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross vs. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 living at that time, he is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manufacturing Co.*, 235 Ark.

195, 357 S.W.2d 504 (1962).

Respondent contend that the claimant refused to participate in or cooperate in a recommended program of vocational rehabilitation, thereby limiting him to his permanent impairment. Respondents' contentions that the claimant be limited to his permanent impairment is simply without merit.

Ark. Code Ann. §11-9-505 (Repl. 2003) provides, in part:

(b)(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or re-employment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the Commission finds that the program is reasonable in relation to the disability sustained by the employee.

(2) The employer's responsibility for additional payments shall not exceed seventy-two (72) weeks, regardless of the length of the program requested.

(3) The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, *no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause* with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

(4) A request for the program, if elected by the claimant, must be filed with the Commission prior to a determination of the amount of permanent disability benefits payable to the employee.

(c) This section shall not be construed as creating an exception to the common law regarding employment at will.

(d) The purpose and intent of this section is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determining appropriate by the Commission. (Emphasis supplied)

An injured worker's refusal to participate in rehabilitation cannot be treated as a bar to an assessment of wage earning loss. *Nicholas vs. Hempstead County Mem. Hosp.*, 9 Ark. App. 261, 658 S.W.2d 408 (1983). The Commission may properly take a claimant's refusal to pursue rehabilitation into account in determining his degree of disability where that refusal hinders the Commission's attempts to assess the extent of disability. However, even where the Commission did not consider the claimant's failure to request rehabilitation analysis to be an impediment to its determination of permanent total disability, which it found based upon the physical injury, age, education and unskilled, manual labor experience, the Commission was not required to consider the claimant's failure to request rehabilitation. *Second Injury Fund vs. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

After consideration of the claimant's age, thirty-seven (31), education, and work experience, it is herein concluded that an overall permanent disability finding of forty percent (40%) to the body as a whole fairly and accurately reflects the extent of claimant's permanent disability.

The only remaining issue, belatedly raised by the claimant's attorney, concerned his request that respondents be assessed sanctions pursuant to Ark.

Code Ann. §11-9-717. Claimant's amended contentions are not appropriate in the instant claim. Although claimant maintained that the respondents filed with this Commission a pleading that had been approached with the specific purpose to harass the claimant and cause a needless increase in the cost of litigation, there is no evidence of same. Further, A.C.A. §11-9-717(b) provides that appropriate sanctions, including the amount of reasonable expenses and attorney's fees, may also be imposed against a party or its attorney which, without good cause shown, fails to appear for a hearing, deposition, or other matters scheduled by the Commission or administrative law judge, or frivolously joins another party. No such action has been taken by the respondents. Accordingly, claimant's request for sanctions is denied and dismissed.

#### AWARD

Respondent, Highlands Insurance Company, is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$291.00 per week beginning August 15, 2002, and continuing for one hundred eighty (180) weeks, representing an overall permanent disability of forty percent (40%) to the body as a whole, twenty percent (20%) impairment and a twenty percent (20%) wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount.

Additionally, claimant's attorney, Mr. Philip M. Wilson, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to to Ark.

Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge