

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F108165**

<b>MATT P. HAMMONDS, III, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>UNIVERSITY TRUCK CENTER, EMPLOYER</b>	<b>RESPONDENT</b>
<b>RISK MANAGEMENT RESOURCES, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 28, 2004**

Hearing before Administrative Law Judge J. Mark White on June 22, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms Betty Demory, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On June 22, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on April 19, 2004, and a Prehearing Order was entered the next day. A copy of the April 20, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including July 10, 2001; that on July 10, 2001, the claimant sustained a compensable injury; that respondents accepted the July 10, 2001, injury as compensable and paid benefits, including a lump-sum payment for permanent partial disability of 16% to the body as a whole; and that the claimant earned an average weekly wage of \$616, entitling him to a compensation rate of \$410 for total disability benefits.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional permanent partial disability benefits; whether the claimant is entitled to vocational rehabilitation; in the alternative, whether the claimant has sustained wage loss in excess of his anatomical impairment; and controversion and attorney's fees.

The claimant contends that he sustained compensable injuries on or about July 10, 2001; that he has experienced impairment of 26% to the body as a whole; that he is requesting payment of benefits in connection with this impairment; that he is entitled to payment of vocational rehabilitation expenses, specifically the cost of starting a new franchise business; in the alternative, that he is entitled to a determination with respect to the extent of wage loss disability experienced over and above the 26% impairment rating; and that these matters have been controverted for purposes of attorney's fees.

Respondents contend that the claimant has been provided all appropriate benefits to which he is entitled; that the respondents have accepted and paid the claimant's medical expenses, temporary total disability benefits for 41 weeks, and permanent partial disability benefits for 72 weeks; that the respondents have already provided vocational counseling and evaluation to the claimant, and that the claimant has waived his right to vocational retraining or evaluation; and that the respondents are unaware of any additional benefits to which the claimant would be entitled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant has proven by a preponderance of the evidence that he has sustained permanent anatomical impairment of 25% to the body as a whole, supported by objective and measurable physical findings.
4. The claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his anatomical impairment of 25%.
5. Therefore, the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits of 25% to the body as a whole.
6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to vocational rehabilitation in the form of payment of his expenses for establishing a franchise of Vanguard ADA Systems of America.
7. The claimant has proven by a preponderance of the evidence that he has sustained wage loss of 25% over and above his permanent anatomical impairment rating of 25%.
8. The respondents have controverted this claim in its entirety.

## DISCUSSION

### I. History

On July 10, 2001, the claimant sustained a compensable injury to his low back while working as a diesel mechanic for the respondent-employer. He was initially treated by Dr. Susan Ebel, who diagnosed a lumbosacral strain and treated him conservatively. When an MRI exam revealed a disc herniation at L4-5 displacing the left L5 nerve root, she referred him to Dr. Scott Schlesinger. Conservative treatment failed, and Dr. Schlesinger performed surgery on October 23, 2001, a left L4-5 microdiscectomy. Dr. James Adametz then assigned a permanent anatomical impairment rating of 10%, which rating the respondents accepted and paid. The claimant then returned to work at the respondent-employer.

The claimant continued to have trouble with his back and ultimately came under the care of Dr. Anthony Russell. Dr. Russell performed a second surgery on June 4, 2002, an L4-5 partial hemilaminectomy and discectomy. Dr. Russell assigned a permanent impairment rating of 16% for both surgeries, and the respondents accepted and paid the additional 6%. The claimant reported that his pain completely resolved after the second surgery, and he again returned to work for the respondent-employer.

On March 10, 2003, the claimant returned to Dr. Russell with “a complete

relapse in his low back pain," which Dr. Russell attributed to his work. Dr. Russell performed a third surgery, a lumbar fusion, on April 3, 2003. After this surgery, Dr. Russell opined that the claimant could not return to his previous occupation as a diesel mechanic, and that the claimant has a high risk of future injury to the L5-S1 and L3-4 discs. Dr. Russell assigned a permanent impairment rating of 25%, plus 1% for the third surgery, to total 26%. The respondents denied this rating and have paid nothing beyond the 16% already paid.

The claimant has not worked since his third surgery. As of the hearing, however, he was receiving unemployment benefits and making the required job contacts.

## **II. Adjudication**

### **A. Permanent Partial Disability Benefits**

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any finding of

permanent impairment must be supported by objective and measurable physical findings. ARK. CODE ANN. § 11-9-704(c)(1)(B). Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a). The Commission has adopted the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition (hereinafter referred to as *AMA Guides*), for use in assessing the extent of permanent anatomical impairment. A.W.C.C. Rule 34 (July 1, 1995). The Commission is allowed to consult the *AMA Guides* when determining the existence and extent of permanent impairment, regardless of whether the relevant portions of the *Guides* have been introduced into evidence. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

The claimant’s most recent impairment rating is 26% to the body as a whole, as assigned by Dr. Russell after his third surgery. Dr. Russell wrote in his January 15, 2004, report:

Using the AMA Guidelines to the Evaluation of Permanent Impairment Fourth Ed. and basing this on Mr. Hammond’s previous history of surgery, including the patients clear cut evidence of loss of motion segment, integrity, [sic] and continuing radiculopathy (i.e. DRE lumbosacral spine impairment category #5, table [illegible], page 110) the patient would be entitled to a 25% impairment rating to the whole person. An additional 1% impairment rating would be added for the most recent operative procedure for a total of 26%.

To date the respondents have paid only the 16% rating assigned prior to the third surgery. At the hearing, the adjuster for the respondent-carrier testified as to her reasons for not paying the 10% difference between the last two ratings:

Because that, on the *AMA Guides*, was not based on objective findings; it was based on range of motion and not voluntary - - involuntary, the range of motion and things that are not usually based for lumbar surgery.

On cross-examination, the adjuster continued her explanation:

Q. Okay. Now it doesn't say anywhere in this letter that range of motion is being considered, does it?

A. If you will look up the table and page number, it does.

Q. It says "loss of motion segment." Right?

A. That is correct.

Q. Something that is seen on MRI, X-ray, that sort of thing. Right?

A. I don't believe so.

Q. Okay. Would you agree with me that the doctor would know more about that than you would?

A. Again, I just went by the tables as the doctor quoted, and looked them up in the *Guides*.

The Fourth Edition of the *Guides* provides two models for determining permanent impairment to the spine: the Injury Model, also referred to as the

Diagnosis-Related Estimates Model (DRE), and the Range of Motion Model. *AMA Guides* § 3.3. The *Guides* provide that the DRE model should be used first, and the Range of Motion model should be used only if an accurate impairment cannot be determined using the DRE model. *Id.* The DRE model is distinctive in that it makes no use of range of motion in determining impairment. *AMA Guides* § 3.3d. This is the model used by Dr. Russell to arrive at the base 25% rating.

An impairment rating for an injury to the lumbar spine may be determined using the DRE model by referring to Tables 70, 71 and 72, contained on pages 108 through 110. These are the tables consulted and identified by Dr. Russell, and referred to by the adjuster in her testimony. These tables make no reference whatsoever to range of motion, contrary to the adjuster's testimony.

These tables, combined with his letter, make clear that Dr. Russell arrived at a 25% impairment rating by noting three primary factors: that the claimant has had a prior spine operation; that he exhibited loss of motion segment integrity; and that he exhibited evidence of radiculopathy. *AMA Guides* § 3.3, Tables 70 & 72. The tables distinguish between unverified complaints of radiculopathy and actual evidence of radiculopathy; a 25% rating may be assigned only with the latter. *Id.* As for loss of motion segment integrity, the adjuster speculated this was a subjective finding, but the *Guides* clearly explain that this factor is determined by measuring the motion of

individual vertebrae with comparative x-rays (referred to as “roentgenograms”) – obviously an objective finding. *AMA Guides* § 3.3b; *AMA Guides*, Table 71. Dr. Russell explicitly identified these three factors in his letter; without some evidence to the contrary, by the terms of the *AMA Guides* the claimant is clearly entitled to an impairment rating of at least 25%. *AMA Guides*, Tables 70 & 72.

In short, the adjuster’s stated basis for denying the 26% rating is wholly without basis in fact or law. However, I do note one defect in the 26% impairment rating assigned by Dr. Russell. Though he assigned 25% based on Tables 70 and 72 of the *AMA Guides*, he added an additional 1% (for a total of 26%) for the claimant’s third surgery. The *Guide’s* Range of Motion model allows for the addition of 1% for each surgery. *AMA Guides*, Table 75. I can find nothing in the *Guides* allowing an additional 1% per surgery under the Injury/DRE model. Therefore, I cannot find that the claimant is entitled to that additional 1%.

I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent impairment in the amount of 25% to the body as a whole, supported by objective and measurable physical findings. The record contains no evidence of any pre-existing condition or other causal factor in the claimant’s impairment. I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his impairment.

Therefore, I find that the claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 25%.

### **B. Vocational Rehabilitation**

In addition to other benefits to which he may be entitled, a claimant is entitled to payment of “reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation” if it is shown (1) that the program is reasonable in relation to the claimant’s disability; (2) that the claimant is entitled to permanent disability benefits; and (3) that the claimant has not been offered reemployment assistance or an opportunity to return to work. ARK. CODE ANN. § 11-9-505(b)(1). “Maintenance” is not defined in the statute, but the Supreme Court has previously affirmed a Commission decision defining it as, “all (reasonable) additional living expenses incurred by the claimant as a result of pursuing his program of rehabilitation.” *Gray v. Armour & Co.*, 268 Ark. 1072, 598 S.W.2d 434 (1980). Like the remainder of the Workers’ Compensation Act, these statutory provisions must be strictly construed. ARK. CODE ANN. § 11-9-704(c)(3).

The claimant contends he is entitled to vocational rehabilitation in the form of payment of \$64,500 towards the costs of establishing his own business, a franchise of Vanguard ADA Systems of America. This sum is for payment of not only the

required training, but also the franchise fee and the equipment and other assets needed to start the business. I cannot conclude that the legislative purpose behind this statute encompasses the payment of franchise fees or the purchase of equipment for a new business. Likewise, I cannot conclude that such payments are “reasonable” within the meaning of the statute.

Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to vocational rehabilitation in the form of payment of his expenses for establishing a franchise of Vanguard ADA Systems of America.

### **C. Wage Loss**

In considering permanent disability benefits in excess of a claimant’s anatomical impairment, the Commission may consider “such factors as the employee’s age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.” ARK. CODE ANN. § 11-9-522 (b)(1). These “other matters” may include the claimant’s motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant has not returned to work, and the parties seem to agree that the claimant is no longer physically capable of performing his old job. A functional capacity evaluation performed November 26, 2003, determined that he is capable of performing medium-level work on a full-time basis. Specifically, the FCE indicated that the claimant's work should require only occasional bending, and that he should lift no more than 10 pounds constantly, 25 pounds frequently, and 50 pounds occasionally. The validity criteria measured by the evaluation suggested the claimant gave a valid effort. Dr. Russell, however, disagreed with the FCE results and opined that the claimant should not work in "anything greater than a sedentary work atmosphere." Dr. Russell continued:

Interestingly enough Mr. Hammonds did a very valid test, but it was his honesty in performing the test that ultimately would cost him. The problem with these tests are that they don't measure the amount of problems that the patient has on the evening and morning following the study. This is what raises my concern in this particular case.

In a similar vein, the claimant testified that although he can perform some work activities, he will "pay for it" over the next few days. He later agreed that he could not promise an employer he could be at work everyday, because there are some days he "just can't get going at all."

The respondents retained a vocational specialist, Gay Signoff, to assist the

claimant in returning to work. On May 14, 2004, Signoff prepared a "Labor Market Survey Report" that purported to list twelve available jobs within the claimant's restrictions. However, at the hearing Signoff admitted she did not know if all these jobs were within the claimant's restrictions; the claimant testified that he called about one of the jobs, a machine operator position paying \$11.21 per hour, only to find out that the job requirements were in fact outside his work restrictions. Excluding this machine operator position, the jobs listed on this report would pay, at minimum, an average weekly wage of \$313.99 – almost exactly half of the claimant's average weekly wage at the time of his injury.

The claimant has undergone three back surgeries; his treating physicians have opined that he is at high risk for a future back injury, and that he will require long-term narcotic medication. He is, at best, capable of only medium work, and perhaps only sedentary work. He is relatively young, only 33, with an 11<sup>th</sup> grade education. He has worked as an auto parts salesman, a customer service representative and a diesel mechanic. He testified that he has unsuccessfully attempted to return to work twice, and since the end of his healing period he has been actively making job contacts to receive unemployment benefits. These facts lead me to believe that he is motivated to return to work.

Considering all the wage-loss factors discussed above, I find that the claimant

has proven by a preponderance of the evidence that he has sustained wage loss of 25% over and above his permanent anatomical impairment rating of 25%.

### **AWARD**

The claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in the amount of 25%; and that he has sustained wage loss of 25% over and above his permanent anatomical impairment rating. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Gary Davis, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge