

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104316

LARRY PORTER, EMPLOYEE	CLAIMANT
BEAN LUMBER CO., SELF-INSURED EMPLOYER	RESPONDENT
COMPENSATION MANAGERS, INC., TPA	RESPONDENT

OPINION FILED JULY 23, 2004

Hearing before Administrative Law Judge J. Mark White on June 15, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Donald C. Pullen, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by Mr. Walter A. Murray, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 15, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on May 3, 2004, and a Prehearing Order was entered that same day. A copy of the May 3, 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 June 1, 2000; that on June 1, 2000, the claimant sustained a compensable injury; that respondents accepted the June 1, 2000, injury as compensable and paid benefits, including 12% permanent anatomical impairment; and that the claimant earned sufficient wages to entitle him to a compensation rate of \$317 for total disability and \$238 for permanent partial disability.

The parties agreed that the issues to be presented were whether the claimant has sustained wage loss in excess of his assigned anatomical impairment rating; and controversion and attorney's fees.

The claimant contends that he continues to have problem with his back and deep vein thrombosis; that he has been unable to work in any capacity; that he is 41 years of age, completed the 9th grade and has received a GED; that his past work history has been that of a fork lift driver, an employee for the respondent's lumber mill for approximately ten years, and other employment consisting of heavy equipment operator, truck driving and welding; that he is entitled to additional wage loss disability; and that he is entitled to attorney's fees.

Respondents contend that the claimant has already been provided all reasonable and necessary medical treatment and benefits.

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 claimant and to observe his 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 wage loss of 10% over and above his permanent anatomical impairment rating of 12%.
4. The claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage-loss disability in an amount equal to 10% to the body as a whole.
5. The respondents have controverted this claim in its entirety.

DISCUSSION

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 sustained a compensable injury to his low back on June 1, 2000, resulting in severe back, left hip and left leg pain. An MRI exam revealed a left paracentral disc herniation at L5-S1 with displacement of the left S1 nerve root; an osteophyte formation near the midline at L5-S1; and mild degenerative changes at L4-L5 with no nerve root impingement. After conservative treatment failed, Dr. Steven Cathey performed a bilateral lumbar decompression surgery at L5-S1 on November 28, 2001. Within a week of the surgery the claimant was diagnosed with postoperative deep vein thrombosis in the right leg. Though the clot was successfully treated, the claimant continues to complain of significant pain and

swelling in his right leg and foot attributable to it. The claimant testified that he must frequently either walk, or lay down with his leg elevated, to relieve the symptoms in his right lower extremity.

As late as April, 2002, the claimant reported to Dr. Cathey that the surgery had alleviated his back and leg pain. However, in a June 18, 2002, letter, Dr. Cathey reported that the claimant “really has not identified any significant improvement following surgery.” Dr. Cathey continued: “Although he concedes he is no longer experiencing the left hip and leg pain he noted preoperatively, he still has persistent chronic lower back pain. He also has chronic discomfort in the right leg related to the deep vein thrombosis he developed postoperatively.” In a December 10, 2002, letter, Dr. Cathey opined that the claimant “is always going to have a significant amount of pain and swelling in the right leg.... I really do not, however, see any clinical indication that he is experiencing lumbar nerve root impingement to explain his right hip and leg pain.”

Dr. Cathey ordered a functional capacity evaluation, which determined that the claimant is capable of working an eight-hour day at the light physical demand level. The evaluation revealed “significant functional deficits referable to the lower back” and recommended that he not perform work involving deep bending or squatting, frequent kneeling, standing or walking for more than one hour at a time,

or frequent stair climbing. The evaluation's validity criteria suggested "excellent effort and valid results."

Dr. Cathey assigned the claimant an impairment rating of 12% to the body as a whole for his back surgery and released him from care. The respondents have accepted and paid the impairment rating assigned by Dr. Cathey. Dr. Bruce Safman also evaluated the claimant and determined he had sustained no impairment as a result of the deep vein thrombosis.

The claimant is 42 years of age. He has a ninth grade education, but during his time off from work he has completed his G.E.D. He has no specialized training or job skills other than welding. As for his work experience, he was employed by the respondent-employer for ten years; he has also done farm and construction work, driven a log truck, and worked in a poultry processing factory. He testified that he worked in a supervisory capacity for the poultry processor, and he briefly worked as a cashier when he was a teenager.

The claimant testified that he continues to have cramps, weakness and pain in his left leg, and stiffness and pain in his back. He testified that he is unable to lift more than a 12-pack of drinks or a 10-pound bag of potatoes. The functional capacity evaluation determined that the claimant was capable of lifting 10 pounds frequently, and 20 pounds occasionally.

The claimant has other work limitations, particularly in regard to his right lower extremity, but these limitations are attributable to his postoperative deep vein thrombosis. This thrombosis was an injury to the leg, meaning it was a scheduled injury. The effects of a scheduled injury may not be considered in determining wage-loss disability benefits. *Federal Compress & Whse. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996). Therefore, in determining the claimant's entitlement to wage-loss disability benefits, I will give no consideration to limitations placed on the claimant by his deep vein thrombosis injury.

The claimant admitted that he has made no effort to find work. He also admitted that he is now receiving more than \$1,700 per month in tax-free Social Security disability benefits. He testified that before his injury, he had never made more than \$2,000 per month. Because he is effectively earning as much as he did while working, and because he has made no effort to seek work, I find that the claimant's motivation to return to work is limited.

Given the claimant's limited motivation to return to work, his relatively young age, his education, his supervisory experience, and the results of his functional capacity evaluation, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 10% over and above his permanent anatomical impairment rating of 12%. Therefore, I conclude

that the claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage-loss disability in an amount equal to 10% to the body as a whole.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage-loss disability in an amount equal to 10% to the body as a whole. 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. Donald C. Pullen, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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.

HON. J. MARK WHITE
Administrative Law Judge