

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F010438

GERVIS D. RAYBON, EMPLOYEE	CLAIMANT
IMPERIAL BLDG. CONTRACTORS, INC., EMPLOYER	RESPONDENT
ALLIANCE NATIONAL INDEMNITY CO., CARRIER	RESPONDENT

OPINION FILED MAY 25, 2004

Hearing before Administrative Law Judge J. Mark White on April 13, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 13, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on December 22, 2003, and a Prehearing Order was entered on December 29, 2003. A copy of the December 29, 2003, 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 August 28, 2000; that on August 28, 2000, the claimant sustained a compensable injury to his hip; that Respondents accepted the August 28, 2000, injury as compensable and paid indemnity and medical benefits; that Respondents have accepted and paid a 10% anatomical impairment rating as assigned by Dr. Richard Hilborn; and that the claimant earned an average weekly wage of \$314, entitling him to a compensation rate of \$209 for total disability and \$157 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 impairment rating; and controversy and attorney's fees.

The claimant contends that he has sustained wage loss in excess of the 10% anatomical impairment rating assigned by Dr. Richard Hilborn.

Respondents contend that all appropriate benefits have been and are continuing to be paid; that work was made available for the claimant by the Respondent-Employer and that the claimant failed to return to employment; and in the alternative, that the claimant should undergo a program of vocational assistance prior to any determination of wage loss disability.

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 failed to prove by a preponderance of the evidence that he has sustained wage loss in excess of his anatomical impairment rating.
4. The respondents have controverted this claim in its entirety.

DISCUSSION

The claimant sustained a compensable injury on August 28, 2000, to his head, arm, chest and right hip when a 1,000 pound steel pipe fell on him. He was treated for his injuries, and the respondents accepted the injury as compensable and paid benefits. On August 29, Dr. Richard Hilborn performed surgery to repair a right femoral neck hip fracture. The claimant recovered well, and by December Dr.

Hilborn was willing to release him to light duty. On April 25, 2001, Dr. Barry Green evaluated the claimant and assigned him an anatomical impairment rating of 25% to the right lower extremity for his hip fracture and surgery. The respondents accepted and paid the rating, which equates to 10% to the body as a whole. Dr. Green opined that the claimant "can go back to a 'sitting' type job now if one is available. Again, he still has a slight limp, so he is not there totally, yet."

In a July 22, 2003, letter, Dr. Hilborn reported that the claimant had developed arthritis and avascular necrosis of the right hip, both of which were "directly related" to his compensable injury. In his treatment note of May 30, 2003, Dr. Hilborn opined that the claimant will ultimately require a hip replacement. The claimant testified at the hearing that he currently walks with a cane; that he is capable of standing for about 45 minutes at a time, and that he is capable of walking about 500 yards at a time. He testified that because of his compensable injury, he is unable to lift heavy weights, to squat, or to do other features of his prior work. He acknowledged that he is capable of working while sitting down. He is currently receiving Social Security disability benefits of \$950 per month.

Since his injury the claimant has worked at two jobs. He worked for ten days supervising a tool shed on a job site for \$18 per hour. He also went to work for an envelope company for \$9.50 per hour, but he testified that the work there was

outside his medical restrictions and he eventually quit. He has also done work remodeling his uncle's bathroom and mechanic work for a cousin. He admitted that the respondents offered him a light duty job within his restrictions but he refused to return to work for them. He has failed to pursue vocational rehabilitation.

The claimant was 50 years of age at the time of the hearing. He has a high school diploma, but no vocational or technical training. He has 18 years of experience in construction and heavy equipment operation; two years of experience as a truck driver; and five years of experience as a millwright.

In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, 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 evidence shows that the claimant is capable of working. Though he testified that he was unable to do the work at the envelope company, he was able

to successfully work within his restrictions supervising a tool shed for \$18 per hour. If he were to find a similar full-time job at even half that pay, he would still be earning more in wages than he earned at the time of his injury. It appears undisputed from the evidence that the claimant is capable of working a light-duty, sit-down job. The only limitations appear to be the job market in his area, and his lack of motivation to work – that he is on social security benefits and has neglected to seek rehabilitation leads me to believe his motivation to work is not high.

Given the claimant's education, physical work capabilities, wage-earning history since his injury, and lack of motivation, I find that the claimant has failed to prove by a preponderance of the evidence that he has sustained wage loss in excess of his anatomical impairment rating.

AWARD

The claimant has failed to prove by a preponderance of the evidence that he has sustained wage loss in excess of his anatomical impairment rating. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge