

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F313048

DAVID STOCKTON, Employee	CLAIMANT
BRUCE JONES CONSTRUCTION, Employer	RESPONDENT
STATE AUTO MUTUAL INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED NOVEMBER 30, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by J. LESLIE EVITTS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On November 8, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on July 14, 2004, and a pre-hearing order was filed on July 15, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his back on November 25, 2003.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$394.00 for total disability benefits and \$296.00 for permanent partial disability benefits.
5. The claimant's healing period ended by at least April 23, 2004. There is no

dispute over temporary total disability benefits.

6. Respondent has accepted and is paying permanent partial disability based upon an 8% rating to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent partial disability benefits for wage loss.
2. Attorney fee.

The claimant contends he is entitled to permanent disability benefits greatly in excess of the 8% impairment rating. The claimant contends his attorney is entitled to an appropriate attorney's fee.

The respondents contend the claimant is not entitled to permanent partial disability in excess of the 8% accepted by respondent.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 14, 2004, and contained in a pre-hearing order filed July 15, 2004, are hereby accepted as fact.

2. Claimant is entitled to permanent partial disability benefits in an amount equal to 8% to the body as a whole attributable to wage loss.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 8% to the body as a whole.

FACTUAL BACKGROUND

The claimant is a 30-year-old man who has worked off and on for the respondent since 1996. Claimant began working for respondent as a general laborer, but subsequently performed many job duties including physical labor as well as supervisory-type duties. Claimant suffered a compensable injury to his low back on November 25, 2003 while in the process of lifting a concrete saw. After some initial medical treatment from Dr. Engelhoven, a chiropractic physician, claimant was evaluated and treated by Dr. Thompson, an orthopaedic surgeon. Dr. Thompson diagnosed claimant as suffering from a herniated disc at the L4-5 and L5-S1 levels. Dr. Thompson recommended rigorous rest, a back strengthening program, and physical therapy for the claimant. Dr. Thompson also ordered a functional capacities evaluation which was performed on March 11, 2004. Dr. Thompson subsequently assigned the claimant a permanent physical impairment rating in an amount equal to 8% to the body as a whole and placed limitations on the claimant's ability to return to work.

Respondent accepted claimant's injury as compensable and paid some compensation benefits including permanent partial disability benefits based upon the 8% impairment rating assigned by Dr. Thompson. Claimant has filed this claim contending that he is entitled to additional permanent partial disability benefits attributable to wage loss.

ADJUDICATION

Claimant contends that he is entitled to permanent partial disability benefits in excess of his permanent physical impairment rating of 8%. Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of the permanent physical impairment the Commission may take into account various factors. These factors include the percentage of permanent physical impairment, the claimant's

age, education, work experience, and all other matters reasonably expected to affect their future earning capacity.

After consideration of the relevant wage loss factors presented in this case, I find that claimant is entitled to permanent partial disability benefits in an amount equal to 8% over and above his impairment rating.

As previously noted, the claimant is a 30-year-old gentleman. Claimant is a high school graduate and is currently enrolled full time at the University of Arkansas - Fort Smith. After graduation from high school the claimant was in the military from 1992 to 1996 when he was honorably discharged. The claimant began working for the respondent as a general laborer in 1996 and he worked for the respondent off and on from 1996 through the date of his injury on November 25, 2003. Although claimant began his employment with respondent as a general laborer, claimant over the years took on additional non-physical job responsibilities. This included the keeping of time records, inventory of materials, monitoring job sites, and the accounting of specific tools used on various job sites.

In addition to his employment with the respondent, claimant also worked for other employers. For instance, claimant drove a truck for his mom and dad and for other companies. Claimant also testified that he operated a bulldozer for another employer. Claimant also performed some accounting work for his mom and dad. According to claimant's testimony the respondent did not have work available for him following his release by Dr. Thompson and other than some informal inquiries, claimant has applied for only one job as an engineer at the Union Pacific Railroad.

Claimant testified that his current problems include trouble bending over to perform activities such as tying his shoe. Claimant also testified that he has pain in his low back and that he cannot sit for long periods of time.

Claimant's primary treating physician has been Dr. Thompson. According to Dr.

Thompson's medical report of December 3, 2003, claimant's MRI scan revealed herniated discs at the L4-5 and L5-1 levels. Although claimant testified that he discussed potential surgery with Dr. Thompson, Dr. Thompson's medical records do not mention any surgical recommendations. To the contrary, Dr. Thompson treated claimant conservatively with bed rest, physical therapy, and back strengthening.

At the request of Dr. Thompson claimant underwent a functional capacities evaluation on March 11, 2004. A review of the evaluation indicates that while claimant was able to perform lifting activities in the "Very Heavy Work" classification, the evaluation recommends work in the "Heavy Work" classification due to an elevated heart rate and blood pressure while lifting. This would include lifting 50 pounds on a frequent basis. The evaluation also indicates that claimant's ability to sit was limited to 5 minutes with proper posture and up to 27 minutes with frequent postural changes. Significantly, the evaluation indicates that claimant is unable to repetitively bend over, work on his hands and knees, or perform sustained bending. The evaluation indicates that claimant gave a consistent effort with regard to testing.

Following the functional capacities evaluation claimant was evaluated by Dr. Thompson on March 22, 2004. Dr. Thompson's medical report of that date does note that claimant is capable of lifting at a heavy work level as long as that lifting is done in certain specific upright positions. However, Dr. Thompson also noted that in situations requiring a bending or squatting posture, the claimant is unable to bend over and move even light objects. This inability to repetitively bend over or perform sustained bending was noted in the functional capacities evaluation.

In a letter dated April 23, 2004, Dr. Thompson assigned the claimant a permanent physical impairment rating in an amount equal to 8% to the body as a whole. Dr. Thompson also indicated that claimant should be limited to lifting and carrying 10 pounds frequently, 10 to 20 pounds rarely, and should never lift more than 20 pounds. Dr.

Thompson also indicated that claimant's ability to stand and walk was limited to one hour at a time for two to three hours total in an eight-hour day. Dr. Thompson also indicated that claimant should not work at unprotected heights, stoop, bend, crawl, or kneel.

Obviously, the restrictions imposed by Dr. Thompson are more limiting than the functional capacities evaluation which indicates that claimant can perform work in the heavy work classification. However, it is important to note that the evaluation also indicates that claimant is unable to repetitively bend over, work on his hands and knees, or perform any sustained bending. This was the opinion of Dr. Thompson as noted in his report of March 22, 2004, that in some positions claimant is capable of performing heavy work but at other positions he is incapable of even moving light objects. For that reason, Dr. Thompson imposed greater limitations on the claimant's ability to work. I find that the opinion of Dr. Thompson is credible and entitled to great weight.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 8% to the body as a whole as a result of his compensable injury. Claimant was assigned a permanent physical impairment rating in an amount equal to 8% by Dr. Thompson and has had limitations placed upon his ability to lift and perform activities by Dr. Thompson. Claimant was not returned to work by the respondent and would not be able to perform that type of work in the future. However, the evidence also indicates that claimant has job skills which do not require physical labor. These included supervisory skills and accounting skills with the respondent and claimant's mom and dad. In addition, claimant is currently enrolled at the University of Arkansas - Fort Smith where he has an A average. Thus, while claimant's ability to lift heavy amounts has been limited, claimant does have skills which do not require manual labor.

Accordingly, for the foregoing reasons, I find that claimant is entitled to permanent partial disability benefits in an amount equal to 8% to the body as a whole over and above

his permanent physical impairment rating of 8%. Respondent has controverted claimant's entitlement to these benefits.

ORDER

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 8% to the body as a whole over and above his permanent physical impairment rating of 8%. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 8% to the body as a whole.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE