

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108688

ANDREW ARMSTRONG

CLAIMANT

KEYSTONE FASTENERS, INC.

RESPONDENT

TRAVELERS INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 10, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by PHILLIP CUFFMAN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 23, 2004, in Fort Smith, Arkansas. An Amended Prehearing Order was filed on November 10, 2004. This Amended Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the Amended Prehearing Order was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On or about July 23, 2001, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$397.00 for total disability and \$298.00 for permanent partial disability.
3. On or about July 23, 2001, the claimant sustained a compensable injury to his low back.
4. There is no dispute over the payment of temporary disability benefits.
5. There is no dispute over the payment of medical expenses.
6. The claimant's healing period ended May 20, 2004.

7. The respondents have accepted and are paying permanent partial disability benefits for a permanent physical impairment of 12% to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The extent of permanent disability for loss of wage earning capacity
2. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that as a result of the compensable injury of July 23, 2001, he reached the end of his healing period on May 20, 2004. Dr. D. Luke Knox rated the claimant a 12% permanent impairment rating to the body as a whole. The respondents have controverted the claim for permanent impairment and wage loss entitling the claimant to an award of an attorney's fee, pursuant to Ark. Code Ann. §11-9-715, in the amount of 25% of the controverted benefits.

The claimant's date of birth is March 2, 1966, and he is 38 years of age, has a ninth grad education, and has been engaged in industrial labor all of his working life. The claimant is unable to return to work with the employer and has set out a course of vocational rehabilitation on his own, since the respondents have failed and refused to assist the claimant in any respect with regard to rehabilitation from and since May 20, 2004. The claimant requests a substantial wage loss as a result of his impairment and as a result of his age, education, and work experience. The claimant has substantial limitations and may require the removal of the hardware impacted as a result of the spinal fusion required for his treatment. The claimant contends that the claim for permanent impairment and wage loss has been controverted in its entirety requiring the respondents to pay an attorney's fee pursuant to Ark. Code Ann. §11-9-715, in the amount of 25% of the benefits awarded."

In regard to these issues, the respondents contend:

"Respondents contend that they have accepted and are paying the impairment rating and have not controverted same. Respondents are unaware of any plan of vocational rehabilitation having been submitted to them for approval. Since the claimant has embarked on a program of vocational

rehabilitation wage loss may be premature."

### DISCUSSION

\_\_\_\_\_ The central issue in this case is the question of the existence and extent of permanent "functional" disability for loss of wage earning capacity. The claimant's compensable injury is to a portion of his body that is not "scheduled" under the Act. Thus, he may be entitled to benefits for permanent functional disability, in addition to benefits for permanent physical impairment. His entitlement to such benefits is controlled by the provisions of Ark. Code Ann. §11-9-522. The burden rests upon the claimant to prove all of the elements necessary to entitle him to permanent functional disability.

Ark. Code Ann. §11-9-522(b) provides:

- "(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity;
- (2) However, so long as the employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer of employment at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and the evidence."

In the present case, the evidence shows that the claimant is not working, nor does he have a bona fide and reasonably obtainable offer of employment for wages equal to or greater than those he was receiving at the time of the compensable injury. Thus, subdivision (2) is not applicable at the present claim.

The respondents argue that, since the claimant is attempting to obtain retraining in order to obtain employment for wages equal to or greater than that he was receiving at the time of the compensable injury, the issue of functional disability

is premature or that the potential benefit of this rehabilitation should be considered in determining the existence and extent of permanent functional disability. I do not find any merit to these arguments.

The record indicates that the claimant is attempting to obtain a high school degree by correspondence courses from some facility in Georgia (James Madison High School). Once he has obtained this high school diploma, he hopes to obtain an associate degree in nursing from a local junior college. This degree would require approximately one year of general courses with a minimum grade point of 2.5 and then a two-year course of study in the nursing program. The claimant has not requested that the respondents be responsible for any portion of this multi-year-high school-college program. Neither have the respondents offered to provide the claimant with any portion of this program or any other form of rehabilitation benefits.

It is clearly possible that the claimant may ultimately complete his high school studies and obtain a high school diploma. It is also possible that he might ultimately complete the junior college program necessary to obtain an associate degree in nursing. It is also possible that if he completes all these, he may be able to increase his earning potential. However, all of these mere possibilities rife with uncertainty. It must be noted that even if the claimant successfully completes all of the studies necessary to obtain an associate degree in nursing, the physical restrictions imposed upon his potential employments by his compensable back injury would preclude him from a majority of the available positions in the nursing field. Most of these positions involve significant bending, twisting, and stooping, and the lifting of weights in excess of the physical capabilities of an individual that has undergone a lumbar fusion.

Certainly, the claimant's desire to improve his earning capacity is laudable. However, the possibility of the ultimate success of this lengthy program is so speculative and remote that it would not merit consideration at this time, nor would

it merit the withholding of a ruling on the claimant's entitlement to permanent functional disability, Deborah Jones v. Seba, WCC D511255, Full Commission Opinion dated December 13, 1989.

The medical evidence establishes that the claimant has experienced a permanent physical impairment of 12% to the body as a whole, solely as the result of his compensable injury. In regard to the physical limitations and restrictions produced by this compensable injury, Dr. Knox recommended a Functional Capacity Evaluation to more accurately ascertain the exact extent of these limitations and restrictions (report of May 20, 2004, Claimant's Exhibit No. 1, page 34). However, there is no indication that the respondents authorized this evaluation, as no FCE report has been introduced. In a previous report on June 20, 2003, Dr. Knox restricted the claimant from excessive sitting, any bending or stooping, and any lifting over 5 pounds. The claimant testified that he could not bend or lift only nominal weights without a significant increase in his discomfort. He also testified that mowing his lawn caused a significant increase in his complaints and required him to take pain medication and lay down for the remainder of the day. In light of the nature of the claimant's compensable injury, it would be reasonable to expect him to be restricted from bending or twisting at the waist, prolonged standing or sitting, and lifting, carrying, pushing, or pulling anything more than nominal weights on a frequent basis of more than 20 pounds on an occasional basis.

The record further shows that the claimant is 38 years old and has a ninth grade education. At the hearing, he appeared to be functioning in the average intellectual level. His prior work experience has consisted of general mechanic/tire man, a tire technician and salesman, a "billet operator," a general mechanic/detailer, and a "plastic collator operator." All of these positions appear to involve bending, stooping, twisting at the waist, and lifting in excess of 20 pounds.

After consideration of the claimant's degree of physical impairment and the physical restrictions his compensable injury has imposed, in light of the claimant's age, education, and prior work experience, it is my opinion that the claimant has sustained a permanent functional disability for loss of wage earning capacity in the amount of 15% to the body as a whole. Thus, the claimant would be entitled to permanent partial disability benefits totaling 27% to the body as a whole. This includes both permanent physical impairment and permanent functional disability.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On or about July 23, 2001, the relationship of employee-employer-carrier existed between the parties.
3. On or about July 23, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$397.00 for total disability and \$298.00 for permanent partial disability.
4. On or about July 23, 2001, the claimant sustained a compensable injury to his lumbar spine.
5. There is no dispute, at the present time, over the payment of medical expenses incurred for the claimant's compensable injury.
6. There is no dispute, at the present time, over the payment of temporary disability benefits.
7. The claimant's healing period from the effects of his compensable injury ended on May 20, 2004.
8. The claimant has experienced a permanent partial disability of 27% to the body as a whole, solely as the result of the effects of his compensable lumbar injury. This consists of permanent physical

impairment of 12% to the body as a whole and permanent functional disability of 15% to the body as a whole.

9. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits in excess of 12% to the body a whole.
10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent partial disability benefits, herein awarded, which exceed 12% to the body as a whole.

#### ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a 27% permanent partial disability to the body as a whole. The respondents are entitled to credit for all such benefits previously paid.

The respondents remain liable for all reasonably necessary medical services required by the claimant for his compensable lumbar injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the 15% permanent partial disability herein awarded for permanent functional disability. One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is withheld by the respondents from these benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge

