

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E814138

RAY DAVIDSON,
EMPLOYEE

CLAIMANT

SUPERIOR TIRE,
EMPLOYER

RESPONDENT

CASUALTY RECIPROCAL EXCHANGE/
ARKANSAS PROPERTY & CASUALTY GUARANTY FUND,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 22, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 3, 2005 in Little Rock, Arkansas. A prehearing order was entered in this case on January 10, 2005. A copy of this 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 this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The employer/employee relationship existed on the date of the accident, November 11, 1998, and at all times pertinent hereto; and the parties stipulate to the authenticity of all medical records and/or bills.
2. The claimant's average weekly wage was \$480.00 which would entitle the claimant to a weekly temporary disability rate of \$320.00 and a weekly permanent disability rate of \$240.00.
3. The claimant received temporary disability benefits during his healing period from November 12, 1998, through February 21, 1999, and from February 11, 2002, through April 20, 2003, in the amount of \$24,502.84, which represents seventy-six (76) weeks and four (4) days of temporary disability benefits.
4. The claimant had surgery by Dr. Bruffett in 2002.
5. The claimant reached maximum medical improvement on April 21, 2003 and Dr. Bruffett assessed a twelve percent (12%) anatomical impairment rating.
6. The twelve percent (12%) anatomical impairment rating has been accepted by the respondents and paid in full.

7. Casualty Reciprocal Exchange went into bankruptcy. The respondent carrier is the Arkansas Property & Casualty Guaranty Fund. Their Third Party Administrator in this claim is Gallagher-Bassett.
8. The parties reserve any contempt issue for the respondents' alleged failure to comply with previous orders of the Commission.

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

1. Wage loss and attorney's fees.

The record consists of the May 3, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which she was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence

demonstrating the degree to which the worker's anatomical disabilities impair her earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

In the present case, I find that Mr. Davidson has sustained a 12% impairment to his wage earning capacity in excess of the admittedly compensable 12% percent permanent anatomical impairment that he sustained for his November 11, 1998 back injury and two level lumbar fusion. In this regard, I note that Mr. Davidson has undergone a rather significant surgery intended to eliminate or reduce his symptoms, and I note that he reports continued debilitating pain notwithstanding surgery.

However, I also note that Mr. Davidson is only 36 years old. He has a high school education, approximately one year of college and sufficient aptitude to be self-educated in automobile repair, electricity and computer repair. While his adult work experience is primarily as an automobile mechanic, he also has experience in related duties including taking money, placing orders, dealing with customers, writing tickets, supervising and training other employees.

In addition, Mr. Davidson has worked as an escort driver for oversized loads, has driven a dump truck in partnership with his brother, and has worked on a surveying crew holding the pole.

The functional capacity evaluation performed in 2003 certainly indicates that Mr. Davidson will never be capable of returning to some aspects of heavy mechanic work after undergoing a two-level lumbar fusion, such as lifting heavy wheels and transmissions. However, that functional capacity evaluation indicates that Mr. Davidson is physically capable of performing medium duty work, and no physician has indicated to the contrary.

As I understand Mr. Davidson's testimony, his primary limitation for standing, sitting, and performing physical exertion is pain. Clearly, pain cannot be measured on a functional capacity evaluation, yet pain is a proper criteria for consideration in assessing permanent wage loss disability. Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

I note that Mr. Davidson's pre-surgical pain is objectively corroborated at times in the medical record by the documentation of contemporaneous muscle spasms. The post-surgical medical record contains no similar

documentation. In fact, Mr. Davidson has acknowledged that he last saw a doctor for low back pain in 2003, and since that time, he takes no prescription medication for low back pain. I also note that the findings of the functional capacity evaluation call into question the reliability of subjective pain complaints in this case.

In reviewing the record, I note that Mr. Davidson should be commended for his application at approximately 27 businesses as documented in exhibit 2. However, I also note his written comments by approximately 25 of these businesses' names in Exhibit 2 indicate that they advised him that he was "too much of a liability". This comment indicates to me that Mr. Davidson's applications may have focused strongly on his disability and on his education and work experience. My conclusions in this regard are consistent with Ms. Nichols' testimony regarding Mr. Davidson's resume, his interviewing skills and his job-seeking skills. I note that Ms. Nichols' has suggested professional assistance with these matters.

In summary, while Mr. Davidson has undergone a serious low back surgery, and has some degree of associated physical restrictions and residual pain limitations, I note that Mr. Davidson is a relatively young man with a normal education,

transferrable work skills, and a significant aptitude for learning mechanical and electrical systems. As indicated above, after considering the claimant's age, education, work experience, and all other relevant factors, I find that Mr. Davidson has experienced a 12% impairment to his wage earning capacity in excess of the 12% permanent anatomical impairment established by the medical evidence and accepted by the respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee relationship existed on the date of the accident, November 11, 1998, and at all times pertinent hereto; and the parties stipulate [to] the authenticity of all medical records and/or bills.

2. The claimant's average weekly wage was \$480.00 which would entitle the claimant to a weekly temporary disability rate of \$320.00 and a weekly permanent disability rate of \$240.00.

3. The claimant received temporary disability benefits during his healing period from November 12, 1998, through February 21, 1999, and from February 11, 2002, through April 20, 2003, in the amount of \$24,502.84, which represents seventy-six (76) weeks and four (4) days of temporary disability benefits.

4. The claimant had surgery by Dr. Bruffett in 2002.

5. The claimant reached maximum medical improvement on April 21, 2003 and Dr. Bruffett assessed a twelve percent (12%) anatomical impairment rating.

6. The twelve percent (12%) anatomical impairment rating has been accepted by the respondents and paid in full.

7. Casualty Reciprocal Exchange went into bankruptcy. The respondent carrier is the Arkansas Property & Casualty Guaranty Fund. Their Third Party Administrator in this claim is Gallagher-Bassett.

8. The parties reserve any contempt issue for the respondents' alleged failure to comply with previous orders from the Commission.

9. The claimant has sustained a 12% permanent impairment to his wage earning capacity in excess of the 12% permanent anatomical impairment established by the medical evidence and accepted by the respondents.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-

half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge