

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202021

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| HENRY GRUBER, JR., EMPLOYEE | CLAIMANT |
| MAVERICK TRANSPORTATION, INC., EMPLOYER | RESPONDENT NO. 1 |
| LIBERTY MUTUAL INSURANCE, CARRIER | RESPONDENT NO. 1 |
| DEATH & PERMANENT TOTAL DISABILITY FUND | RESPONDENT NO. 2 |

OPINION FILED NOVEMBER 17, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on August 18, 2005 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE DAVID C. JONES, Attorney at Law, Little Rock, Arkansas.

Respondent No 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of wage loss disability benefits.

At issue is the extent of the claimant's permanent disability pursuant to Ark. Code Ann. §11-9-102, Fund liability; and an offset of benefits pursuant to Ark. Code Ann. §11-9-411.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship with Respondent No. 1 on February 13, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$425.00/\$319.00. Medical expenses, temporary total disability benefits (until April 11, 2003) and a 6% rating to the body as a whole (as assessed by Dr. Baskin on April 4, 2005) were paid. The claimant receives benefits from the Veterans Administration (VA),

Social Security and a Teamsters pension. This claim was the subject of a previous hearing with an Order entered by the Administrative Law Judge on May 11, 2004. Based on the Order, the healing period ended March 25, 2003.

The claimant contends he remains symptomatic from his back injury and is unable to work. He further contends that because of his age, he is not a viable candidate for rehabilitation. The claimant seeks payment of permanent total disability benefits or alternatively wage loss in excess of the impairment rating.

Respondent No. 1 contends the claimant is capable of working based on Dr. Ward's assessment and therefore he is not entitled to wage loss benefits. Furthermore, the "major cause" of the claimant's disability is the result of a preexisting degenerative condition and other unrelated health problems and not the result of the compensable injury. Alternatively, in the event of an award, wage loss should be minimal as the claimant has not pursued employment options. Also, the respondents would be entitled to a credit for overpayment of temporary total disability benefits from March 25, 2003 to April 11, 2003, and an offset against Veterans benefits. Respondent No. 1 further contends that the Fund is not entitled to the credits requested based on the Full Commission's decision in Thomas v. Legacy, Lumbermans and the Death & Permanent Total Disability Trust Fund, May 4, 2005 (F100487).

Respondent No. 2, the Fund, contends the carrier must pay out the anatomical impairment rating before beginning payment of permanent total disability benefits. Additionally, the carrier is not entitled to a credit against its maximum liability cap (\$75,000.00) for payment of the rating. The Fund also seeks a credit pursuant to Ark. Code Ann. §11-9-411 for benefits paid by third parties on this claim.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The claimant, who uses a cane, was the only witness to testify at the hearing.

The claimant, age 60 (D.O.B. September 17, 1945), has a high school education, service in the Air Force, and work experience in construction. For most of his adult life, he has been employed as a long haul truck driver. He started work for the respondent-employer in 2000 and at the time of his injury, he was earning \$800.00-\$900.00 per week, or \$43,000.00 per year. Presently, he receives a Teamsters Pension (\$651.00 mo.), Social Security benefits (\$1,419.00 mo.) and Veterans benefits (\$1,057.00 mo). The claimant stated the VA benefits were subject to an offset against Social Security.

On cross-examination, respondents' counsel emphasized that the claimant received treatment for two separate back injuries in 1982 and 1985. The claimant characterized these incidents as minor and stated he had forgotten all about them until he was shown his medical records. The medical records show he was treated conservatively with no permanent impairment. There is no indication either of the two back injuries interfered with his ability to work.

Respondents' counsel also pointed out that the claimant has not looked for work since 2002 and draws about as much income in disability benefits as he earned while working. Furthermore, the claimant was able to drive from West Virginia to Arkansas to attend the hearing.

MEDICAL EVIDENCE

The Commission's prior opinion summarizes the claimant's medical records until the spring of 2003. Since the last hearing, the claimant has continued to complain of low back pain. Repeat diagnostic testing (x-rays, MRI scans) in May, 2003 and December 2003 show no new findings. The claimant suffers from preexisting multi-level degenerative disc disease, stenosis, and disc bulges at L3-4 and L5-S1 and L4-5. The claimant consulted another neurosurgeon at the VA, Dr. Moossy, who opined the claimant was not a surgical candidate as there was no nerve root compression. The claimant is being treated conservatively with Aqua Therapy and pain medication.

Dr Barry Baskin saw the claimant at the respondents' request and issued a report dated April 4, 2005, which summarizes the claimant's medical history and treatment. Dr. Baskin characterized

the claimant's disc abnormalities as "minimal". He assessed a 6% rating for two level disc bulges but specifically did not include the degenerative spondylosis in the rating. He assessed no specific work restrictions.

FINDINGS AND CONCLUSIONS

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bona fide job offers, credibility, or voluntary termination. 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), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The evidence of records shows the claimant is 60 years old with a high school education and work experience as a long haul trucker. He developed some degenerative spinal changes and suffered two back injuries in the 1980's but neither the degeneration or injuries required continuing medical treatment or caused disability. The claimant sustained a compensable injury to his back in 2002 and has not attempted to return to work. His back injury has been treated conservatively with medication, injections and physical therapy. After diagnostic testing revealed two-level bulging discs, he was assessed a 6% impairment rating to the body as a whole and released to return to work with no specific restrictions. Based on this evidence, I find the claimant is not permanently and totally disabled.

Although diagnostic testing confirms spinal abnormalities, the claimant's physicians have characterized his condition as "minimal" and he is not considered a surgical candidate. The claimant referred to himself as a "cripple" during his testimony and has made no attempt to re-enter the work force despite the fact that he is still able to drive and has no specific work restrictions. I find that the

claimant is not motivated to return to the work force.

However, I also find the claimant is entitled to some wage loss as his injury, permanent impairment and age would adversely affect his reentry into the work force. The major cause of this disability is the compensable injury with resulting pain and permanent impairment.

The claimant has received Veteran's benefits for which the respondents seek a credit under Ark. Code Ann. §11-9-411. The purpose behind this provision of the Act is to eliminate a "windfall" to the claimant for double recovery of group medical expenses and disability benefits. Veterans benefits are not a group benefit as contemplated by the Act and benefits earned through service to our country are not a "windfall".

1. The Workers' Compensation Commission has jurisdiction of this claim in which an employer-employee-carrier relationship with Respondent No. 1 on February 13, 2002 at which time the claimant sustained a compensable injury to the body as a whole at a compensation rate of \$425.00/\$319.00. Medical expenses, and temporary total disability benefits (until April 11, 2003) were paid. This claim was the subject of a previous hearing with an Order entered by the Administrative Law Judge on May 11, 2004. Based on the Order, the healing period ended March 25, 2003. Permanent impairment, 6% to the body as a whole was assessed by Dr. Baskin on April 4, 2005, after the Order was issued.
2. The claimant has proven by a preponderance of the evidence of record that he sustained wage loss disability in the amount of 45% in addition to the 6% rating to the body as a whole, for a total of 51%. The compensable injury is the major cause of disability.
3. The respondents are not entitled to an offset against Veterans benefits under Ark. Code Ann. §11-9-411.
4. The respondents are entitled to a credit for an overpayment of temporary total disability benefits from March 25, 2003 to April 11, 2003 based on the findings of the previous order filed May 11, 2004 which was not appealed.
5. The Fund has no liability in this case.
6. The respondents are directed to pay court reporting fees and expenses to Ms. Sue Pruett pursuant to

Commission Rule 20.

7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge