

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306205

CARL HALE

CLAIMANT

GATOR FREIGHTWAYS, INC.

RESPONDENT EMPLOYER

FIDELITY & GUARANTY INSURANCE CO.

RESPONDENT CARRIER NO. 1

**DEATH & PERMANENT DISABILITY
TRUST FUND**

RESPONDENT NO. 2

ORDER AND OPINION FILED MARCH 28, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DONALD S. RYAN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on February 23, 2005, in Little Rock, Arkansas. A prehearing conference was held on December 14, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and introduced into evidence without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a May 12, 2003, compensable injury.
2. The compensation rates have been stipulated by the claimant and Respondent No. 1 to be \$440/330.
3. The end of the healing period is November 18, 2003.

4. A 29% body as a whole rating has been accepted by Respondent No. 1.

The claimant contends that he is permanently and totally disabled or, alternatively, entitled to wage loss benefits and attorney's fees.

Respondent No. 1 contends the claimant is not permanently and totally disabled and was released to return to work with no restrictions on November 18, 2003. The claimant applied for and received unemployment benefits on two separate occasions. Respondent No. 1 contends the claimant has, in fact, returned to work and is not entitled to wage loss benefits. Respondent No. 1 further asserts that the \$75,000 maximum includes permanent anatomical benefits, as well as permanent and total benefits.

Respondent No. 2 contends that if the claimant is found to be permanently and totally disabled, Respondent No. 1 has an obligation to pay the anatomical impairment over and above the \$75,000 maximum before the Fund becomes liable. Respondent No. 2 maintains that the \$75,000 maximum pertains only to permanent and total disability benefits.

ISSUES TO BE LITIGATED

1. Permanent and total disability or wage loss.
2. Whether permanent anatomical benefits can be included in the \$75,000 maximum for Respondent No. 1.
3. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, as well as the record and opinions

from the previous hearing incorporated by reference, 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 made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a May 12, 2003, compensable injury.
2. The compensation rates have been stipulated by the claimant and Respondent No. 1 to be \$440/330.
3. The end of the healing period is November 18, 2003.
4. A 29% body as a whole rating has been accepted by Respondent No. 1.
5. The claimant has failed to prove that he is permanent and totally disabled.
6. The claimant has proven by a preponderance of the evidence that he has sustained a diminished wage earning capacity amounting to 65% over his permanent anatomical impairment.

DISCUSSION

The claimant, 39 years old, has been a heavy truck and heavy equipment mechanic most of his life. The claimant was working for the respondent employer in May 2003, maintaining equipment when he suffered an injury to his head. The claimant now works at a Shell station from 3:00 p.m. until 1:00 a.m., as a cashier, and began that employment in October 2004. According to the claimant, he gets confused on pricing and makes mistakes. The claimant recently received a citation for selling beer

to a minor because he was unable to calculate the age from the license. The claimant makes \$500 every two weeks at his current employer and works full-time and had been so employed for about five months. The claimant testified that he had applied for other employment but was not hired.

According to the claimant, he is now unable to work in the mechanical field because it takes him too long to try to assemble or repair anything. The claimant testified he cannot remember how to put something back together.

Under cross examination, the claimant verified that he drew unemployment benefits from November 24, 2003 through May 30, 2004.

Sherry Hale, wife of the claimant, testified that she has been married to the claimant for 21 years. She testified that before the accident, her husband would maintain the home and make repairs and share responsibilities, but he can no longer do those things. Now he gets aggravated and agitated easily over minor things, such as the telephone ringing, the dog barking, or a door shutting. Ms. Hale is a director of a child care center and works from 6:00 a.m. until 6:00 p.m. She testified that the claimant spends about three to four hours per day at the child care center with her.

Edna Hicks, manager of the Shell Station where the claimant works, testified that the claimant had poor memory and was slow. Ms. Hicks has tried to help the claimant by posting pricing signs and helping him. Ms. Hicks personally knew the claimant and knew he needed employment and that was why he was hired.

The claimant contends he is permanently and totally disabled or, alternatively, entitled to wage loss benefits.

Ark. Code Ann. §11-9-519(e) provides:

(1) 'Permanent total disability' means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

In the present case, the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. At the hearing, the claimant presented testimony that he currently is working full-time at a Shell station where he works as a cashier and makes about \$500 every two weeks. The claimant testified that he was experiencing difficulty in making change and pricing of products; however, he has had continued employment since October of 2004. Since the claimant has maintained some gainful employment following his work injury, he has failed to prove that he is permanently and totally disabled. The claimant also contends that he has sustained wage loss disability.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). 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 reasonable expected to affect his or her future earning capacity.

The claimant has proven by a preponderance of the evidence that he has sustained wage loss disability as a result of his compensable head injury. The claimant is 39 years of age with completion of the 12th grade, although no diploma, and extensive work experience with heavy equipment and trucks. He sustained a compensable head trauma injury in May 2003, resulting in a 29% anatomical rating to the body as a whole. Dr. Reza Shahim opined on November 18, 2003, that the claimant had reached maximum medical improvement but recommended a neuropsychiatric evaluation. Dr. Scott Schlesinger stated on November 8, 2004, that the claimant's head injury resulted in severe cognitive problems. On January 26, 2004, Dr. Winston Wilson evaluated the claimant and diagnosed him with dementia due to head trauma and depressive disorder. Dr. Wilson administered a variety of tests and opined that the claimant "does not encode or decode information in the normal range of time and lacks impulse control." Cl. Exh. No. 1, p. 3. Dr. Wilson recommended the claimant not return to work. Finally, a vocational assessment was performed by Bob White, a vocational specialist, and his report dated December 8, 2004, concluded that the claimant for all practical purposes has been eliminated from the labor market. The claimant was working when Mr. White evaluated him; however, Mr. White was aware of the problems the claimant was experiencing with his job and opined, "While Carl may be able to work, I believe any work will be sporadic, short term in nature with no ability to maintain consistent employment." Cl. Exh. No. 1, p. 6.

Respondents submitted a surveillance video of the claimant driving his vehicle, visiting and shopping. I did not find the video of any assistance in determining whether

wage loss benefits were or were not appropriate. Certainly, the claimant did not contend that he was unable to drive, walk and push a grocery cart.

After considering all the credible evidence, I find the claimant has proven by a preponderance of the evidence that he has sustained a diminished wage earning capacity of 65% over and above the permanent impairment rating. I found the claimant's testimony to be persuasive and the medical evidence certainly documented the claimant's diminished cognitive capabilities. Despite the medical records indicating the claimant was unable to work, he is currently gainfully employed in a cashier job. The claimant admitted that he was experiencing problems with the job, to include pricing products, making change and interacting with customers and supervisors. The claimant's mechanic salary was approximately \$700 per week and he currently makes \$250 per week with his cashier job. While only time will tell if the claimant can continue in his current capacity with his work, he has demonstrated motivation to return to the workforce.

ORDER

The claimant has failed to prove that he is permanently and totally disabled. The claimant has proven by a preponderance of the evidence that he has sustained a diminished wage earning capacity amounting to 65% over his permanent anatomical impairment.

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 claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**