

**BEFORE THE ARKANSAS WORKERS' COMPENSATION  
COMMISSION**

**CLAIM NO. F211988**

**JOSEPH M. LAMB, EMPLOYEE**

**CLAIMANT**

**LONOKE COUNTY,  
EMPLOYER**

**RESPONDENT**

**SELF-INSURED,  
(AAC RISK MANAGEMENT SERVICES, TPA)**

**RESPONDENT**

**OPINION FILED JUNE 14, 2005**

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 16, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

A hearing was held on March 16, 2005, to determine whether claimant is entitled to wage loss disability experienced over and above the 10 percent impairment rating accepted by respondents.

The parties stipulated to the existence of the employee-employer relationship on October 12, 2002, when claimant sustained a compensable back injury. It was further stipulated that claimant was earning sufficient wages to entitle him to weekly indemnity benefits of \$200.00 for temporary total disability and \$154.00 for permanent partial disability benefits. The parties additionally stipulated that the

respondents paid temporary total disability benefits from the date of injury through June 2, 2003, and stipulated that respondents have accepted and paid a 10 percent impairment rating to the body as a whole.

Claimant contends that he is entitled to a determination with respect to the extent of wage loss disability he has experienced over and above the admittedly compensable 10 percent impairment rating. Claimant contends that benefits in excess of that rating have been controverted for purposes of attorney's fees.

Respondents controvert any wage loss disability in excess of the 10 percent whole body physical impairment rating that they have accepted and paid.

#### **STATEMENT OF THE CASE**

Claimant is a forty-nine-year-old man with a sixth-to-seventh-grade education. He testified that he had been employed with respondent-employer for approximately ten years at the time of his injury on October 12, 2002. He testified that he was an "inspector" of sorts at the transfer station for solid waste management and had held that job for the entire ten years he was employed with respondent-employer.

Claimant testified that as an "inspector," he had to call the loads in and check the loads of waste that were delivered to the station to make sure they did not contain the wrong types of materials, such as hazardous waste. Claimant testified that, at times, he had to pick up 250 trash bags and open a twenty-foot gate and sometimes operate a backhoe and compactor to mash the trash. He testified that he worked forty

hours per week and earned \$7.50 per hour. Claimant testified that the position he held with respondent-employer actually required some sort of special environmental protection license but that he had been “grandfathered in,” so he did not have to take a special test to do his job.

Claimant testified that on October 12, 2002, he was injured when he fell on a sand rock as he was trying to open a gate. He reported the accident to his employer, and respondents accepted the claim as compensable and have paid all benefits to date, including a 10 percent permanent impairment rating to the body as a whole. Claimant has never returned to work.

Claimant testified that today he has so much trouble just sleeping, in and of itself, that there is no way he could work because he simply could not function with such little sleep. Claimant, however, testified that he never had a problem with attendance at work prior to this injury and that he would even go to work on days when he was so sick, with a cold, for instance, that he “could hardly walk.”

Although surveillance received into evidence showed claimant performing duties that would be very similar to the job he held prior to the accident on October 12, 2002, claimant maintains that he is in so much pain now, with leg cramping, that he can hardly even walk. The surveillance disks, however, do not indicate that claimant has any trouble walking or is disabled in any way; it does not show him

limping or wearing a brace or using a cane. Claimant admitted that the surveillance does not show any disability on his part.

Claimant testified that he is not in any kind of business now, although he admitted that he used to run auctions. Claimant testified that he is currently seeing Dr. Schultz, although he now has no insurance and that all of this makes him very emotional. He testified that he may lose his farm that has been in his family for six generations.

Claimant admitted that his boss, Jim DePriest, offered him his old job back, but claimant just does not think he could do the work. Claimant submitted to a Functional Capacity Evaluation (FCE) on May 21, 2003. The results of the FCE, which showed inconsistent and unreliable effort on claimant's part, indicated that claimant could return to his old job; however, claimant testified that he disagrees with the FCE results and does not believe he could return to his job. He admitted that he has never even *attempted* to return to work for respondent-employer. Testimony revealed that respondent-employer held claimant's job open for him; however, because he never returned to the job he was offered, claimant was eventually sent a letter of termination from respondent-employer.

Claimant testified that prior to his job with respondent-employer, he never worked anywhere else. He testified that he took care of his father. He admitted that

they did have a “junk store” and rented an eighty-foot building that is on his property for auctions. He further admitted that they had a can-recycling business in the past.

Claimant testified that he has no income at all now. He testified that he has applied for social security disability but had not, as of the date of the hearing, been approved. He testified that he has not looked for other employment. He claims he lives off his “life savings” and the interest from some certificates of deposit.

Claimant denies being involved in any other money-making businesses or ventures. Claimant testified that the eighty-foot building on his property houses some things he is “storing” for his brother, who is “100 percent disabled with the V.A.” Claimant admitted that the building has some sort of rack outside of it that he is working on; however, he testified that he is not working on it by himself. Further, he admitted that trucks are parked on his property but denied that he is being paid for this.

Claimant testified that he is not married and that he lives alone, although his sister-in-law does stay at his residence on occasion. He testified that he owns thirty acres of land, as well as horses and chickens, and that he takes care of his property by himself. He testified that he feeds his animals and mows his lawn on his own.

### **FINDINGS OF FACT**

1. All of the stipulations agreed to by the parties herein are accepted as fact;

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability over and above the 10 percent permanent impairment rating previously accepted and paid by respondents.

### DISCUSSION

Claimant's entitlement to permanent disability benefits is controlled by Ark.

Code Ann. § 11-9-522 (Repl. 2002), which states in pertinent part:

(b)(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.

Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *See Whitlatch v. Southland Land & Development*, CA 03-736 (Ark. App. 1-21-2004); *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a

consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

In this case, while it is true that claimant has limited formal education, he is a relatively young man who is, by his own testimony, able to maintain thirty acres of land by himself, including mowing and caring for his horses and chickens. The FCE, to which claimant submitted, showed inconsistent and unreliable effort on claimant's part; and, the findings of the FCE indicate that claimant could return to his former job with respondent-employer.

Moreover, surveillance received into evidence showed claimant performing duties that would be very similar to the job he held prior to the accident on October 12, 2002, and indicated no limping or any obvious pain or disability on claimant's part. Finally, claimant admitted that he was offered to return to his job with respondent-employer within his restrictions but chose not to even *attempt* to return to work at all. He further testified that he has not looked for other employment. This certainly evidences a lack of motivation on his part to return to work at all, thereby

impeding this examiner's ability to assess claimant's loss of earning capacity. In this examiner's opinion, claimant's contention that he is unable to return to his former job, or any job, is simply not credible.

For these reasons, it is my opinion that claimant has failed to meet his burden of proving by a preponderance of the credible evidence that he is entitled to wage loss disability experienced over and above the impairment rating. As such, the claim herein is respectfully denied and dismissed.

IT IS SO ORDERED.

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CYNTHIA ESTES ROGERS  
Administrative Law Judge