

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400284

RONALD SADOSKI	CLAIMANT
TANKERSLEY FOOD SERVICES	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 9, 2005

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA ROSS CRINER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 16, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on May 26, 2005. This pre-hearing 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 pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On November 14, 2003, the relationship of employee-employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$375.00 for total disability and \$281.00 for permanent partial disability.
3. On November 14, 2003, the claimant sustained a

compensable injury to his back.

4. There is no dispute, at present, over the payment of medical expenses.
5. There is no dispute, at present, over the payment of temporary disability benefits.
6. The claimant's healing period ended on March 7, 2005.
7. The respondents have accepted liability for and are paying permanent partial disability for a permanent physical impairment of 13% 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 functional disability or loss of wage earning capacity.
2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant contends that he is not able to return to his former employment and that he has suffered wage loss disability greatly in excess of the 13% impairment rating.

The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"Respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim. The claimant was released to return to work and work was made available for him by respondent employer. As such, it is respondent's position that wage loss disability is not applicable with regard to this claim."

DISCUSSION

The central issue in this case is the claimant's entitlement

to permanent partial disability benefits for permanent functional disability or loss of wage earning capacity. The burden rests upon the claimant to prove the existence and extent of such permanent functional disability. The claimant's entitlement to these benefits is controlled by the provisions of Ark. Code Ann. §11-9-522(b).

The first subdivision of this subsection provides that this Commission shall consider not only the percentage of the permanent physical impairment that has been produced by the compensable injury, but also the restrictions and limitations imposed by the compensable injury together with the claimant's age, education, previous work experience, and any and other matters reasonably expected to affect his future earning capacity. In the present case, the claimant is relatively young at 38 years of age. He also holds a high school diploma and a commercial driving license. His employment experience is somewhat limited with 7 years of experience in the tree trimming business, and 7 years experience driving a truck, the last 5 of which was in the capacity of a route salesman for the respondent.

The claimant's testimony testified that his compensable injury and resulting two-level fusion has restricted him from sitting more than one hour at a time, standing more than one hour at a time, walking more than 200 yards, and lifting more than 25 to 30 pounds without increased symptoms. He also stated that jarring or swaying causes a substantial increase in his symptoms.

The record reveals that the claimant underwent a functional capacity assessment at the request of his treating physician. This

testing was interpreted as showing substantially maximum effort and was a valid reflection of the claimant's actual abilities. This testing showed that the claimant was capable of sitting for 28 minutes at a time with a total of 2 hours and 45 minutes. He also demonstrated the ability for dynamic standing of up to 22 minutes at a time, with a 64 minute total standing time. He was able to walk up to 27 minutes at a time (one mile). The claimant was found to be capable of lifting up to 48 pounds on an occasional basis, pushing up to 150 pounds for 25 feet (on an occasional basis) and pulling up to 150 pounds for 25 feet (on an occasional basis). He was able to stoop in a seated position for 28 minutes and in a standing position for 6 minutes. He was noted to have difficulties in any bending or twisting at the waist.

The medical evidence shows that the claimant has been assessed a permanent physical impairment of 13% to the body as a whole. This assessment was based upon the claimant's compensable injury and the double level lumbar fusion it necessitated.

The restrictions indicated by the claimant's testimony and the FCE upon the claimant coincided with those that would be normally expected for injuries such as that experienced by the claimant with a resulting surgical fusion. This type of injury and corrective surgery generally results in prohibitions against prolonged sitting, standing or walking; repetitive turning, bending, or stooping; repetitive lifting, pushing or pulling, and any lifting in excess of 50 pounds.

Clearly, the foregoing restrictions would prevent the claimant from performing the position he held at the time of his compensable injury. It would also prevent him from performing his previous employment positions. These restrictions would further prevent him from performing the duties required by most route sales and delivery positions. In fact, these limitations would effectively exclude him from most general truck driving positions. Finally, these physical restrictions would prevent the claimant from performing many factories or assembly line positions and essentially all manual labor positions.

The record show that the claimant has obtained suitable employment that is within his physical restrictions and limitations. He is currently employed as a sanitation truck driver receiving an hourly rate of pay of \$9.00. Although he is currently only working 30 to 32 hours a week in this position he stated that this reduced work week is not related to his physical limitations and that he is physically capable of performing this position for at least 40 hours per week.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that he has experienced a permanent functional disability or loss of wage-earning capacity in the amount of 10% to the body as a whole. This permanent functional disability or loss of wage-earning capacity is in addition to the 13% permanent physical impairment, which has been stipulated to by the respondent. Thus, the claimant would be entitled to permanent partial disability benefits totaling 23% to the body as a whole.

However, the respondents contend that the claimant is barred from receiving permanent partial disability benefits for this permanent functional disability or loss of wage-earning capacity by the provisions of Ark. Code Ann. §11-9-522 (b)(2). This subsection states:

“However, so long as an employee (subsequent his or her injury) has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed 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 evidence.”

Ark. Code Ann. §11-9-522(c) places the burden upon the respondents to prove that the claimant has returned to employment or has a bona fide offer of employment to be employed at wages equal to or greater than those at the time of his accident and compensable injury. From the evidence presented, it is not entirely clear that the “light duty” job, which the respondent’s created and offered to the claimant, was at wages equal to or greater than those he was receiving at the time of his compensable injury. Lisa Morgan, the respondent’s witness, testified that the position given to the claimant would likely involve his working 40 to 45 hours per week. There was no evidence offered to indicate whether or not his hourly rate would be the same for this position, as he was earning at the time of his employment related accident. In order for §11-9-522(b)(2) to apply, it must be assumed that the created position would pay the claimant at his same hourly rate of

\$13.10. It must be further assumed that the claimant would have been able to average 42.94 hours per week (the average number of hours he was working at the time of his accident, which has been derived from the stipulated compensation rate). Neither of these facts have been actually proven by the respondent.

However, this is not the basis for my opinion on the question of the applicability of Ark. Code Ann. §11-9-522(b)(2). Although this subdivision does not expressly state that the “work” or “employment” must be suitable (i.e. within the claimant’s limitations and restrictions), this understanding is implied for this subdivision to act in harmony with other applicable sections of the Act. Section 11-9-522(c)(2) clearly makes it permissible for an injured worker to leave or refuse work for “good cause connected with the work” without losing or forfeiting his right to benefits for permanent functional disability. Under this subdivision, leaving or refusing work that would not be within the injured employee’s physical limitations and restrictions would certainly constitute “good cause” and, in turn, would prevent the application of §11-9-522(b)(2) for leaving or refusing such a position.

In the present case, the claimant testified that the position he was given required him to use a motorized hydraulic pallet jack to transport loaded pallets from the inside of the respondent’s plant and load them into the appropriate tractor-trailer. These activities comprised a major portion of his work day and involved considerable standing. According to the claimant’s testimony,

standing or riding on the pallet jack caused jarring and jerking around of his entire body with increased pain and difficulties with his injured back. He further testified that raising and closing the doors and moving the bulkheads inside the trucks also caused a significant increase in his difficulties. Clearly, any activities that caused jerking and jarring of the claimant's body, including his spine, would be logically contraindicated in light of the claimant's injury and resulting spinal fusion. A significant increase in his difficulties as a result of this stress on his lumbar spine would not be unusual. Prolonged standing and walking over a 12 hour shift would also be logically contraindicated by the type of injury the claimant sustained.

The claimant testified that when he advised his supervisor of the problems he was having with certain activities, he was allowed to sit down for a few minutes, but the basic requirements of his position were not changed. I find this testimony of the claimant to be credible.

It is apparent from the testimony of the respondent's witnesses and the documentary evidence offered that the only physical restriction the respondent's considered in the employment position they provided to the claimant was the restriction against lifting. It would appear that no consideration was given to any of the other physical limitations and restrictions resulting from the claimant's compensable injury, such as no prolonged standing, twisting, or jarring of the spine, etc.

After consideration of the evidence presented, it is my

opinion that the greater weight of the credible evidence fails to prove that the respondent's provided the claimant with employment or a bona fide offer of employment that was actually within the physical restrictions and limitations resulting from his compensable injury. Therefore, the claimant's voluntary "leaving" of this employment was for good cause connected with the work. As a result, he would not be barred by the provisions of Ark. Code Ann. §11-9-522(b)(2) from receiving an award of permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity that would be in excess of the permanent partial disability attributable to his permanent physical impairment.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 14, 2003, the relationship of employee-employer carrier-third party administrator existed between the parties.
3. On November 14, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$375.00 for total disability and \$281.00 for permanent partial disability.
4. On November 14, 2003, the claimant sustained a compensable injury to his back or lumbar spine.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical

services at the respondent's expense.

6. There is no dispute, at the present time, over the claimant's entitlement to temporary total disability benefits and all such benefits accruing to date have been paid.
7. The claimant's healing period from the effects of his compensable injury ended on March 7, 2005.
8. The respondents have accepted liability for and are paying permanent partial disability benefits for permanent physical impairment in the amount of 13% to the body as a whole.
9. The claimant has sustained a permanent partial disability for permanent functional disability or loss of wage-earning capacity, which is in excess of that attributable to permanent physical impairment, in the amount of 10% to the body as a whole. Therefore, the claimant has experienced a total permanent partial disability of 23% to the body as a whole (10% attributable to permanent functional disability or loss of wage-earning capacity and 13% attributable to permanent physical impairment).
10. The claimant is not barred from receiving permanent partial disability benefits that is in excess of that attributable to permanent physical impairment by the provisions of Ark. Code Ann. §11-9-522(b)(2). The claimant's voluntarily termination or refusal of the employment position actually provided him by the

respondent was for good cause connected with the work, in that the position actually provided was not within the physical restrictions or limitations caused by his compensable lumbar injury.

11. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits in excess of 13% to the body as a whole.
12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded which are in excess of 13% to the body as a whole.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits for a 23% permanent partial disability to the body as a whole. This represents permanent partial disability attributable to permanent physical impairment in the amount of 13% to the body as a whole and permanent partial disability attributable to permanent functional disability or loss of wage earning capacity in the amount of 10% to the body as a whole. The respondents are entitled to credit for all such benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded which are in excess of 13% to the body as a whole. One-half of this attorney's fee is the obligation of the respondents in addition to such additional

permanent partial disability. The remaining one-half of this attorney's fee is to be withheld by the respondents from the controverted permanent partial disability benefits herein awarded.

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.

MICHAEL L. ELLIG
Administrative Law Judge