

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F402502

LARRY BUTLER, EMPLOYEE

CLAIMANT

CONTINENTAL EXPRESS, EMPLOYER

RESPONDENT

**GIBRALTAR NATIONAL INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 21, 2006

Hearing before Administrative Law Judge Barbara W. Webb on June 22, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Scott Willhite, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A Pre-hearing Order was entered in this case on April 28, 2006. The Pre-hearing Order set forth the stipulations as submitted by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Pre-hearing Order was made Commission Exhibit 1 to the hearing record. The following stipulations as submitted by the parties and the Pre-hearing Order as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including March 1, 2004, at which time claimant suffered a compensable back injury during the course and scope of his employment.

3. The applicable compensation rate in this case is \$453.00 for temporary total disability and \$340.00 for permanent partial disability, if awarded.
4. The claimant has been assigned a five percent (5%) impairment rating, which rating has been accepted and is being paid.
5. The claimant reached maximum medical improvement in connection with the compensable injury as of September 28, 2004.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Whether claimant is entitled to wage-loss benefits.
2. Whether claimant is entitled to vocational rehabilitation.
3. Claimant reserves all other issues, including reimbursement for mileage.
4. Attorney's fees as to wage-loss benefits and vocational rehabilitation benefits, if awarded.

The claimant contends that on March 1, 2004, he sustained a compensable injury to his back as a result of a specific incident while working for respondent employer; that he is entitled to wage-loss benefits, rehabilitation, and attorney's fees. Claimant reserves all other issues, including the right to reimbursement for mileage.

The respondents contend that all appropriate benefits have been paid; that the medical records do not support claimant's entitlement to wage-loss benefits; that vocational rehabilitation is not reasonable in relationship to the claimant's injury; and attorney's fees are not proper in connection with the claim for vocational rehabilitation benefits, if awarded. Respondents further contend there was an overpayment of permanent partial disability

benefits in the amount of \$3,060.00 and respondents are entitled to a credit for that overpayment in the event claimant is found to be entitled to additional benefits.

I. FACTUAL BACKGROUND

The claimant is 45 years old (b. June 17, 1961). On March 1, 2004, he was employed as a truck driver. Prior to March 1, 2004, he was in excellent physical condition and had no physical limitations. He graduated high school and attended two years of undergraduate courses at the University of New Orleans. He attended Sojourner Douglass College in Baltimore, Maryland, and earned nine additional credits. He subsequently began attending Tallahassee Community College but left in 1994 to pursue a career as a truck driver and writer. He attended trucking school at the National Training Institute in Orange Park, Florida, and graduated in 1996. While on the road, he finished his studies at Tallahassee Community College by independent study and was conferred an Associate of Arts degree in 2000. He received a certificate from Writer's Digest School in fiction writing and a certificate from the National Radio Institute in non-fiction writing. Prior to 1996, he held various minimum wage part-time jobs working in fast food restaurants, college work study programs, and construction labor.

In 1996, the claimant began his trucking career with McClendon Trucking of Lafayette, Alabama. He worked at McClendon for ten months and earned \$24,000.00. After McClendon, he worked for Pascal Truck Lines for six months earning between \$700.00 and \$800.00 a week in gross income. After Pascal, he worked as an owner-operator with Air Ride earning about \$1,900.00 a week. After the theft of his truck and

freight and an investigation surrounding the thefts, the claimant began working for Continental in December of 2002. By March of 2004, he was earning between \$700.00 and \$800.00 in average weekly wages. On March 1, 2004, while driving a truck for Continental, his truck was struck from behind by another vehicle in North Dakota. As a result of the accident, the claimant suffered two herniated discs. He was subsequently treated by Dr. Kirk Mauro and Dr. Allen Dukes. His medical bills were paid and he received permanent partial disability benefits until he reached maximum medical improvement. He was released to medium duty, but could not return to long-haul truck driving due to his medical restrictions. He worked with Research Network taking surveys over the telephone for approximately six weeks earning minimum wage, i.e. \$6.15 an hour. He got a job with the Association for Community Organizations ("ACORN") in September of 2004. He earned \$1,400.00 per month. He worked for ACORN until January 15, 2005. In March of 2005, he was employed part-time by Entropy Newspaper delivering newspapers to vending machines. He earns \$1,000.00 per month. He works two to five hours per day, seven days a week. He testified that he had applied for other jobs but could not perform some of the jobs due to recurrent pain and discomfort. He testified that he could not return to his job with Continental due to current physical restrictions.

He testified that he would like to pursue training to be a broker in the trucking business with Quik Truk. He explained that a broker is the person who connects the trucking company with the people who have to move freight. He estimated the total cost of his training and start-up costs to be \$32,000.00. This amount includes the expense of

the training and equipment. The training class costs around \$4,500.00 and is located in Arizona.

II. VOCATIONAL REHABILITATION AND WAGE LOSS

In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b)(1)(Repl. 2004); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Arkansas Wood Products v. Atchley*, 21 Ark. App. 138, 729 S.W.2d 428 (1987); *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000).

The claimant is 45 years old with a college education. He has worked in various jobs. A functional capacity evaluation performed February 23, 2006, determined that claimant is capable of performing light to medium-level work, with 37 pounds of lifting, on a full-time basis. On May 31, 2005, Dr. Mauro rendered a medical opinion that the claimant was not capable of returning to long distance driving due to difficulty with recurrent getting in and out of the truck, prolonged sitting, using the equipment, moving tarps, or unloading materials.

The claimant testified that he had used his best efforts to find a job. He testified that he could not get a job with the state because of “nepotism” and further that he was not “the state worker kind of type of guy.” He testified that he would like to work in a convenience store, but could not get the job without cutting his hair and shaving his face. He explained that his hair was long due to religious reasons. He testified that although there was good money in managing convenience stores, he was “not really a fast food management or convenience store management type of person”. He explained that he was terminated from his job at ACORN due to gender discrimination consisting of a “struggle between me and the other girl” in management. The claimant testified that he had filled out paperwork with the Workforce Development Center, but the only job referral was working with an apartment cleaning crew which involved job duties that he was not able to perform in light of his physical restrictions, i.e. carrying vacuum cleaners upstairs.

The claimant testified that the rehabilitation truck broker training program was a seven day program for \$4,500.00. On cross-examination, he admitted that the program was available through a home study program for \$130.00, but contended that hands-on training was necessary in order to become competitive in the industry.

Promotional materials from Quik Truk reflect that the broker training was available by home study with a cost ranging from \$130.00 to \$799.00 and classroom study with hands on training with a cost ranging from \$2,500.00 to \$4,500.00.

Stephen Campbell, Executive Vice-President of Continental Express, testified that there were a moderate amount of light duty trucking jobs available in the industry, such

as a competitive route, a bread route, or other short haul routes that were within the claimant's working restrictions. He explained that the claimant was terminated from his job on December 28, 2005, due to lack of contact after efforts of the company to contact the claimant failed.

In the instant case, the claimant is well-educated. He can read and write. He has had no medical treatment in the last eighteen months and has not taken any prescription medications since February 23, 2005. Although the medical records indicate that the claimant cannot return to his former employment as a long-haul truck driver or heavy labor, the records indicate that the claimant is able to perform gainful employment in various capacities. Following his release to return to work, the claimant has not sought employment in the trucking industry within his restrictions, i.e. short-haul trucking. Likewise, It is important to note that claimant did not attempt to return to work with the respondent and was terminated due to a lack of contact. Moreover, the claimant has worked in a number of jobs since his injury but clearly has chosen to not seek employment in other potential areas based on personal preference or religious beliefs. Based on the claimant's testimony, he was able to perform the job with ACORN and left the job for reasons not related to any permanent disability in connection with the alleged injury. Based on the evidence, I find that the medical records and other evidence do not support claimant's entitlement to wage-loss benefits or that vocational rehabilitation is reasonable or necessary in relationship to the claimant's injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including March 1, 2004, at which time claimant suffered a compensable back injury during the course and scope of his employment.
3. The applicable compensation rate in this case is \$453.00 for temporary total disability and \$340.00 for permanent partial disability, if awarded.
4. The claimant has been assigned a five percent (5%) impairment rating, which rating has been accepted and is being paid.
5. The claimant reached maximum medical improvement in connection with the compensable injury as of September 28, 2004.
6. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage-loss benefits;
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to vocational rehabilitation benefits.

ORDER

For the reasons discussed herein, this claim must be, and hereby is respectfully denied.

Butler - F402502

- 9 -

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge