

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306228

TONY M. CORNISH, EMPLOYEE	CLAIMANT
L A DARLING COMPANY, EMPLOYER	RESPONDENT
MANAGEMENT CLAIM SOLUTIONS, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 17, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on December 9, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Neal L. Hart, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Gail O. Matthews, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted December 9, 2005, to determine whether the claimant was entitled to additional permanent disability benefits.

A prehearing conference was conducted in this claim on November 2, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" without objection.

It was stipulated that the employment relationship existed between the parties at all relevant times, including November 8, 2002; that the claimant sustained a compensable injury on said date; that he earned sufficient wages to entitle him to the maximum compensation rates of \$425.00 per week for temporary

total disability and \$319.00 per week for permanent partial disability; that the respondents paid appropriate temporary total disability, as well as related medical treatment; that the claimant was assigned an eight percent (8%) whole body impairment on or about February 15, 2005, which respondents had accepted; and respondents had controverted claimant's entitlement to wage-loss disability.

The sole issue presented for determination was whether the claimant was entitled to wage-loss disability.

Claimant contended, in summary, that as the result of his November 8, 2002, admitted injury, he had sustained wage-loss disability in an amount to be determined by this Commission. If awarded, claimant requested a controverted attorney's fee.

The respondents contended that the claimant did not sustain any wage-loss disability, maintaining that his job was eliminated, along with other white-collar workers, and that any diminished wages were unrelated to the injury.

The claimant testified in his own behalf. Gary Gossett, the Human Resource Manager for the employer, was called as a witness by the respondents. The record is composed solely of the transcript of the December 9, 2005, hearing containing numerous exhibits.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed of the parties are hereby accepted as fact.
3. Subsequent to his November 8, 2002, injury, the claimant returned to his regular work at wages equal to, or greater than, his average weekly wage at the time of his accident, and has, therefore, failed to prove that he is entitled to permanent partial disability benefits in excess of the eight percent (8%) permanent physical impairment accepted and paid by the respondents in accordance with the provisions of Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002).
4. Respondents have established, by a preponderance of the evidence, that the claimant's termination from employment was unrelated to his compensable injury.

DISCUSSION

\_\_\_\_\_The claimant, Tony M. Cornish, testified in his own behalf. The claimant is fifty (50) years old. He graduated from high school in 1973. After high school, the claimant took a number of courses in management training at Arkansas State University, but does not have a college degree. He also received management

training provided by various employers, including the employer herein. The claimant worked for various factories before going to work at L A Darling. Many of his jobs were as a working supervisor. In addition, he has also worked as a production superintendent which did not require any manual labor. In fact, when the claimant began his employment with the respondent, he was a production superintendent. His job required him to oversee work orders and involved a great deal of record keeping and computer work. He was also required to do a great deal of walking within the plant. The claimant sustained an admitted, compensable injury on November 8, 2002, when, while walking across the plant, he stepped in a hole in the floor and fell, injuring his low back. Although the claimant testified that during the fifty-two (52) weeks preceding his injury, he earned approximately \$72,000.00, this statement is inconsistent with the record as a whole. Rather, the record reflects that the claimant earned approximately \$72,000.00 during the year 2004. As will be reflected further below, the record indicates that the claimant's employment was terminated on October 31, 2004, as the result of an overall reduction in the respondent's workforce, including salaried employees. The claimant actually earned more money during the year 2004 for a ten (10) month period, in part, because it may have included compensation as part of an employment separation package. (Tr.16, 35, 37-38)

Following his injury, the claimant was examined and treated by Dr. Adalberto Fonticiella. Initially, the claimant was treated conservatively. Dr. Fonticiella

eventually conducted additional diagnostic studies which revealed a herniated disc, at which time the claimant was referred by Dr. James Rodney Feild, a neurosurgeon with Mid-South Neurological Clinic in Cordova, Tennessee. The claimant underwent surgery on July 8, 2003. He subsequently returned to work in his prior management position, earning his regular salary. In addition, the claimant worked considerable overtime for which he was paid additional compensation. As previously pointed out, the claimant's employment was terminated on October 31, 2004, as the result of an overall reduction in workforce by the employer. The claimant was one of nine (9) positions eliminated. Although it was the claimant's personal opinion that his termination was directly related to his injury, a preponderance of the credible evidence reflects otherwise.

The claimant was notified of the reduction in workforce determination by letter sent September 2, 2004, offering the claimant a separation package which he agreed to accept. The claimant went to work for another employer, Systex, immediately following his termination. The claimant was working for Systex at the time of the within hearing. Although the record reflects that the claimant was earning significantly less wages with his new employer, a preponderance of the credible evidence reflects that his reduction in income is due to economic considerations rather than physical restrictions. (Cl. Ex. A, pp.1-2)(Tr.26-28)

The record in this claim is extremely confusing concerning the claimant's pre-injury and post-injury earnings. The exact amount of the claimant's earnings is

further complicated by the fact that the claimant missed some work during September, 2004, as the result of additional surgeries for non-work related hemorrhoids and surgical repair of a hernia. In addition, the record reflects that the claimant apparently applied for, and was approved for social security disability in February, 2005, while working for a different employer. The claimant has remained gainfully employed at all times since November, 2004, and has apparently elected not to draw social security disability. The record also reflects that the claimant was involved in another work-related incident at Systex in September, 2005, which, to date, has not resulted in any lost time from work. (Tr.25, 41-42)

I feel compelled to point out that any determination made by the Social Security Administration is not binding on this Commission. Further, it is unclear as to specifically what injuries and/or disabilities the Social Security Administration considered in its determination. The record reflects that the claimant's past medical history includes a heart attack and triple by-pass surgery in March, 2002, and hernia surgeries in 1961 and 1963. As previously noted, the claimant underwent hemorrhoid surgery and an additional hernia surgery in September, 2004. (Resp. Ex. A, p.5)

Gary Gossett, the Human Resource Manager for L A Darling Company, was called as a witness by the respondents. Mr. Gossett's testimony revealed that the claimant returned to work for the employer earning the same or greater wages following the November 8, 2002, admitted injury. In fact, based upon the best

available records, Mr. Gossett testified that the claimant earned more money during 2004 which was the final year of his employment with the respondent employer, despite the fact that he only worked ten (10) months in 2004 for said employer. Concerning the reasons for the claimant's termination, Mr. Gossett's illuminating testimony is set out below:

Q Let's talk about that RIF. The letter went out September 2 of 2004. First of all, just tell me about that, please?

A About the entire RIF?

Q Yes.

A Well, the company in 2004 basically reorganized itself and we had a very, very large downsize in 2004. We basically took the two middle division plants, one in Paragould, one in Corning, and we basically separated them from an operating standpoint. There was approximately 28 to 30 positions that were eliminated as a part of that restructure.

Q While I'm thinking about it, was Tony a good employee?

A Yes, sir.

Q Excellent employee, wasn't he?

A Yes, sir, to my knowledge, yes.

Q If it hadn't been for this RIF, as far as you're concerned, would he still be there doing that job?

A Yes, sir.

Q There was no intent as far as you knew at any time, until this came up, to get rid of Tony or his job, was there?

A To my knowledge, no.

Q Now, in this RIF it shows that there was two manufacturing managers, right?

A Yes, sir.

Q One retained, one is eliminated?

A Yes, sir.

Q I think it's already been developed that Tony was eliminated and Ron Coy was retained?

A Yes.

Q With Ron Coy, was actually his position reduced?

A Yes, sir, it was.

Q He was reduced down one level to a production supervisor?

A Actually, two levels to a production supervisor.

Q Okay. Were all the manufacturing management jobs eliminated over there?

A Yes, sir.

Q That was the only two that was over there at that time?

A Yes, sir.

Q There had been others, but they had already been eliminated, right?

A Yes.

Q Okay. So it gets down to where you are going to keep Tony Cornish or Ron Coy, is that correct?

A Yes, sir.

Q In their performance ratings in 2004, how did their performance ratings compare?

A I believe Ron Coy was rated an overall three, and Tony was rated an overall four.

Q All right, sir. Now, here we are right here. In the objective matters, how did they rate?

A In their written objectives for the year, Tony was rated a 3.3, Ron was rated a 3.2.

Q Anything above three is – tell me what the one, two, three, four, tell us how those go?

A Okay. We basically consider a two a below standard performance level, a three is a solid performance and a four is an excellent performance.

Q Was there considerable discussion as to which one of these gentlemen was going to be eliminated?

A Yes, sir, there was.

Q Who all was involved in the discussions?

A Myself, Mark Broadway and Kevin Osborn.

Q And what did it finally come down to?

A The decision was to eliminate Tony rather than Ron.

Q Will you tell us why?

A Yes, sir. If you look at – I mean, they are both considered solid performers, no doubt about it. Both of them are capable of doing their jobs, okay? But you have employees that have been with the company in excess of 35 years at the age of 58. It was recommended that we retain that long term employee, the older employee.

Q It's almost a cinch that you get an age discrimination claim otherwise, don't you?

A Yes, sir.

Q Did Tony's workers' comp injury have anything to do with that decision at all?

A None whatsoever.

Q But at that time, as far as you were concerned, he was doing his job great,

right?

A Yes. (Tr.47-51)

#### WAGE-LOSS DISABILITY

Compensation for permanent disability for unscheduled injuries is provided in Ark. Code Ann. §11-9-522 which is set out, in part, below:

(b)(1) In considering claims for permanent total 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.

(2) However, so long as an employee, subsequent to 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.

(c)(1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a *bona fide* offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

(d) In accordance with this section, the Commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

This is an extremely unusual claim. First, the record reflects that the claimant is hard working, motivated, and a conscientious worker. This is confirmed by his work history subsequent to the November 8, 2002, admitted injury. Both before and after November, 2002, the claimant worked a great deal of overtime. Despite undergoing surgery and complaints of pain, he resumed his regular job which he performed until his involuntary termination on October 31, 2004. Further, the record reflects that the claimant returned to work at wages equal to, or greater than his average weekly wage at the time of the accident which disqualifies him from being entitled to wage-loss disability in excess of his physical impairment as of the date of the within hearing. A.C.A. §11-9-522(b)(2).

The record reflects that the claimant's wage-loss beginning November, 2004, is the result of economic factors rather than physical restrictions imposed upon the claimant. The claimant's primary treating physician and surgeon is Dr. James Rodney Feild. On November 28, 2005, Dr. Feild was specifically asked whether or not he recommended that the claimant seek employment in a less physically demanding field following his medical release the previous year. In response, Dr. Feild indicated that he made no such recommendations while, at the same time, acknowledging that if the claimant's work activities caused pain, he would agree that the claimant should seek less physically demanding work. (Cl. Ex. A, p.3)

First, it must be noted that the claimant's work does not appear to be physically demanding. As previously pointed out, the claimant is a supervisor and

is not required to perform manual or physical-type work. I recognize that Dr. Fonticiella, a general practitioner, opined that the claimant's work-related back injury has rendered him permanently and totally disabled from engaging in employment of any type, and that the claimant should retire. In view of the claimant's course of conduct and work history, I find Dr. Fonticiella's conclusion to be inconsistent with, and overshadowed by, the overwhelming evidence in this claim. (Cl. Ex. A, p.4)

I further find that the respondent met its burden of proving the claimant's post-injury employment at wages equal to or greater than those at the time of the accident. I am also persuaded that the evidence reflects claimant's discharge was not because of the injury, but based upon economic considerations at the respondent's plant. The record reflects that a number of employees were terminated and that the decision to eliminate the claimant's position was based, in whole or part, in an attempt to avoid an age discrimination lawsuit. Accordingly, I find that the respondents have satisfied its burden under A.C.A. §11-9-522(c).

The claimant stated that in his opinion, his physical condition was gradually deteriorating. However, the claimant has apparently not returned to Dr. Feild since August, 2004. Further, the record reflects that the claimant was involved in an independent intervening accident in September, 2005, while working for his current employer. No medical evidence was introduced related to the most recent incident which occurred subsequent to the claimant's request for a hearing in the instant claim. (Tr.41-42)

I feel compelled to further point out that A.C.A. §11-9-522(d) provides that the Commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts. The Arkansas Court of Appeals has held that the denial of a wage-loss claim is not permanently barred. Specifically, the Court held that the Commission's finding with respect to subsection (b), that a claimant who has once returned to work at equal or greater wages is permanently barred from receiving benefits for a loss in wage earning capacity, even should his subsequent employment cease, unless the claimant is termination for reasons related to his compensable injury was erroneous. *See, Belcher vs. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

The claimant returned to work earning wages equal to or greater than those at the time of his injury. The record reflects that the claimant's discharge from work resulting in diminished wage earnings was the result of economic factors rather than the claimant's physical restrictions. Respondents have accepted and paid appropriate permanent disability benefits, to date. If the claimant's physical condition has deteriorated since last examined by Dr. Feilds on August 6, 2004, A.C.A. §11-9-522(d) and A.C.A. §11-9-713 provide a remedy. The record in this matter does not support an award of additional permanent disability benefits. In view of the foregoing, it is herein concluded that the claimant has failed to prove

entitlement to wage-loss disability. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge