

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403213

PAUL HARP	CLAIMANT
ATLANTIS PLASTICS INC.	RESPONDENT
FIRST LIBERTY INSURANCE CORP INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 14, 2006

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

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by JEFFERY RICKARD, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 19, 2006, in Fort Smith, Arkansas.

A pre-hearing order was entered in the case on August 2, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to resolved at the present time. A copy of this 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 January 9, 2004, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$212.00 for total disability and \$159.00 for permanent partial disability.

3. On January 9, 2004, the claimant sustained a compensable injury to his low back.
4. There is no dispute over the payment of medical expenses or temporary total disability benefits.
5. The claimant's healing period ended on or about June 28, 2004.
6. The respondents have accepted liability for permanent partial disability benefits attributable to a permanent partial impairment of 8% 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 existence and extent of permanent functional disability or loss of wage earning capacity.
2. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a).
3. Whether the claimant unjustifiably refused suitable employment.
4. Appropriate attorney's fee.

By agreement of the parties, the claimant contends:

"It is claimant's contention that claimant sustained a compensable back injury arising out of and in the course of employment with the respondent on or about 1/9/2004. Claimant contends entitlement to workers' compensation benefits as set forth in the issues response in the prehearing memorandum and specifically, reasonable necessary and related medical expenses; ACA 11-9-505 benefits; permanent partial/total disability benefits; and controverted attorney's fees."

By agreement of the parties, the respondents contend:

“The respondents will contend that all compensation benefits to which the claimant is entitled have voluntarily been paid at the proper compensation rate. The respondents contend that the claimant voluntarily quit his employment on or about October 14, 2004, after having been released by his treating physician with permanent restrictions. The respondents further contend that appropriate work at an average weekly wage equal to or greater than his pre-injury wages and within the treating physician’s restrictions was being made available to the claimant by the respondent employer at the time he voluntarily terminated his employment.”

#### DISCUSSION

\_\_\_\_\_The record shows that the claimant began employment with the respondent on August 5, 2002, as a press operator. In the early part of 2003, the claimant was moved to the position of a fork lift operator, a higher paying position. In his position as a fork lift operator, the claimant sustained an admittedly compensable injury to his lower back on January 9, 2004. This injury was in the form of a herniated disc at L5-S1 with resulting radiculitis in the right lower extremity. This injury ultimately resulted in corrective surgery by Dr. Joseph Queeney on March 19, 2004.

within a little over a month following the surgery, Dr. Queeney released the claimant to return to light or limited duty employment with no lifting more than 25 lbs. or working more than 8 hours per day. The effective date of this release was given as 5-3-02(sic). The respondent provided the claimant with an employment position that was within these restrictions. This position appears to have been a modification of a position known as “heat stake.” This modification involved reducing the normal work day to 8 hours

and not requiring that he periodically fill in as a machine operator. The claimant returned to work in this created position.

On June 28, 2004, Dr. Queeney released the claimant from further treatment and assessed a permanent physical impairment of 8% to the body as a whole. At that time, he allowed the claimant to return to a 12 hour work day, and indicated that the previous lifting restriction would be raised from 25 to 50 pounds in 3 weeks.

Apparently, some time after Dr. Queeney's report of June 28, 2004, the claimant was reassigned by the respondent to the position of fork lift driver. However, some of the duties required by this position exceeded his physical restrictions.

On August 2, 2004, the respondent reassigned the claimant to the "heat stake" position. However, this time the respondent did not continue to pay the claimant at the wage he was earning in the fork lift driving position, but reduced his hourly rate to that normally paid for this position (approximately 40 cents). The respondent further required the claimant to perform all of the normally assigned duties of the "heat stake" position, which included periodically operating one of the various presses. The duties required to operate some of these presses exceeded the claimant's physical abilities, primarily prolonged or repetitive bending or stooping. The claimant testified that when he was required to perform these activities, he would experience an increase in pain and discomfort in his back and leg, and on several

occasions he had to leave work early as a result of these increased symptoms.

Approximately October 18, 2004, the claimant was assigned by his supervisor, Mike Lewis, to operate a press. At that time, the claimant advised Mr. Lewis that he did not believe that he was physically capable of performing the duties required to operate this press. No other position was offered to the claimant and he was again directed to run this particular press (apparently, press 24). In regard to this conversation, Mr. Lewis testified:

“I had been having him (the claimant) run an easy job for a while and it come down to the point where I had a priority machine that was a must run machine and I assigned him to that machine.”

The evidence presented shows that in order for the claimant to operate press number 24, he was required to be constantly bending at the waist. The record reveals that the claimant attempted to perform the duties required of the operator of this press for several hours. It was the claimant's testimony that the constant bending over during this period produced an increase in his back pain and swelling in his back. Clearly, such an increase in symptoms would not be unreasonable or unlikely in an individual that had undergone surgical correction of a herniated lumbar disc only four months prior.

After this increase in his symptomology, the claimant returned to Mr. Lewis and again advised him that he was physically unable to perform this position. Again, no other position was offered the

claimant. At that point, the claimant apparently left the respondent's premises (T.39-40).

The claimant testified that he reported for work the following scheduled shift but was terminated by Mr. Lewis, in the presence of Richard Foster (an intermediate supervisor). He further testified that he was given checks, at that time for his accrued time and for his accrued vacation pay. Mr. Lewis testified that he did not fire or terminate the claimant and to his knowledge the last he ever saw of the claimant was when he refused to perform his assigned employment position and left the plant. Richard Foster, the claimant's intermediate supervisor, testified that he never terminated the claimant and that he never saw the claimant again after the claimant stated that he was unable to do his assigned position and left.

#### I. APPLICABILITY OF §11-9-505(a)

Ark. Code Ann. §11-9-505(a) provides additional benefits when a respondent has available a suitable employment position that is within an injured worker's physical and mental limitations, but unreasonably refuses to provide such a position to the injured employee. However, in order to be entitled to such benefits, the burden rests upon the claimant to prove all of the elements necessary to invoke the provisions of this subsection.

Clearly, the first of these elements is that the respondent must have a "suitable" position "available." In order to constitute a "suitable" position, the evidence must not only show that the position is within the physical limitations and restrictions caused

by the compensable injury, but must also show that the claimant is otherwise physically and mentally capable of performing all of the work required for this position. The Appellate Courts have held that an employer must take some steps to assist the claimant in qualifying for an employment position for which he would otherwise be physically capable and mentally competent. However, there is no requirement, under Ark. Code Ann. §11-9-505 (a) that an employer must create or significantly alter the duties of a particular employment position so as to cause it to come within the claimant's physical and mental limitations.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that the respondent had suitable employment available on and after the claimant's termination in October of 2004. In fact, the evidence fails to show that the respondent had available a regular employment position that was within the claimant's physical limitations even prior to October of 2004.

The record shows that while the claimant was still undergoing active treatment for his compensable injury, he was released to return to limited or light duty. At that time, the respondent made available to the claimant a "heat stake" position. However, it is appears that the employer had significantly altered the regular "heat stake" position to accommodate the claimant during his period of recovery. In this particular position, the claimant was not required to "fill in" when necessary, on the various presses as a "press operator." The evidence shows that in a regular "heat

stake” position, the worker would be required to fill in for absent press operators on a weekly basis.

The record then shows that when the claimant reached maximum medical improvement, he was returned to his regular position as a fork lift driver. However, the claimant acknowledged that the regular duties for the fork lift driver position exceeded his physical limitations. He was only able to perform this position for a limited period of time, only by receiving assistance from fellow employees. The claimant was subsequently returned to the “heat stake” position on August 2, 2004. However, this position was no longer limited from filling in for absent press or machine operators. Instead, the claimant was required to fill in as a machine or press operator, whenever needed. In regard to some of the presses or machines, this operator’s position was beyond the claimant’s physical limitations. In fact, his temporary assignment to fill in on such a press or machine created the circumstances that resulted in the ultimate severance of his employment with this respondent in October of 2004.

It was the claimant’s own testimony that he was physically incapable of performing the regular job duties of any of the identified employment positions available through the respondent. These would include the “heat stake” position, the fork lift driver position, and the machine or press operator position. According to the claimant’s testimony, the only way he would be physically capable of performing any of these positions would be for the

respondent to substantially alter the normal duties required for these positions.

As previously stated, I do not find that Ark. Code Ann. §11-9-505(a) mandates that a respondent employer make such substantial alterations in the regular job duties of a position so as to make it "suitable." The fact that the respondent may have made such alterations for a limited time during the claimant's active recovery period would not automatically obligate them to do the same on a permanent basis once the claimant's condition had stabilized.

As the claimant has failed to prove that the respondent had suitable employment available to him on and after the date of his separation from employment in October of 2004, I find that the claimant has failed to prove his entitlement to the additional benefits provided by Ark. Code Ann. §11-9-505(a). Therefore, his claim for such benefits must be denied.

II. REFUSAL OF SUITABLE EMPLOYMENT AND THE EFFECT OF ARK. CODE ANN. §11-9-522(b)(2)

\_\_\_\_\_The respondents contend that the claimant is not entitled to any permanent partial disability benefits for permanent functional disability or loss of wage earning capacity. The basis for this argument rests upon the provisions of Ark. Code Ann. §11-9-522(b)(2). This subsection provides:

"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.”

Clearly, the evidence shows that the respondent returned the claimant to work at wages equal to his average weekly wage at the time of his accident. However, such a fact, in and of itself, does not act to forever bar the claimant from receiving benefits for functional disability or wage loss. Instead this bar only continues until the claimant is no longer employed at wages equal to or greater than his average weekly wage at the time of his accident, unless this decrease was the result of termination of the employment was for misconduct in connection with the work or because the claimant left the work voluntarily and without good cause connected with the work.

After consideration of all the evidence presented, it is my opinion that, as of the date of the claimant's separation from employment with the respondent in October of 2004 (apparently October 27, 2004), Ark. Code Ann. §11-9-525(b)(2) was no longer a bar to the claimant's entitlement to permanent partial disability benefits for permanent functional disability or loss of wage earning capacity.

First all of the evidence presented shows that after August 2, 2004, the claimant was earning wages that were less than his average weekly wage at the time of his accident. While this difference in pay may not have been particularly great (approximately 40 cents per hour), it was clearly less than the

claimant's average weekly wage at the time of his accident. Ark. Code Ann. §11-9-522(b)(2) is quite specific. To substitute almost equal to for the statute's express wording of equal to or greater than would be an impermissible violation of the mandate of strict interpretation of the Act.

There is no direct evidence offered in regard to the reason for this reduction in pay. However, it would appear from the evidence presented that this reduction merely reflected the claimant being moved from his pre-injury job as a fork lift driver to the "heat stake" position, which was a lower paying job by classification. It would further appear from the evidence presented that this transfer was occasioned by the claimant being physically unable, due to the effects of his compensable injury, from performing all of the job duties required for the fork lift driver position. Regardless, there is no evidence this reduction in pay was due to any misconduct or any matter over which the claimant had any control.

Secondly, the evidence presented shows that the various positions provided the claimant by the respondent on and after his release from treatment (i.e. fork left operator and the regular heat stake position), exceeded the claimant's physical restrictions and limitations from his compensable back injury. Thus, such employment would not represent a bona fide return to work or reasonably obtainable offer of employment. The claimant's ultimate refusal, in October of 2004, to continue to perform the employment provided him by the respondent that exceeded his physical

limitations and restrictions from his compensable injury was clearly reasonable and for good cause. Ark. Code Ann. §11-9-522(b)(2) should not be interpreted in such a manner as to force an injured employee to perform work that increases his pain or symptoms.

The respondent's continually point to the fact that the employment positions they offered the claimant were within the physical restrictions that were set by his treating physician (Dr. Joseph Queeney), in his report of June 28, 2004. The only permanent restriction imposed by Dr. Queeney in this report was a restriction against lifting in excess of 50 pounds.

While medically imposed restrictions are certainly relevant and important in determining the actual physical limitations and restrictions resulting from a compensable injury, medically imposed restrictions are not absolute and are not the only factors to be considered. In the present case, the claimant testified that he experienced increased pain and difficulties involving his back, when he was required to bend, or twist repetitively at the waist. It is further apparent from the evidence that he informed his supervisors of this fact. Clearly, such a physical restriction or limitation would be reasonable and logically expected from an injury such as that experienced by the claimant (a herniated lumbar disc requiring surgical intervention). In fact, I am surprised that Dr. Queeney did not expressly include such a limitation in his report, as it consistently appears in the numerous cases of this type of lumbar injury with which I have been involved for the past

thirty years. Curiously, the respondent did not even check with Dr. Queeney, in regard to the validity of the claimant's complaints of increased difficulties as a result of performing these employment activities.

Ultimately, a functional capacity evaluation was performed on the claimant, at the request of Dr. Queeney, on November 16, 2004. This testing revealed that the claimant gave his full effort on testing and that the results of the testing were reasonable and reliable. This testing not only revealed that the claimant should refrain from lifting in excess of 50 pounds, but was also restricted from prolonged and repetitive positions such as bending and stooping. Dr. Queeney appears to have concurred with these findings (Respondent's Exhibit No. 1, page 7).

### III. EXTENT OF PERMANENT PARTIAL DISABILITY FOR PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE EARNING CAPACITY

\_\_\_\_\_The final issue remains the question of the existence and extent of permanent functional disability or loss of wage earning capacity. The burden rests upon the claimant to prove all of the elements necessary to entitle him to these benefits. This issue is controlled by the provisions of Ark. Code Ann. §11-9-522(b)(1).

The record shows that the claimant is 50 years old. He has a somewhat limited education, having completed only part of the twelfth grade. His prior work experience consists extensively of ranch or farm work with some assembly line or factory work, including operating a forklift. He was employed by the respondent for approximately two years prior his termination. His compensable

injury consisted of a lumbar disc herniation with a free fragment and resulting radicular difficulties that required surgical intervention. This injury and surgery resulted in a permanent injury with an assessment of permanent physical impairment in the amount of 8% to the body as a whole. The evidence presented also establishes that this injury has permanently limited the claimant to employments that do not require lifting in excess of 50 pounds, only occasional lifting of 20 to 50 pounds, and frequent lifting from 10 to 25 pounds. He is also precluded from engaging in any employments that would require him to maintain prolonged or repetitive bending or stooping. He also appears to have experienced a loss of strength and stability in his right lower extremity from the radicular effects of the compensable injury.

After consideration of the permanent restrictions and limitations resulting from the claimant's compensable injury, in light of his age, education, prior work experience, and various other factors relevant to his wage earning ability (i.e. the various types of employment positions available in the area of the claimant's residence, the claimant's excellent motivation as demonstrated by his repeated attempts to maintain his employment with this respondent, etc.), I find that the greater weight of the credible evidence proves that the claimant has experienced permanent partial disability for permanent functional disability or loss of wage earning capacity. I further find this permanent partial disability to be in the amount of 10% to the body as a whole. Therefore, I find that the claimant is entitled to permanent

partial disability benefits for a permanent partial disability of 18% to the body as a whole. This includes permanent partial disability for both permanent physical impairment and permanent functional disability or loss of wage earning capacity.

FINDINGS OF FACT & CONCLUSIONS OF LAW

\_\_\_\_1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On January 9, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On January 9, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$212.00 for total disability and \$159.00 for permanent partial disability.

4. On January 9, 2004, the claimant sustained a compensable injury to his low back in the form of a herniated disc with free fragment and resulting radiculopathy.

5. There is no dispute over the claimant's entitlement to reasonably necessary medical services at the respondents' expense and all such services accruing to date have or will be paid.

6. There is no dispute over the payment of 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 or about June 28, 2004.

8. The claimant has experienced a permanent partial disability of 18% to the body as a whole, as the result of the permanent effects of his compensable lumbar injury. This includes

a permanent partial disability of 8% for permanent physical impairment and a permanent partial disability of 10% for permanent functional disability or loss of wage earning capacity.

9. The claimant is not prevented from receiving permanent partial disability benefits for permanent functional disability or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-522(b)(2). Specifically, on and after August 2, 2004, the respondents had not returned the claimant to employment at wages equal to or greater than his average weekly wage at the time of his accident. When the respondent returned the claimant to his preinjury position as a forklift driver, the respondent did not return the claimant to suitable employment that was within his physical restrictions and limitations caused by his compensable injury. When the respondent subsequently transferred the claimant to the "heat stake" position, which required him to fill in as a machine or press operator, the respondent did not return the claimant to suitable employment that was within his physical restrictions and limitations. When the claimant refused to continue to perform the "heat stake" position, including filling in as a machine or press operator, in October of 2004, such a refusal did not represent misconduct in connection with the work and did not represent a voluntary cessation of work by the claimant without good cause connected with the work.

10. The claimant has failed to prove by a preponderance of the evidence, that he is entitled to the additional benefits provided by Ark. Code Ann. §11-9-505(a). Specifically the claimant has

failed to prove that the respondent had available suitable employment that was within his physical restrictions and limitations.

11. The respondent has denied the claimant's entitlement to any permanent partial disability benefits for permanent functional disability or loss of wage earning capacity and his entitlement to any benefits under Ark. Code Ann. §11-9-505(a).

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted permanent partial disability benefits herein awarded for permanent functional disability or loss of wage earning capacity.

#### ORDER

\_\_\_\_\_The respondents shall pay to the claimant permanent partial disability benefits for a permanent partial disability of 18% to the body as a whole, which includes permanent partial disability benefits for a permanent physical impairment of 8% to the body as a whole, and permanent partial disability benefits for 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 any permanent partial disability benefits previously paid.

The respondents remain liable for all reasonably necessary medical services for the claimant's compensable injury.

The respondents shall pay to the claimant's attorney, the maximum statutory attorney's fee on the additional permanent partial disability benefits herein awarded for permanent functional

disability or loss of wage earning capacity. One-half of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

The claimant's request for additional benefits under Ark. Code Ann. §11-9-505(a) should be and hereby is denied for the reasons heretofore set forth in this Opinion.

All benefits herein awarded, which have previously 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.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE