

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F400197

RONNIE SANDERS, EMPLOYEE **CLAIMANT**

**GOOD HOME CENTER,
EMPLOYER** **RESPONDENT NO. 1**

**ST. PAUL-TRAVELERS INS. CO.,
INSURANCE CARRIER/TPA** **RESPONDENT NO. 1**

**DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND** **RESPONDENT NO. 2**

OPINION FILED SEPTEMBER 12, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 was represented by Mr. Phillip P. Cuffman, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Christy King, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 17, 2008, the above captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on January 29, 2008, and a Prehearing Order was entered on that same date. A copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record herein without objection, subject to any modifications made at the full hearing.

The parties stipulated to the following at the June 17, 2008, full hearing:

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- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including August 8, 2003.
- 3) The claimant's average weekly wage was \$380.00 per week which would entitle the claimant to a temporary total disability rate of \$253.00 per week and permanent partial disability rate of \$190.00 per week.
- 4) The claimant sustained a compensable back injury on August 8, 2003, and the claimant's last maximum medical improvement date was October 16, 2006.
- 5) The claimant sustained a 15% anatomical impairment to the whole body which was accepted and paid by Respondent No. 1.

The parties agreed at the full hearing to litigate the following issues:

- 1) Whether the claimant is entitled to additional temporary total disability benefits for the period between March 18, 2005, through March 8, 2006.
- 2) Whether the claimant is now permanently and totally disabled, or in the alternative entitled to wage loss disability benefits in excess of the 15% impairment.
- 3) Attorney's fees.

At the full hearing, the claimant contended the following:

- 1) That claimant was initially assessed at maximum medical improvement prematurely and as a result is entitled to temporary total disability benefits for the period between March 18, 2005, through March 8, 2006.
- 2) That he is now totally and permanently disabled, or in the

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alternative entitled to wage loss disability benefits in excess of the anatomical impairment.

- 3) That he is entitled to attorney's fees.

Respondent No. 1 contended the following at the full hearing:

- 1) That they have paid appropriate benefits for the claimant's injury.
- 2) That they are not aware of any unpaid benefits owed to the claimant.
- 3) That claimant is not permanently and totally disabled and is not entitled to wage loss.
- 4) Respondents have paid all reasonable and necessary medical treatment.

Respondent No. 2 contended at the prehearing conference and by letter that has been incorporated as Respondent No. 2's Exhibit No. 1 that they will defer to the outcome of the litigation. Respondent No. 2 also contended that if the claimant is found to be permanently and totally disabled, Respondent No. 1 is not entitled to a credit for payment of permanent disability benefits against its maximum liability as defined in A.C.A. § 11-9-502 prior to the date upon which the claimant reached the end of his healing period and became permanently and totally disabled pursuant to Death & Permanent Total Disability Trust Fund v. Legacy Insurance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents,

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and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from March 18, 2005, through March 8, 2006.
- 4) Therefore, the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
- 5) The claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled.
- 6) Upon consideration of all relevant wage loss factors, I find the claimant established a decrease in his wage earning capacity equal to 20% to the whole body, and is therefore entitled to wage loss disability benefits. The claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. Respondent No. 1 is liable for wage loss disability in the amount of 20% to the body as a whole, over and above the claimant's 15% anatomical impairment rating.
- 7) Claimant's attorney, the Honorable Gregory Giles, is entitled to the maximum attorney's fee under A.C.A. § 11-9-715(a)(2)(A).

DISCUSSION

The claimant, age 38, testified that he began working for Good Home Center around 1996. The claimant was an accountant manager for Respondent No. 1 and testified as follows regarding his duties of “account manager”:

Q Explain to us briefly what kind of job duties, responsibilities, you had as the account manager.

A As the account manager I managed the accounts. I took payments, delivered furniture, repossessed furniture, worked the showroom floor as far as setting it up with the furniture.

Q Did you have to do loading and unloading and things of that nature?

A Yes, sir.

Q Lifting and carrying the furniture?

A Yes, sir.

(T. pg. 15, lines 2-13).

The claimant testified that prior to going to work for Respondent No. 1, he worked for Taco Tico, Ludwig, a grocery store, and a different furniture store. The claimant testified that his job duties at the grocery store consisted of being a stocker; and that his duties at Taco Tico were in food preparation. The claimant testified that at Ludwig he worked in a plant type setting where Styrofoam was made.

On August 8, 2003, the claimant sustained an admittedly compensable back

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injury. The claimant testified as follows regarding the August 8, 2003, work related incident:

A During that time me and my manager, which was Jim Lewis at the time, we was putting away air conditioners for the fall and we had lifted the air conditioner and I heard a pop in my back and pain went shooting up my back and down my legs. At that point in time I was sent to the company doctor, which was Dr. Antoon.

(T. pg. 17, lines 4-10).

Following the claimant's admittedly compensable injury the medical evidence shows the claimant sought medical attention from Dr. Patrick Antoon on August 13, 2003. Dr. Antoon recommended an MRI of the claimant's lumbar spine which was conducted on September 3, 2003. The claimant's September 3, 2003, lumbar MRI report stated, "... moderately large central and left-sided herniation of nucleus pulposus with encroachment on the left intervertebral foramen and the left L1 nerve within the spinal canal." (Cl. Ex. 1, pg. 12). Thereafter, the claimant was referred to Dr. Shahim who on October 9, 2003, recommended microdiskectomy surgery at left L5-S1. (Cl. Ex. 1, pg. 25). On January 5, 2004, the left L5-S1 microdiskectomy was performed by Dr. Shahim. On February 23, 2004, Dr. Shahim returned the claimant to light duty for one month then recommended full duty. (Cl. Ex. 1, pg. 48). Dr. Shahim's report from April 12, 2004, indicates that Dr. Shahim decided to leave the claimant on light duty through April 26, 2004. (Cl. Ex. 1, pg. 59). Then, on April 26,

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2004, Dr. Shahim released the claimant to full duty with an 8% impairment rating. (Cl. Ex. 1, pg. 60).

The medical records indicate Dr. Shahim changed his mind on June 2, 2004, and put the claimant back on light duty. (Cl. Ex. 1, pg. 66). Thereafter, another MRI of the claimant's lumbar spine was recommended and performed. On August 3, 2004, after another MRI, Dr. Shahim opined, "He has evidence of a small recurrent disc herniation at the left L5-S1 resulting in S1 nerve root compression." As a result, Dr. Shahim recommended a redo surgery of the claimant's diskectomy at L5-S1. (Cl. Ex. 1, pg. 77). On September 10, 2004, a second surgery was performed by Dr. Shahim that was basically a redo surgery of the claimant's left L5-S1 microdiscectomy. (Cl. Ex. 1, pg. 83). Following the claimant's second surgery, Dr. Shahim recommended that the claimant be off work through November 22, 2004. Thereafter, Dr. Shahim recommended another MRI of the claimant's lumbar spine and on November 22, 2004, after another MRI Dr. Shahim opined, "I see evidence of broad disc herniation at L5-S1." (Cl. Ex. 1, pg. 95). At that time, Dr. Shahim recommended that the claimant remain off work and undergo physical therapy and steroid injections. Then on January 11, 2005, Dr. Shahim recommended that the claimant undergo a fusion at L5-S1 due to the claimant's recurrent pain and MRI findings. (Cl. Ex. 1, pg. 107). Dr. Shahim then recommended that the claimant remain off work through January 27,

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2005.

The claimant was sent to Dr. Krishnan for some epidural steroid injections on January 11, 2005. (Cl. Ex. 1, pg. 109). On January 27, 2005, Dr. Shahim still recommended the fusion but indicated the claimant wanted to continue conservative treatment with injections. (Cl. Ex. 1, pg. 112). With the claimant not wanting another surgery from Dr. Shahim, Dr. Shahim released the claimant at MMI with a 10% whole body impairment on February 16, 2005. (Cl. Ex. 1, pg. 116). On March 31, 2005, Dr. Shahim released the claimant to light duty but still recommended surgery. Dr. Shahim stated in his March 31, 2005, report, "If he was unable to work or change his mind about further surgical treatment I would be glad to discuss interbody fusion with him." (Cl. Ex. 1, pg. 119). On April 28, 2005, the claimant underwent a Functional Capacity Evaluation which indicated the claimant exhibited self-limitating behavior. The Functional Capacity Evaluation found the claimant was able to perform light duty work. (Cl. Ex. 1, pp. 122-126).

On May 18, 2005, Dr. Antoon opined, "claimant cannot return to work," and on June 10, 2005, the Arkansas Workers' Compensation Commission issued the Change of Physician Order changing the claimant's doctor from Dr. Shahim to Dr. Bryant. Dr. Bryant also recommended another MRI of the claimant's lumbar spine which was performed on August 2, 2005. Following a review of the claimant's most

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recent MRI, Dr. Bryant also recommended that claimant undergo a fusion surgery. (Cl. Ex. 1, pg. 145). Ultimately, the claimant was referred to Dr. Wayne Bruffett who saw the claimant on November 4, 2005, and opined, “I have told him that I really cannot say he is incapable of any type of work right now. . . He has had an FCE in the past, which I believe showed he could do light-duty and that is what I will release him to currently.” Dr. Bruffett also recommended the claimant undergo a discography procedure. (Cl. Ex. 1, pg. 157).

After the discography recommended by Dr. Bruffett, the claimant saw Dr. Bruffett on January 25, 2006, whereby Dr. Bruffett also recommended that the claimant undergo fusion surgery. On March 9, 2006, the claimant underwent a fusion surgery by Dr. Bruffett. (Cl. Ex. 1, pg. 173). Following the claimant’s fusion surgery, Dr. Bruffett released the claimant to light duty on May 19, 2006. On October 16, 2006, Dr. Bruffett released the claimant to sedentary work with a 15% whole body impairment. (Cl. Ex. 1, pg. 202). Dr. Bruffett saw the claimant again on November 20, 2006, and opined that the claimant’s chronic pain may be related to depression. Dr. Bruffett recommended that the claimant undergo an evaluation and treatment for his depression. (Cl. Ex. 1, pg. 206). On March 6, 2007, the medical reports indicate the claimant saw Dr. Peckham for depression. (Cl. Ex. 1, pg. 224).

On April 26, 2007, the claimant underwent another MRI of his lumbar spine

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that was reviewed by Dr. Bryant who opined that the claimant did not need further surgical intervention. (Cl. Ex. 1, pg. 230). Dr. Bryant then recommended that the claimant receive pain management. On March 21, 2008, Dr. Bryant opined that the claimant was totally disabled. (Cl. Ex. 1, pg. 251). Then, on March 26, 2008, another MRI was performed on the claimant's lumbar spine which Dr. Bruffett reviewed and still opined that no surgical intervention was needed but did recommend that the claimant continue to see Dr. Abraham for pain management. (Cl. Ex. 1, pg. 254).

As a result of his August 8, 2003, compensable back injury, claimant is requesting that he be found permanently and totally disabled, or in the alternative entitled to wage loss disability benefits in excess of his 15% whole body impairment rating. The claimant also contends that he is entitled to temporary total disability benefits for the period of March 18, 2005, through March 8, 2006.

ADJUDICATION

The claimant has contended entitlement to additional temporary total disability benefits from March 18, 2005, through March 8, 2006. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. Ark. State Hwy. & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the period of TTD now requested by the claimant took place between the claimant's second and third surgeries. During the period of TTD

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now requested by the claimant, Dr. Shahim had recommended a fusion surgery; however, the claimant did not wish to undergo the fusion surgery at that time because the claimant testified that he had lost faith in Dr. Shahim due to the previous two surgeries that Dr. Shahim had performed.

Clearly, the claimant was still within his healing period because there was an additional surgery being recommended which now with the benefit of perfect hindsight we know was actually performed by Dr. Bruffett on March 9, 2006. Therefore, the claimant has proven the first prong outlined in Breshears in that he was still within his healing period for the requested period of TTD. The claimant has, however, failed to prove by a preponderance of the evidence that he was totally unable to earn wages during the period of requested TTD. Both Drs. Shahim and Bruffett opined that the claimant was still able to do some light duty work during the period between March 18, 2005, through March 8, 2006. In Dr. Shahim's March 31, 2005, report found at Claimant's Exhibit 1, page 119, Dr. Shahim released the claimant to light duty work even with the pending fusion recommendation. Then, on April 28, 2005, the claimant underwent a Functional Capacity Evaluation which stated that the claimant could not meet the physical demands of his job that he was performing at the time of the compensable injury; however, the Functional Capacity Evaluation still found the claimant capable of performing light duty work. (Cl. Ex. 1, pp. 122-126). Even Dr. Bruffett in his November 4, 2005, report found at Claimant's Exhibit 1, page

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157, stated, "I have told him that I really cannot say he is incapable of any type of work right now. . . He has had an FCE in the past, which I believe showed he could do light-duty and that is what I will release him to currently."

Based upon the medical evidence contained in the record herein and recited above, and the Functional Capacity Evaluation, I find that the claimant has failed to prove by a preponderance of the evidence that he was totally unable to earn wages between the period of March 18, 2005, through March 8, 2006. In making this determination, I do not disregard Dr. Antoon's report of May 18, 2005, found at Claimant's Exhibit 1, page 132, wherein he opines that the claimant "cannot return to work." However, Dr. Antoon's report leads this examiner to find that although the claimant could not return to the work that he was performing at the time of his compensable injury, Dr. Antoon does not state that the claimant could not return to any work. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits for the period of March 18, 2005, through March 8, 2006.

The claimant contends that he is now permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." (A.C.A. § 11-9- 519(e)). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. (A.C.A. §

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11-9-102(4)(F)(ii)(a)).

Based upon the evidence now before the Commission, I find that the claimant has failed to prove by a preponderance of the evidence that he is now permanently and totally disabled. In making such a determination, I rely on the opinions from Drs. Shahim and Bruffett prior to the claimant's fusion surgery on March 9, 2006. Even before the fusion surgery, both doctors opined that the claimant could return to some type of work. Then, on March 9, 2006, the claimant underwent a fusion surgery which should have benefitted the claimant and not made his functional abilities worse. In fact, on March 12, 2008, Dr. Wayne Bruffett examined the claimant and found that his fusion was solid and all the instrumentation to be in stable position. (Cl. Ex. 1, pg. 250J). Further, even after the claimant had his fusion surgery, Dr. Bruffett examined the claimant on more than one occasion and ultimately found that the claimant could be released with a 15% whole body impairment rating and released to do sedentary work. (Cl. Ex. 1, pg. 202). In making such determination, I do not disregard Dr. Bryant's opinion that the claimant is totally disabled as he stated in his March 21, 2008, report found at Claimant's Exhibit 1, page 251. However, when taking the totality of the evidence into consideration, I find that Dr. Bruffett's opinion regarding the claimant's work abilities should be given more weight. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent and total disability benefits.

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When addressing permanent and total disability, it is necessary to look into the possibility of wage loss disability benefits. The claimant's entitlement to permanent disability benefits is controlled by A.C.A. § 11-9-522, 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.

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. 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. Eckhart v. Willis 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 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).

At this time, the claimant is only 38 years old, and the parties stipulated to the claimant's 15% whole body impairment due to his admittedly compensable injury. As recited herein, the claimant's work history indicates the claimant has worked in jobs

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ranging from light to medium duty. It must also be pointed out that the claimant's motivation to return to work could be brought into question based upon the "self-limitating" behavior that was reported in the claimant's Functional Capacity Evaluation.

It is clear to this examiner that the claimant has sustained some wage loss as a result of his compensable injury. However, the claimant is only 38 years old and has a 15% whole body impairment. In taking into account all the relevant factors to consider when determining wage loss, and after a thorough review of the record now before the Commission, I find that the claimant has sustained wage loss in the amount of 20% over and above his stipulated anatomical impairment of 15% for a total of 35%. Therefore, I find that the claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability benefits in the amount of 20% over and above his stipulated anatomical impairment rating. I further find that the claimant's attorney, the Honorable Gregory Giles, is entitled to the maximum statutory attorney's fees for the permanent benefits awarded herein.

AWARD

Respondents are herein directed and ordered to pay the claimant for his additional 20% permanent disability benefits for wage loss over and above his 15% anatomical rating forthwith. Said sums accrued shall be paid in a lump sum without discount.

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Maximum attorney's fees are herein awarded to the claimant's attorney, the Honorable Gregory Giles, pursuant to A.C.A. § 11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. § 11-9-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb