

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F901210

WAYNE WOOD, Employee	CLAIMANT
J.B. HUNT TRANSPORT INC., Employer	RESPONDENT
AIG DOMESTIC CLAIMS, Carrier	RESPONDENT

OPINION FILED JULY 6, 2011

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by K. KEITH WREN, Attorney, Little Rock, Arkansas.

Respondents represented by JOSEPH H. PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 15, 2011, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 7, 2011, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on January 30, 2009.
3. The claimant sustained a compensable injury to his back on January 30, 2009.
4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rates.
5. The respondent accepted and paid permanent partial disability benefits based on an 11% rating to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Wage loss.
2. Attorney fee.

The claimant contends he has been unable to find employment and that he has sustained wage loss as a result of his compensable injury.

The respondents contend they accepted this claim as compensable from the outset and that they have paid all sums thus far that are due and owing claimant.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 7, 2011, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 25% to the body as a whole for a loss in wage earning capacity resulting from his compensable injury.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 25% to the body as a whole.

FACTUAL BACKGROUND

_____ The claimant is a 61-year-old man who has worked as an over-the-road truck driver since 1992-93. Claimant suffered an admittedly compensable injury to his back while working for the respondent as a driver on January 30, 2009. After some initial medical treatment the claimant underwent an MRI scan which revealed a disc herniation at the L4-

5 level. Claimant underwent surgery to repair the herniation on July 9, 2009, and this procedure was performed by Dr. Bolt.

Following claimant's surgery Dr. Bolt ordered a functional capacities evaluation and on May 5, 2009 released the claimant as having reached maximum medical improvement. Dr. Bolt also assigned claimant a permanent physical impairment rating in an amount equal to 11% to the body as a whole. Respondent accepted and paid claimant permanent partial disability benefits based upon the 11% rating. Claimant has filed this claim contending that he is entitled to additional permanent benefits for wage loss suffered as a result of his compensable injury.

ADJUDICATION

_____ In considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors. These factors include the claimant's age, education, work experience, and other matters reasonably expected to affect the employee's future earning capacity. A.C.A. §11-9-522(b)(1).

In this particular case, the claimant is 61 years old. Claimant graduated from high school and completed one and a half years of college. In addition, the claimant has also undergone some training such as receiving a certificate in 1982 that would have allowed him to become an electrician's apprentice and he also received some training and worked in the culinary/restaurant management field.

Prior to becoming an over-the-road truck driver in 1992-93, the claimant performed some work in restaurant management. He also worked as a rigger on a tug boat for six months in 1993 and worked as a shipping manager who was responsible for labeling and loading and unloading trucks with a forklift.

At the hearing claimant testified that he suffers from physical restrictions which

severely limit his ability to perform work. Claimant testified that he suffers from numbness in the back and shooting pain in his left leg. Claimant also testified that his left ankle will buckle and give way causing him to fall once or twice a week if he does not use a cane. Claimant testified that walking and sitting makes his condition worse and that he can only sleep two to three hours before waking up. Claimant also testified that he takes a number of medications which make him drowsy and cause trouble with concentration. Claimant contends that his problems with sleeping and the medications would affect his ability to perform regular work because sometimes in the afternoons he has to lay down for two or three hours and take a nap.

The claimant's view of his restrictions is more limiting than the findings contained on the FCE and the opinion of Dr. Bolt. At Dr. Bolt's request claimant underwent a functional capacities evaluation on April 21, 2010. That evaluation indicates that claimant was functionally capable of performing the job of a driver for the respondent based upon the respondent's job description. The evaluation report also indicates that claimant demonstrated the ability to function at a minimum in the medium work level. Claimant demonstrated the ability to occasionally lift up to 30 pounds and frequently lift 20 pounds. According to the evaluation report, claimant demonstrated a consistency of performance during the testing procedure.

Following the functional capacities evaluation claimant was next evaluated by Dr. Bolt on May 5, 2010. In his report of that date Dr. Bolt indicated that claimant had reached maximum medical improvement and he assigned the claimant the 11% impairment rating. He also addressed the findings of the evaluation report and stated as follows: "I reviewed this with Mr. Wood and we feel this is an accurate representation of his abilities and I am going to accept the results of the functional capacity evaluation as detailed in the report."

On that same date Dr. Bolt completed a form indicating that claimant should not perform commercial driving and that he should not engage in stooping, bending, or

twisting. He also indicated that claimant should alternate sitting and standing and that he should not lift more than 20 pounds.

Following his release by Dr. Bolt claimant has been treated for pain management by Dr. Dreskin. In his initial medical report of June 8, 2010, Dr. Dreskin indicates that Dr. Bolt had previously addressed claimant's work restrictions in his report of May 5, 2010, and he would defer to Dr. Bolt's opinion regarding claimant's work status or restrictions.

Other than contacting the respondent prior to his release by Dr. Bolt, claimant testified that he has not applied for work anywhere. A claimant's lack of interest in pursuing employment is an impediment to the Commission's full assessment of wage loss and it is a factor which may be considered. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W. 3d 258 (2005).

Obviously, claimant's view of his ability to return to work and his physical limitations is more severe than the limitations shown on the functional capacities evaluation or the limitations imposed upon him by Dr. Bolt. While claimant has characterized the functional capacities evaluation as a "dog and pony show", I find that the functional capacities evaluation and Dr. Bolt's opinion regarding claimant's physical restrictions are credible and entitled to great weight.

In short, after consideration of the relevant wage loss factors in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 25% to the body as a whole. While according to Dr. Bolt claimant cannot return to work as a commercial truck driver, claimant is capable of performing work which involves lifting up to 20 pounds. Based upon claimant's prior work history he has some transferrable skills from his work in restaurant management and as a shipping clerk. In addition, I note that claimant is a high school graduate and attended college for one and a half years. Based upon these factors as well as the remaining evidence, I find that claimant has suffered a

loss in wage earning capacity in an amount equal to 25% to the body as a whole.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 25% to the body as a whole for loss in wage earning capacity resulting from his compensable injury. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 25% to the body as a whole.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$417.50.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE