

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E708319

CLIFFORD CASTOR, EMPLOYEE	CLAIMANT
SOUTHFORK CAFÉ, EMPLOYER	RESPONDENT NO. 1
HOUSTON GENERAL INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 7, 2003

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and Reversed in part.

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to a 45% loss in wage-earning capacity in excess of the 15% permanent physical impairment and a finding that the Second Injury Fund had no liability in this claim. Based upon our de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. Specifically, we

reverse the decision of the Administrative Law Judge awarding wage-loss disability benefits, and affirm the decision finding that the Second Injury Fund has no liability.

The claimant was employed by the respondent-employer as a chef. He sustained an admittedly compensable injury on July 7, 1997, when he slipped while carrying a pan of boiling water and fell. The respondent accepted this claim as compensable and paid benefits. The claimant has undergone two fusion surgeries, as well as the implantation of a morphine pump. As a result of this injury and all the subsequent surgeries, the claimant contends that he is permanently and totally disabled. The respondents contend that the claimant is not entitled to any additional benefits in excess of his 15% permanent impairment, which they have accepted and paid. The respondents, in addition, contend that if the claimant is entitled to any wage-loss disability benefits they are the responsibility of the Second Injury Fund. Our review of the evidence in the record demonstrates that the claimant is not entitled to any wage-loss disability benefits.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled

to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

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. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). 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. Emerson Electric v. Gaston, supra.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

However, so long as an employee, subsequent to his 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 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. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has 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 average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1). In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, supra.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Under the Arkansas Workers' Compensation Law that existed prior to the passage of Act 796, an injured worker could also be classified as permanently and totally disabled under the "odd lot" doctrine even though the injured worker was not altogether incapacitated from work. An injured worker was said to fall into the "odd lot" category where the obvious severity of his injury combined with other factors such that the services he could perform were so limited in quality, dependability, or quantity that a reasonably stable market did not exist for those services

even though the claimant was not completely incapacitated from work. See, Lewis v. Camelot, 35 Ark. App. 212, 816 S.W.2d 632 (1991). However, Act 796 eliminated the "odd-lot" doctrine as a consideration in a claim for permanent disability benefits under the Arkansas Workers' Compensation Commission. See, Ark. Code Ann. § 11-9-522(e) (Repl. 2002).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code

Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

At the hearing, the claimant presented the testimony of no less than six witnesses who all claimed that the claimant was unable to perform in a capacity that he was prior to his compensable injury. However, all six of these individuals are friends of the claimant and had not seen the claimant since he moved to Florida, approximately six months prior to the hearing.

The evidence demonstrates that the claimant, at the time of the hearing, was 54 years old. He had been a professional baseball umpire for approximately 15 years prior to his move to Mountain Home. The claimant has a college degree - a double major in business and advertising.

The claimant has a 15% permanent impairment rating, but the record fails to contain any reports from a doctor saying that the claimant is unable to do any type of work for the rest of his life. The claimant has not attempted to return to work, nor has he attempted vocational rehabilitation. In fact, the claimant has moved to Florida,

where he is now living with his mother and sister.

The medical evidence indicates that the claimant has some symptom magnification, as noted by Dr. McBride. Dr. McBride's report dated January 11, 2000, indicates that there was evidence of symptom amplification and poor voluntary effort during testing. He recommended that the claimant undergo psychological testing. In short, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage-loss disability benefits in excess of the 15% permanent impairment. Accordingly, because we find that the claimant is not entitled to wage-loss disability benefits, the Second Injury Fund has no liability.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____For the reasons set out below, I respectfully dissent from the decision reached by the majority in this case. I find that the claimant has proven his entitlement

to permanent and total disability benefits or, in the alternative, that he has incurred a substantial amount of wage-loss disability.

The facts necessary to decide this case can be summarized very quickly. The claimant, who at the time of his injury was employed as a chef at the respondent's restaurant, injured himself in a slip and fall accident. As a result of this injury, he has sustained an anatomical impairment in the amount of 15% to the body as a whole. In the 25 years preceding his injury, the claimant had been employed either as a high school, college, or professional sports official; a restaurant chef; and other and strenuous and demanding activities. There is no dispute that the respondent has not offered the claimant any job within his abilities nor is there any serious allegation that the claimant could return to performing any of his past jobs. The Administrative Law Judge found that the claimant was not permanently and totally disabled as a result of his injuries, but did find that he was entitled to wage-loss disability benefits in an amount equal to 45% to his body as a whole. However, the majority is reversing this decision and holding that the claimant is not entitled to any wage-loss disability.

I am writing this dissent not only to protest the

denial in this case but to point out a disturbing trend in which the Commission has recently begun denying wage-loss disability benefits in cases where such benefits are clearly justified. The present claim is just such a case. The claimant had an injury which resulted in a significant amount of anatomical impairment with substantial restrictions on his vocational abilities. Further, all of the claimant's past work experiences have been in activities which were physically strenuous. Even the respondent does not seriously argue that the claimant is still capable of performing any type of manual labor. Clearly, the claimant's disabilities and limitations imposed by his compensable injury preclude him from returning to his former occupations.

While it may be arguable whether the claimant is permanently and totally disabled as a result of his injury, there is no doubt that the injury has reduced his ability to earn a living. Ark. Code Ann. § 11-102(8) provides that a disability is an "incapacity because of compensable injury to earn, in the same or any other employment, wages which the employee was receiving at the time of the compensable injury." Further, the Courts have held that 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. App. 232, 58 S.W.3d 848 (2001).

Another relevant statute is Ark. Code Ann. § 11-9-522(c)(1). That section provides that the respondent has the burden of proving that the claimant has returned to work or that he has received a bona fide offer of re-employment at wages equal to or greater than his average weekly wage at the time of the accident. In the present claim, no such evidence has been offered. Further, the respondent's only effort at suggesting the claimant is employable is the reference to his college degree. However, this degree was earned over 30 years ago and, except for a few months in the late 1960s, the claimant has never been employed in any field even remotely related to his college degree. While the claimant may be college educated, there is nothing in the record to suggest that his educational background has any bearing on his current employability.

In my opinion, there is simply no doubt that the claimant has established his entitlement to benefits over and above those to which he is entitled based upon his anatomical impairment. While I believe that the claimant should receive permanent and total disability benefits, the decision of the majority to not only deny those benefits but to find that the extensive impairment the claimant has

suffered has not affected his earning ability is unsupported by the facts of this case. For that reason, I dissent not only from the decision denying the claimant's claim for permanent and total disability benefits, but also from the decision finding that the claimant is not entitled to any wage-loss disability benefits.

SHELBY W. TURNER, Commissioner