

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E904952

GERALD BOYER,
EMPLOYEE

CLAIMANT

SAFECO CORPORATION,
EMPLOYER

RESPONDENT NO. 1

GENERAL INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JULY 23, 2003

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

Claimant represented by HONORABLE ZAN DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents No. 1 represented by HONORABLE GUY A. WADE,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted in part; reversed in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal
from a decision of the Administrative Law Judge filed
October 16, 2002. The Administrative Law Judge entered the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction over this claim.
2. The stipulations agreed to by the parties and
set forth above are hereby accepted as fact.

3. I find that the claimant sustained a 40% impairment to his earning capacity in excess of the 10% permanent physical impairment established by the medical evidence.
4. I find that a preponderance of the evidence fails to establish that any preexisting disability or impairment combined with the recent compensable injury to produce the current disability status.
5. I find that a preponderance of the evidence fails to establish that the respondents are entitled to such a credit.
6. The respondents controverted the claimant's entitlement to any permanent disability compensation in excess of the 10% permanent physical impairment.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's Findings 1-4 and 6 are supported by a preponderance of the credible evidence, correctly apply the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that these findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

With regard to Finding No. 5, the record indicates that the claimant has received benefits from a third-party as a result of his injury which may be subject to the provisions of Ark. Code Ann. § 11-9-411. Nevertheless, the Administrative Law Judge found that the respondents failed to establish that they are entitled to a credit based on the

record developed. Neither party has discussed Finding No. 5 on appeal.

Although the Arkansas courts have not yet addressed the issue in a published opinion, we have previously interpreted that Ark. Code Ann. § 11-9-411 was clearly enacted in part to protect the interests of the third-party payor who is not normally a party to the hearing, and not solely to protect the interests of the claimant or respondent who are parties to the hearing. We have previously found that respondents are not required to affirmatively plead this issue for the provisions of Ark. Code Ann. § 11-9-411 to apply. See, Dooley v. Automated Conveyor Systems, Inc., Full Workers' Compensation Commission, Opinion filed January 8, 2003 (F100282); Turner v. Trane Unitary Products, Full Workers' Compensation Commission, Opinion filed June 17, 1998 (E616700); Wilkins v. Van Buren School Dist. #42, Full Workers' Compensation Commission, Opinion filed February 7, 1999 (E510091). Because Ark. Code Ann. § 11-9-411 is intended to protect a third party payor, the respondent is directed to hold in reserve for a period of five years a sum equal to the potential subrogation claims for any benefits the claimant received described in Ark. Code Ann. § 11-9-411(a). The respondent is entitled to a dollar-for-dollar offset on those benefits the claimant has

received described in Ark. Code Ann. § 11-9-411(a). If the parties are unable to determine on their own the appropriate amount of reserve and offset, the parties may file another request for hearing on that specific issue at some future date.

Thus, we affirm and adopt in part and reverse in part the decision of the Administrative Law Judge. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 1996).

For prevailing in part on this appeal before the Full Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ While I concur with the findings in the principal opinion that claimant is entitled to benefits for a loss in wage-earning capacity in an amount equal to at least 40% to the body as a whole and that the Second Injury Fund has no liability, I must respectfully dissent from the findings

that claimant failed to prove entitlement to benefits for permanent total disability and that respondent is entitled to an offset or credit pursuant to Ark. Code Ann. § 11-9-411 (Repl. 2002).

Claimant is an honest, sincere, industrious, and conscientious worker. He freely admitted that "I'm not in a wheelchair, I don't want to be, and I don't pretend to be." He takes daily medications for his almost constant pain. He testified to having good days and bad days, although at the time of the hearing, he estimated that he experienced three or four bad days each week where "I don't do anything." He cannot sit or stand for prolonged periods of time before experiencing debilitating symptoms in his lower extremity. He must lie down frequently. He candidly speculated that he might be able to perform some work over a period of eight hours if allowed to sit, stand, and lie down as needed. However, neither claimant's treating physician nor the functional capacity evaluator believed claimant could return to "full capacity" work. Claimant has proven by a preponderance of the evidence that he does not have the ability to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002).

Respondent repeatedly describes claimant as lacking any motivation to find employment. Respondent even

makes the incredible charge that claimant has made no effort to find employment subsequent to the compensable injury.

Respondent's allegations are simply not true. In an effort to find employment subsequent to the compensable injury, claimant (1) asked respondent to allow him to return to his old job, to which respondent replied that there were no jobs for him in Arkansas; (2) unsuccessfully tried to secure an opening with the employer in Indiana; (3) on his own, sought the services of "Arkansas State Rehabilitation Agency"; (4) inquired about a job with Hartford when he learned that the employer had sold its boiler business to Hartford,; (5) contacted the Human Resources Department of Zurich Insurance Company; (6) registered for work at the local office of the Employment Security Division; and (7) made several other inquiries about employment. Claimant has, in fact, sought work but has been unable to secure employment due to the effects of the work-related injury. The employer certainly made no effort whatsoever to facilitate claimant's return to work.

SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion awarding the claimant a 40% loss in wage-earning capacity in

excess of his 10% permanent physical impairment rating.

Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

Accordingly, I find that the claimant is not entitled to any wage-loss disability benefits.

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters are motivation, post-injury income, credibility, and demeanor. 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).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In considering the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 1982.

The evidence in the record indicates that the claimant has extensive past work experiences which involve a number of different professions, as well as numerous training opportunities and job skills. The claimant's education includes three years of college and a number of work-related courses and extensive on-the-job training. The claimant is proficient in the use of a computer and his last job involved the use of a lap-top. The claimant testified he had no difficulty reading, writing, or performing math.

He has a valid driver's license and, in fact, drove himself to the hearing. The record also demonstrates that the claimant has run his own business, hired and fired employees, as well as coordinated the efforts of sub-contractors and suppliers. The claimant also has experience programming computers.

The record reveals that the claimant has made no effort to find subsequent employment since his compensable injury. The claimant has had no interviews or filed any applications. However, the record does indicate that the claimant receives long-term disability benefits in the amount of \$2,470.00 a month and social security disability benefits in the amount of \$1,384.00 a month. In addition, the claimant also has rental property in which he receives income that is in excess of the property notes.

Further, the claimant acknowledged that he is able to perform a number of tasks. These have included the claimant delivering food for his church, building a home, performing yard work, washing cars, and a lot of other tasks around the house. He has been able to do this all subsequent to the April 1999 injury.

The claimant's post-injury income and his lack of effort to interview or apply for any work, these actions reveal a lack of motivation to find any subsequent employment. When I take into consideration the claimant's

extensive employment history, education, training, lack of motivation, experience, and skills, I find that the claimant is not entitled to any wage-loss disability benefits over and above his permanent impairment rating. Therefore, I find that the claimant is not entitled to any wage-loss disability benefits.

Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion awarding the claimant a 40% loss in wage-earning capacity.

JOE E. YATES, Commissioner