

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F014504

KENNETH D. MURPHY, EMPLOYEE	CLAIMANT
BECHTEL CONSTRUCTORS, EMPLOYER	RESPONDENT
ST. PAUL FIRE AND MARINE, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 6, 2003

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE JOSEPH E. KILPATRICK, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 21, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the stipulations agreed to by the parties at the pre-hearing conference conducted on November 21, 2001, and contained in a pre-hearing order filed November 21, 2002, as well

as those at the hearing herein, are hereby accepted as fact.

3. That the Claimant has failed to prove by a preponderance of the evidence that he has sustained any degree of additional impairment to his wage-earning capacity in excess of the 5% permanent anatomical impairment attributed to the unscheduled injury to his back; specifically, the Claimant is aged 58 at the time of the hearing herein, engaged in significant physical activity in his leisure time, was assessed as having significant symptom magnification in an FCE conducted in October 2001, was capable of attending 3 separate 2 week summer camps as a medic with the Alabama National Guard in the summer of 2002, is a certified welder in 2 separate areas, and has the opportunity to seek and gain employment involving skills of a highly specialized nature which he can still utilize if he is so inclined.

4. That the Claimant's claim is hereby respectfully denied and dismissed in its entirety.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the opinion of the majority finding that the claimant is not entitled to any benefits for wage-loss disability.

The claimant sustained an admittedly compensable injury to his left ankle, left knee, and back on December 6, 2000. The only issue presented for determination in this matter is the amount of wage-loss disability, if any, to which the claimant is entitled.

At the time of the claimant's injury, he was 56 years of age and was employed as an iron worker. According to the claimant's testimony, he had been employed in this occupation for over 30 years. The claimant also testified that in the year preceding his injury, he had earned over \$60,000.00. In the years preceding this, his annual income as an iron worker exceeded \$50,000.00.

The claimant was injured when a metal platform fell, pinning his left leg underneath him. The injury resulted in a broken left ankle, a torn cartilage in his left knee, and a herniated disc in his lower back at L5-S1. The respondent has accepted and paid benefits for a permanent anatomical impairment of 6% to the body as a whole.

The only witness who testified at the hearing was the claimant. He stated that he was no longer employable as an iron worker. The claimant stated that his job restrictions are no climbing, crawling, or stooping. He has a 25 pound weight limit with the additional requirement of having a 15 minute break every 45 minutes. The claimant testified that iron working is heavy manual labor requiring frequent climbing, bending, and lifting. The claimant stated that at a minimum, one would have to climb to high levels carrying at least 40 pounds of equipment.

The claimant also testified that he was not totally incapacitated. He stated that he had sought employment as a security guard, courier driver, and similar occupations. The claimant testified that the highest paying job he was offered was at \$8.00 per hour as a security guard.

The claimant is presently employed as a part-time bus driver and is a member of the Alabama National Guard.

He also stated that as a substitute bus driver, he had earned \$567.00 during the previous year and that his income from the National Guard was \$296.00 per month. However, he also testified that his National Guard duties had been limited by his restrictions and that he would soon be discharged. He is also receiving social security disability benefits in the amount of approximately \$1,500.00 per month.

The claimant also admitted during his testimony that he was still able to hunt, drive a car, and engage in similar activities. He was also a board member of his local union and was still active in union affairs.

The claimant had no formal education beyond high school. Shortly after leaving high school, the claimant entered the U.S. Army where he served in Viet Nam. After his discharge in the late 1960's, he worked at a variety of jobs until he became employed as an iron worker in 1969. He continued in that employment until his injury in December of 2000. The claimant did occasionally engage in other part-time occupations prior to his injury. As indicated above, he is a member of the Alabama National Guard. He also did some farm work and, for a brief period of time in the early 1990s, had supervised a small municipal water department.

This Commission and the Appellate Courts of this State have considered a claimant's entitlement to wage-loss disability benefits on innumerable occasions. Wage-loss

disability has been defined as the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. Grimes v. North American Foundry, 316 Ark. 395, 872 S.W.2d 59 (1994). When determining the extent of an individual claimant's wage-loss disability, the Commission can consider medical evidence and other matters affecting the claimant's future earning capacity such as his or her age, education, and work experience Bradley v. Allumex, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

The Workers' Compensation Act also provides that the Commission, when considering claims for benefits in excess of a claimant's anatomical impairment, can consider those same factors as are reasonably expected to affect his future earning capacity. See Ark. Code Ann. § 11-9-522 (Repl. 2002). The Act also places a certain burden on the employer in wage-loss disability cases, specifically Ark. Code Ann. § 11-9-522 (c) (1) (Repl. 2002), proves that:

The employer or his or her workers' compensation insurance carrier shall have 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 or her average weekly wage at the time of the accident.

In the present case, the respondent does not offer any evidence indicating that the claimant has ever been offered any employment equal to or greater than his pre-injury wages. In fact, the respondent did not tender any

evidence whatsoever as to the claimant's re-employability. The only evidence offered on this point was the claimant's candid admission that he had sought other employment and that he was able to secure work as a security guard at \$8.00 per hour. The claimant also stated that he did not accept this type of full-time employment because he would have been earning less than he was from his social security disability benefits (in this regard, I note that receipt of social security disability benefits is not a bar to an award of benefits for wage-loss disability, but merely a factor to be considered. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990)).

In short, there is simply no reason to deny the claimant's wage-loss disability claim in its entirety. The claimant has undeniably established that the compensable injury has prevented him from returning to a very lucrative and high paying job at which he could have continued to remain employed for a number of years, but for his injury.

For the reasons set out above, I find that the claimant has met his burden of establishing his entitlement to wage-loss disability benefits and that the decision of the Administrative Law Judge should be reversed.

SHELBY W. TURNER, Commissioner