

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113089

RUSTY CRAIG,
EMPLOYEE

CLAIMANT

BEATY LOGGING COMPANY,
UNINSURED EMPLOYER

RESPONDENT NO. 1

BEAN LUMBER COMPANY,
SELF-INSURED EMPLOYER

RESPONDENT NO. 2

COMPENSATION MANAGERS,
TPA

RESPONDENT NO. 2

OPINION FILED JUNE 4, 2004

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

Claimant represented by HONORABLE ROBERT BLATT, Attorney at
Law, Fort Smith, Arkansas.

Respondent No. 1 not represented by counsel.

Respondents No. 2 represented by HONORABLE WALTER MURRAY,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed as
modified.

OPINION AND ORDER

Respondents appeal and Claimant cross-appeals the
Administrative Law Judge's opinion filed August 22, 2003,
which awarded Claimant 20% wage-loss disability benefits in
addition to benefits for a 25% permanent physical impairment
to the body as a whole. After reviewing the entire record
de novo, the Full Commission modifies the Administrative Law
Judge opinion to find that Claimant is entitled to wage-loss

disability benefits in an amount equal to 25% to the body as a whole.

On November 16, 2001, Claimant incurred compensable injuries to his head, cervical spine, thoracic spine, right arm and face when a tree fell on him while he was working as a logger for Respondents. Specifically, Claimant incurred a depressed skull fracture that did not require surgery, a thoracic fracture that required surgical fusion, and a cervical fracture at C2-3 that required bracing. Dr. Anthony Capocelli, Jr. treated Claimant and ultimately performed a fusion of the T3 through T7 levels of Claimant's thoracic spine. Dr. Capocelli testified that he assigned Claimant a 25% impairment rating pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993) for Claimant's injury and resulting surgery.

A Functional Capacity Evaluation (FCE) was administered on April 8, 2002. The FCE states that Claimant can occasionally squat, reach-up, bend, climb, and stand and that he can frequently reach-out, walk, and sit. The FCE also shows that Claimant's ability to lift certain amounts of weight for prolonged periods of time is limited.

Dr. Capocelli interpreted the FCE in a written report dated April 16, 2002:

This patient is known to me. He is status post a thoracolumbar fracture. At this point he has gone through physical therapy and he has had a functional capacity exam which demonstrates him to be able to do light work. To that end, we specifically mean 20 pounds occasional lifting, 10 pounds frequent, and up to 7 pounds constant based on these final work restrictions. As the patient has probably reached maximal medical improvement I am going to go ahead and issue an impairment rating of 25% to the whole person.

Dr. Capocelli further testified that Claimant would not be able to engage in his "previous type work which involves a lot of looking up and changing head positions, which would be very difficult for him because of loss of range of motion at the upper thoracic cervical segment." Dr. Capocelli testified that, following the fusion procedure, Claimant has zero spine mobility at the T3 to T7 levels, loss of range of motion, and a significant amount of rhomboid muscle spasms in his neck. Dr. Capocelli also gave deposition testimony that Claimant was permitted to drive a tractor and do minimal lifting and bending within his light duty restrictions.

Claimant, age 22 at the time of the hearing, testified that, up until his logging accident, the only jobs he had since graduating from high school were as a logger using a chain saw to cut down and trim trees and operating a loader that picked cut trees up and loaded them in trucks.

Claimant testified that as a logger he cut trees down at the base of the trunk with a chain saw and then cut the limbs off of the trees. He testified that the chain saw he operated weighed about 13 pounds and that he was required to bend, stoop, and lift while working as a logger.

Claimant's father died in January 2002, approximately two months after the logging accident. Claimant inherited his father's chicken house as well as a small head a cattle, approximately 38 or so, and now manages these farming operations. Claimant testified that his father had operated the chicken house for seventeen years as a laying house for Tyson. Claimant testified that he cannot bend and stoop as required to collect the eggs on a daily basis. He testified that he, therefore, has hired workers to gather the eggs and recently installed equipment to aid in the collection of eggs. Claimant testified that he has operated a bobcat, four wheeler, pick up truck, front end loading tractor, "little dump truck," and a dune buggy on the farm. Claimant testified that his wife and friends also aid him in these farming operations.

Lavoyne Craig, Claimant's grandmother, also testified that Claimant was the manager of the chicken farm. She further testified that, to her knowledge, Claimant did not do much manual labor on the farm. She testified that

Claimant has hired people to pick up the eggs and gets assistance from friends and family for other tasks.

The record contains Claimant's 1099 forms for 2000 and 2001, the year of the logging accident, from Respondent Beauty Logging in the amounts of \$16,894.95 and \$11,813.57, respectively. Neither of these amounts take into account Claimant's expenses as a self-employed logger. The record further shows that Claimant now earns significantly less wages as the owner of the chicken and cattle operations than he was earning at the time of his compensable injuries.

At the hearing, Claimant was questioned regarding vocational rehabilitation:

Q: And we had talked about vocational rehabilitation when I took your deposition, didn't we? Do you remember that? I asked you if you were interested in any kind of vocational rehabilitation?

A: Yeah.

Q: And you weren't interested or didn't know of anything; is that right?

A: Yes.

Q: You're satisfied with doing what you're doing now, aren't you?

A: Yeah.

The above-referenced deposition testimony was not made part of the record. The record is void of any

suggested plan of vocational rehabilitation or offer of vocational rehabilitation from Respondents.

The Administrative Law Judge held that Claimant had proven a 20% loss in wage earning capacity in addition to a 25% permanent impairment rating to the body as a whole. The Respondents have appealed the Administrative Law Judge's wage-loss disability award and argue that Claimant is not entitled to any wage-loss disability award because his age, education, work experience, and other matters do not show a decrease in future earning capacity, Claimant has "effectively waived" vocational rehabilitation, and Claimant has been receiving wages from the operation of the chicken and cattle farm that equal or exceed those earned before his compensable injury. Claimant cross-appealed and contends that the Administrative Law Judge's wage-loss disability award is inadequate.

The sole issue on appeal is whether Claimant is entitled to wage-loss disability benefits in addition to the 25% permanent physical impairment award to the body as a whole. The wage-loss factor is the extent to which a compensable injury has effected the claimant's ability to earn a livelihood. In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's

general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b)(1) (Repl. 2002); Glass v. Edens, 233 Ark. 786, 346 S.W.2d 682 (1961); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

We find that the factors favoring a wage-loss disability award are satisfied here and that Claimant is entitled to a 25% wage-loss disability award. Here, the record shows that Claimant's physical activities are significantly restricted and he cannot engage in jobs requiring heavy lifting and other heavy labor. Additionally, Claimant's ability to pursue factory work and other manual labor positions within his physical limitations, limited education and job skills is significantly impaired. While he is able to engage in a certain amount of physical activity, it is noteworthy that he has not been able to engage in many of the manual labor tasks required to run his farming operation and, as a result, has hired workers to assist in the farming operations. Further, the Functional Capacity Evaluation and Dr. Capocelli's assessment of Claimant's post-injury condition establish that Claimant's

ability to work in manual labor positions is significantly limited because Claimant is only able to engage in light duty work, which has been defined as "20 pounds occasional lifting, 10 pounds frequent, and up to 7 pounds constant" and only occasional squatting, reaching-up, bending, climbing, and standing. Additionally, Dr. Capocelli testified that Claimant has zero spine mobility at the T3 to T7 levels, loss of range of motion, and a significant amount of rhomboid muscle spasms in his neck in his post-surgery condition. Thus, considering claimant's age, education, work experience, physical impairment, and his limited education and training, we find that Claimant is entitled to a 25% wage-loss disability award.

We also find that Respondent's have not met their burden of establishing that Claimant is employed or that Claimant has an offer of employment within his current physical limitations at wages equal to or great than the average weekly wage he was earning at the time of the accident pursuant to Ark. Code Ann. § 11-9-522:

(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.

(2) However, so long as an employee, subsequent to his or her 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 or her 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.

(c)(1) 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.

We find that there is insufficient evidence to show that Claimant is earning, or has the capacity to earn, wages equal to or greater than his wages at the time of the logging accident. We find that the evidence shows that Claimant is earning significantly lesser wages than he was earning at the time of his compensable injuries.

Respondents also argue that Claimant has "effectively waived" vocational rehabilitation and, therefore, is not entitled to wage-loss disability benefits pursuant to Ark. Code Ann. § 505(b)(3). We find, however, that Claimant has not refused to participate in a program of

vocational rehabilitation or indicated an unwillingness to cooperate in such a program. Instead, we find that the record is void of any suggested plan of vocational rehabilitation or offer of vocational rehabilitation from Respondents and, at most, merely shows that Claimant was not interested in pursuing vocational rehabilitation on his own volition nor was he informed of rehabilitation opportunities. See Second Injury Fund v. Furman, 60 Ark. App. 237, 245 (1998) (holding that claimants do not have a duty to pursue rehabilitation); Second Injury Fund v. Stephens, 62 Ark. App. 255, 264 (1998) (rejecting an argument that a claimant waived his right to vocational rehabilitation by not pursuing rehabilitation); See, Newman v. Crestpark Retirement Inn, Full Commission Opinion filed September 14, 1998 (E418166) (recognizing that "a respondent must show that a claimant has refused to participate in a program of vocational rehabilitation or job placement assistance or, through some other affirmative action, indicated an unwillingness to cooperate in those endeavors.")

For these reasons, we affirm the Administrative Law Judge's award as modified and award 25% wage-loss disability benefits to the body as a whole to Claimant. Respondents are directed to comply with the award of

benefits set forth herein. 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. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a permanent partial disability for loss of wage earning capacity in the amount

of 25% to the body as a whole. Based upon my de novo review of the entire record I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a decrease in his wage earning capacity. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

Claimant's claim for wage loss disability is greatly influenced by his inheritance of the family farm after the death of his father. Claimant's father passed away in January of 2002 without a will; however as the only heir, the claimant received the family chicken farm. After the estate was probated, the farm passed to the claimant in the fall of 2002. However, while the farm was intestate, claimant and his grandmother were appointed administrators of the estate and the claimant carried on the day to day operations of the farm. A large portion of the hearing and the parties' briefs focused on the income claimant has generated off the farm, including claimant's expenses, loans, and depreciation. However, I do not interpret the issue before this Commission to be whether the claimant can make a living running the family chicken farm or whether he earned more in the logging business. The issue is whether the claimant has sustained a decrease in his wage earning capacity, not whether the farm generated a profit or a loss.

The fact that the claimant has chosen to limit his present earnings by continuing in the family owned business and not place himself in the labor market is an impediment to our assessment of wage loss disability. Moreover, claimant inherited this business at a time that it required improvements and updates.

The record reflects that Dr. Capocelli placed permanent restrictions upon the claimant of only occasionally lifting up to 20 pounds. The Functional Capacity Evaluation revealed that the claimant can occasionally squat, reach up, bend, climb, stand, and can frequently reach out, walk, and sit. As noted by the Administrative Law Judge, claimant's fusion involves a portion of the spine that is not particularly mobile, therefore, the fusion has not greatly restricted his ability to bend and twist at the waist.

Claimant worked in the logging industry at the time of his compensable injury. The claimant did not offer testimony concerning his wages at the time of this injury; however, the parties stipulated to a temporary total disability rate of \$171.00 which computes to an average weekly wage of approximately \$256.00 or \$6.40 per hour. Tax records for the year 2000 reflect that claimant worked as a self-employed logger and was paid a total of \$16,895 by

Beaty Logging for the entire year. In addition, the 1099 claimant received from Beaty Logging for the 2001 tax year reflects that the claimant was paid a total of \$11,813.57. Since claimant was injured on November 16, 2001, the claimant was unable to work the remainder of that year.

With regard to the claimant's ability to earn wages, the record reflects that the claimant is more than capable of managing a farm, operating a tractor, operating a bobcat, hiring and supervising employees, and performing construction work on the chicken houses. The claimant even agreed that he was a "physically active young man," and that he "did not have an inability to work."

Being very young at the time of his injury, the claimant's work experience has been limited to farming and logging. Moreover, with claimant's youthful age, he has not amassed extensive work experience for which higher wages are usually earned. Nevertheless, claimant's occupations have bestowed upon him the knowledge and ability to operate heavy equipment and run a small business.

Claimant sustained numerous injuries for which he has received excellent medical treatment and has attained maximum medical improvement. Claimant was released to return to work in a light duty capacity. These restrictions may have foreclosed claimant's ability to return to logging,

operating a chainsaw; however, the claimant's injury has helped the claimant discover that he has employable skills of managing and operating a farm. Claimant's tax records demonstrate that his chosen occupation as a logger has not been a lucrative business, earning gross wages of less than \$17,000 in 2000, and less than \$12,000 in 2001. These figures do not even take into account claimant's expenses as a self-employed logger.

After considering the claimant's youthful age, the fact that claimant is a high school graduate, claimant's work experience both prior to and subsequent to his compensable injury, claimant's injuries, and all other matters which would be expected to affect his future earning power, I find that the claimant has failed to prove by a preponderance of the evidence that he has sustained a decrease in his wage earning capacity. Claimant's inheritance of the family chicken farm and his ability and desire to run this business reflects a motivation to work and to earn wages. Regardless of whether the claimant has had a profitable year, the claimant's work efforts obviously demonstrate claimant's wage earning ability. In my opinion, claimant's capacity to earn wages has not been decreased by his compensable injury. Certain jobs may no longer be available to the claimant due to the minor restrictions

placed upon him by his treating physician, nevertheless, the claimant still possesses an ample capacity to work and earn wages in areas of management or higher skilled labor that in his short work span he has never previously explored.

Accordingly, for those reasons set forth above, I find that the claimant has failed to prove by a preponderance of the evidence that he has sustained a decrease in his wage earning capacity. Therefore, I find that the claimant has failed to prove an entitlement to wage-loss disability benefits in excess of his physical impairment rating.

For all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner