

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103875

JIMMY McDONALD,  
EMPLOYEE

CLAIMANT

LOGAN COUNTY,  
EMPLOYER

RESPONDENT

AAC RISK MANAGEMENT SERVICES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 17, 2004

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE BRUCE ANIBLE, Attorney  
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed as  
modified.

OPINION AND ORDER

Respondent appeals and claimant cross-appeals an  
opinion and order of the Administrative Law Judge filed May  
14, 2003.

The Administrative Law Judge found that claimant  
is entitled to benefits for a wage-loss disability of 10% to  
the body as a whole; that respondent has no subrogation  
rights in a third-party action filed by claimant because  
claimant has not been "made whole" by the proceeds of the  
settlement of the tort claim; and that respondent has  
controverted claimant's entitlement to any benefits for

wage-loss disability, as well as the amount (\$11,111.12) respondent claims as a result of the third-party settlement.

After our de novo review of the entire record, we find that claimant has not been "made whole" by the proceeds of the third-party settlement and, therefore, respondent has no right to subrogation. We also find that claimant's attorney is entitled to a controverted attorney's fee based on the award for wage-loss disability and the amount respondent claimed as a result of the third-party settlement. However, we find that claimant is entitled to benefits for wage-loss disability in an amount equal to 25% to the body as a whole. Accordingly, we affirm, as modified, the opinion of the Administrative Law Judge.

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 685 (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).

At the time of the hearing, claimant was 58 years old and had a ninth grade education. He has specialized training as a mechanic. Claimant was self-employed as a mechanic for approximately 14 years before going to work for the employer.

On November 21, 2000, claimant sustained a serious back injury when the tractor he was driving for the employer along the roadway was rear-ended by another vehicle. Claimant eventually came under the care of Dr. Giles, a neurosurgeon, who performed surgery in May 2001.

In a report dated January 8, 2002, Dr. Giles noted that claimant's convalescence had been less than satisfactory with MRI scan evidence of epidural fibrosis or scarring in the surgical site. After strengthening exercises failed to improve claimant's condition, he underwent a functional capacity evaluation, which clearly showed that he could not return to his prior jobs as a mechanic due to the use of heavy equipment and the prolonged sitting, standing, and heavy lifting. Dr. Giles noted that "[t]his could not be accomplished not only due to his

chronic pain, but to palpable muscle spasm which increased in severity with the motor testing that was required."

As a result of the above findings, Dr. Giles rated claimant's permanent anatomical impairment at 10% to the body as a whole. Additionally, Dr. Giles noted that claimant "will be in need of muscle relaxants, analgesics, and even possibly physical therapy with modalities and mild analgesics from time to time in the future." Claimant testified that he takes five prescription medications for his condition.

As noted above, the results of the functional capacity evaluation conducted in April 2002 revealed significant physical limitations or restrictions. Moreover, the functional capacity evaluation was repeated in December 2002 and Dr. Davis noted a "40% deterioration."

Respondent hired Terry Owens, a vocational case manager, to assist claimant in returning to work. Claimant has been highly motivated in trying to find gainful employment through his own personal efforts and through the assistance of, or suggestions by, Owens. It appears that claimant has applied for most, if not all, jobs within his restrictions and located within a reasonable distance from his residence. He has been unable to find any employment.

Serious efforts were made by claimant to return to work for the employer, but the employer was either unwilling or unable to allow claimant to remain as an employee.

Based on the above factors, which are reasonably expected to affect claimant's future earning capacity, we find that claimant has proven by a preponderance of the evidence that he is entitled to benefits for wage-loss disability in an amount equal to 25% to the body as a whole.

Claimant received \$25,000.00 in settlement of his action against the third-party tort-feasor. In determining whether claimant has been "made whole" by the proceeds of the third-party settlement, we must compare the amount of workers' compensation benefits received by claimant with the total amount of damages incurred (including expenses) in realizing on his third-party action. Respondent can receive reimbursement only for the amount by which the sum received in the third-party action exceeds the total amount of damages incurred. See Gerald James v. Phillip Morris, Full Commission Opinion filed October 24, 2001 (E713387).

Respondent has submitted documentary evidence in an effort to support its allegations concerning the amount of benefits it has paid on this claim. (Rx. 1, p. 13-17) However, whereas this document suggests a grand total of

\$43,644.59, when we add up the various totals, we reach the sum of \$38,553.16. Using this total, plus the \$25,000.00 claimant received in the third-party settlement, plus \$17,325.00 (the 25% wage-loss disability award), claimant will have received approximately \$81,000.00. There is insufficient evidence that claimant has been fully compensated, or in other words, "made whole."

We would initially point out that there is only \$11,111.12 available for reimbursement to respondent out of the proceeds of the third-party settlement. Further, it is likely that the \$25,000.00 settlement was not entirely to compensate claimant alone, but included damages suffered by claimant's spouse. It also should be remembered that the sums respondent paid for temporary and permanent disability pursuant to the Workers' Compensation Law did not fully compensate claimant for his loss in these areas. During the weeks that claimant was voluntarily compensated by respondent for these disabilities, he received only two-thirds of his average weekly wage. This difference is approximately \$7,100.00 and certainly does not include any future lost wages.

Additionally, Dr. Giles has opined that claimant will need future medical treatment including prescription medications and physical therapy with modalities.

After considering the above evidence, we find that there is insufficient evidence that claimant has been "made whole." He is certainly not receiving a double recovery. Accordingly, respondent is not entitled to any reimbursement from the proceeds of the third-party settlement.

Finally, we find that respondent is liable for a controverted attorney's fee based on the amount it seeks for reimbursement out of the proceeds of the third-party settlement. Respondent's distinction that it is seeking reimbursement rather than a credit is a distinction without a difference. As noted by claimant's attorney in claimant's brief to the Commission, any way you look at it, respondent is trying to take away \$11,111.12 in benefits from claimant. Accordingly, respondent has controverted claimant's entitlement to these monies and, therefore, owes an attorney's fee based thereon. See Cleek v. Great Southern Metals, 335 Ark. 342, 981 S.W.2d 529 (1998). Additionally, respondent does not dispute that it will owe a controverted attorney's fee based on any award for wage-loss disability.

For the foregoing reasons, we affirm the opinion of the Administrative Law Judge in its entirety, except for the modification to award benefits for a loss in wage-earning capacity in an amount equal to 25% to the body as a whole. Respondent is directed to comply with the award 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

## DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant was not made whole by the third party settlement and a finding increasing the claimant's wage loss disability benefits to 25%. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant's wife testified that she handles the financial records for the family and that her husband had planned on retiring at age 66. Mrs. McDonald testified that the claimant had a small shop where he worked on machinery for extra money. She stated that he had grossed \$8,900.00 from this shop in 2000 and \$2,800.00 in 2001, but had earned no money from this shop since 2001. For a period of time after the claimant's injury, he rented the shop out for \$200.00 a month, but it was not rented at the time of the hearing.

Mrs. McDonald stated that the claimant was very active prior to the motor vehicle accident. He had worked in his shop evenings and weekends, and performed home repairs and improvements. During cross-examination Mrs. McDonald agreed that the claimant is able to perform some activities around the house such as mowing the lawn, and maintaining their lawnmowers and other small equipment. She also agreed

that her husband was able to drive around town, to the grocery store and to visit friends.

Mrs. McDonald testified that after his injury, the claimant tried to continue working for the respondents, but quit on March 31, 2001, because of his pain, and had not worked for anyone since that date.

The claimant underwent back surgery on May 18, 2001. He was released by his back surgeon to return to work in December 2001. The claimant suffered a minor stroke in August 2001. This stroke temporarily affected the claimant's mental abilities, but did not affect him physically.

The claimant is 58 years old and has a 9<sup>th</sup> grade education. He began working for the respondent in April 2000. He was earning \$7.43 an hour working for the respondent at the time of the motor vehicle accident, and while he continued to work following the accident, he was given a raise to \$7.80 per hour. The claimant testified that he continues to have pain in his back and right hip, continues to receive medical treatment, and is currently taking five prescription medications related to his back injury. He testified that the respondent did not offer to employ him after his release in December 2001 and that he has applied for work at a Tyson's plant, two auto parts stores, and the Logan County Sheriff's Office, but has not

been offered any employment. On cross-examination the claimant agreed that he quit working out of his shop after he began his employment with the respondent, and stated that several other mechanic shops had opened in his area recently, so that even if he could continue working out of his shop, he could not get enough business to make it profitable.

In August 2002, the claimant began counseling with Terry Owens, a vocational case manager. Based on her interviews with the claimant, Ms. Owens assessed him as being qualified for entry-level factory assembly work, tune-up mechanic work, security work, or janitorial work. She stated that to her knowledge the claimant had followed-up on the employment leads that she suggested to him. It was her opinion that the claimant was employable, but that he would have to re-enter the workforce slowly and needed a part-time job to start with. Ms. Owens stated that it was her impression that the claimant desired to return to work full-time.

In a letter dated January 8, 2002, Dr. Wilbur Giles stated that he began treating the claimant for a herniated disc and performed surgery for the same in May 2001. Dr. Giles wrote that a MRI scan obtained on September 10, 2001, showed that the discogenic displacement

had resolved, but that the claimant had epidural fibrosis or scarring at the surgical site. Because the claimant failed to improve, he was sent for a functional capacity evaluation. Dr. Giles indicated that this test showed that the claimant could not return to his prior job as a mechanic. Dr. Giles opinion was that the claimant had sustained a permanent impairment to the body as a whole of 10% as a result of his injury, and that the claimant would continue to require muscle relaxants, analgesics, and physical therapy from time to time in the future.

A report signed by Dr. Ben Jacobs dated April 8, 2002, documents the claimant's Functional Capacity Examination results. It reflects that in an eight-hour workday, the claimant could sit for two hours at a time, stand for 10 to 30 minutes at a time, and walk for 30 minutes at a time. During an entire day, the claimant would be required to sit for four hours, stand for two hours, and walk for two hours. The claimant was restricted from lifting anything above 20 pounds and carrying anything above 10 pounds. It was stated that the claimant could not squat, crawl or crouch, and could only occasionally bend, climb, reach and stoop. He was moderately restricted in driving and moderately restricted in extended sitting/standing/walking.

An independent medical examination was performed by Dr. David Davis on December 30, 2002. Dr. Davis wrote:

I have not seen [the claimant's] structural studies (MRI and CT scans), so the foregoing is qualified by the assumption that he no longer has neural impingement in the lumbar spine, that he does not have cervical myelopathy from cervical spinal cord impingement or abnormalities such as low serum B12 or low thyroid, and that his apparent stroke was a small vessel stroke as seems to be described, at the most. With those stipulations, he does seem to have reached maximum medical improvement in that there is little else to offer him in the way of further evaluation or treatment for his low back pain. Functional Capacity Evaluations are of limited utility when pain is involved, . . . he should be able to return to work in his previous capacity of driving a tractor, doing light mechanical repairs upon the tractor as needed. He could not return to full time immediately. He would need a gradual return to work. As with many men his age, he would need assistance with moderate to heavy lifting.

Dr. Davis concludes by agreeing with Dr. Giles' permanent impairment rating assignment.

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 she 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).

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.

I find that the Administrative Law Judge's assessment of a 10% wage loss was fair and correct. The claimant has failed to prove he was entitled to an increase. The claimant has a 10% permanent impairment rating. He has transferable skills. When I consider the claimant's age, education, work experience, and the medical evidence, I find that the increase to 25% in wage loss disability benefits is not supported by a preponderance of the evidence.

\_\_\_\_\_I also dissent from the finding that the claimant was not made whole. The claimant has failed to prove by a preponderance of the evidence that his losses related to the November 2000 injury exceed that amount and the amount of the workers' compensation benefits paid to him. The claimant

testified that several other mechanic shops had opened in his area recently so that even if he could continue working out of his shop, he could not get enough business to make it profitable. It was also acknowledged that the claimant has been able to secure some income by renting out his shop. In addition to these facts which negate the loss of income from the claimant's shop as considerations in this analysis, the claimant has received temporary total disability benefits, his medical bills have been paid, he has received a 10% permanent impairment rating, and he has now received a 25% wage loss benefit.

Furthermore, the medical evidence and the evidence from the vocational counselor in no way suggests that the claimant is unable to return to any employment. Clearly the Administrative Law Judge erred in calculating the claimant's income losses based upon seven years' worth of wages from his work for the respondent and his work out of his home shop. The claimant, according to the records, should be able to return to work part-time initially, should be able to return to work in some full-time capacity, and by the Administrative Law Judge's award will be compensated for any wage loss he may sustain as a result of being unable to perform the same type of work for the respondent. Therefore, I find that the claimant has in fact been made whole, and

that the respondents are therefore entitled to the balance of the third-party settlement in the amount of \$11,111.12.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner