

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103941

MARK POLK, EMPLOYEE	CLAIMANT
QUALITY RENTALS, INC., EMPLOYER	RESPONDENT
AMERICAN STATES INS. CO., CARRIER	RESPONDENT

OPINION FILED MAY 14, 2004

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

Claimant represented by HONORABLE JAMES FILYAW, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent appeals from a decision of the Administrative Law Judge filed August 18, 2003, in which the Administrative Law Judge found that the claimant sustained a 7% wage loss disability over and above his 14% anatomical impairment rating for a total permanent partial disability rating of 21%. Claimant filed a notice of cross appeal, but is now advocating that the Administrative Law Judge opinion be affirmed. Based upon our de novo review of the entire record, and without giving the benefit of the doubt to either party, we find that the claimant has failed to prove that his compensable injury has resulted in a decrease in

his wage earning ability. Therefore, we find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed.

Claimant sustained an admittedly compensable injury on March 23, 2001. Respondents accepted the injury as compensable and paid all temporary total disability benefits and medical benefits to date. Claimant was assigned a 14% anatomical impairment rating by his treating physician which has also been accepted by respondent. The sole issue for determination at the hearing held on July 3, 2003, was whether claimant sustained any wage loss as a result of his compensable injury.

The record reveals that claimant injured his back on or about March 23, 2001, while lifting at work. Claimant initially received medical treatment for this injury at the Cooper Clinic where he was diagnosed with sprain of the back and low back and left leg pain. Claimant was prescribed medication and physical therapy. A CT scan performed on April 17, 2001, revealed a moderate sized central disc protrusion at L4-5 and a tiny midline spur and disc protrusion at L5-S1. An MRI performed on May 17, 2001, likewise revealed small central disc herniations at L4-5,

and L5-S1. Claimant was placed in a pain management program and administered epidural steroid injections.

On December 18, 2001, claimant was examined by Dr. Anthony Capocelli, Jr., a neurosurgeon. After conducting a discogram, which confirmed small to moderate central disc herniations at L4-5, and L5-S1, Dr. Capocelli recommended surgical intervention. On February 22, 2002, claimant underwent a bilateral L4-5, L5-S1 laminectomy with bilateral diskectomy L4-5, L5-S1 with interbody arthrodesis and posterior lumbar interbody fusion at L4, L5, S1. Following a post-surgical examination on April 9, 2002, Dr. Capocelli authored the following report:

This patient is known to me. He is status post lumbar fusion approximately six weeks ago. Postoperatively, the patient is progressing reasonably well. He has good days and bad days. His wound is healing quite well and his current x-rays look perfect. At this point I am going to send him over to the Arkansas Strengthening center for six weeks of physical therapy and I will plan on seeing him back in six weeks with a follow-up x-ray. At that time I will consider work hardening depending on how he is doing. I gave him a refill on his Robaxin and Lorcet today.

On June 4, 2002, Dr. Capocelli prescribed a two to three week program of work hardening. A Functional Capacity Evaluation was performed on August 7, 2002. This evaluation revealed:

The results of this evaluation indicate that Mark Polk demonstrated the ability to work in the HEAVY category of work for an 8 hour day. Even though Mark demonstrated the ability to lift in the HEAVY category, he did not meet the maximum occasional demands required by his job as a furniture mover. Mark was unable to complete the positional tolerance test because his heart rate met and exceeded 85% of his age-adjusted submaximal end-point. Mark demonstrated consistency of effort throughout testing.

With regard to the positional tolerance portion of the evaluation, the FCE report reveals that the claimant's injury did not prevent him from completing this portion of the evaluation, but rather claimant's increased heart rate called for an early termination of the testing. However, claimant was able to complete six circuits on this portion of the evaluation.

Claimant returned to Dr. Capocelli on September 17, 2002, for a follow-up examination. Although the claimant's x-rays looked "reasonably well",

Dr. Capocelli elected to place claimant on a nine month bone growth stimulator. Nevertheless, Dr. Capocelli concluded after examining the claimant that the claimant was ready to return to work. Dr. Capocelli specifically stated in his report:

However, at this point I think the patient is ready to return to work, though I do not think the patient is capable of returning to his premorbid work duty which involved lifting in excessive of what he was capable of doing in the functional capacity exam. At this point he is able to work in a heavy category for an eight hour day with a maximal lifting of 60-70 pound occasionally. At this point I do feel the patient has reached MMI and I am going to issue an impairment rating based on the Guide to the Evaluation of Permanent Impairment , 4<sup>th</sup> edition. Based on that the whole person impairment is 14%. It is my concern that as the patient does heavy furniture lifting he is probably not going to be able to return to his premorbid work duty, however, and would probably be optimally treated with re-training and identification of a job within the restrictions. Please refer to the Functional Capacity Exam for any further details on the work restrictions. At this point my follow-up with him will be p.r.n. although we will go ahead and continue him on the bone stimulator and we will plan on getting x-rays at three, six and nine months of the course of bone stimulator use.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 his employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

Claimant is a young man, only 31 years of age. He has completed his GED work and is waiting to take the test. Claimant has work experience in fast food, factories, and as a general laborer. Claimant has worked in construction, as a

janitor, in a bondo shop, and as a delivery truck driver. At the time of his compensable injury, claimant was earning approximately \$8.00 per hour. Claimant was found to have attained maximum medical improvement and was released to return to work by his treating physician on September 17, 2002. According to claimant's Functional Capacity Evaluation, claimant was physically capable of working in a heavy category for an eight hour day. Although claimant's physician did not recommend that the claimant return to work delivering furniture, no permanent restrictions were placed upon the claimant. Moreover, a review of the Functional Capacity Evaluation reveals that claimant's heart rate, not his compensable back injury, prevented the claimant from completing the "Positional Tolerance" portion of the evaluation.

Upon learning of his release to return to work, claimant was able to secure part-time employment working weekends for Bost Human Development earning \$8.00 per hour. Claimant sought full-time employment with this employer, but moved to Tennessee prior to a full-time position becoming available. In Tennessee, claimant obtained temporary employment as a driver, escorting dump trucks, earning

approximately \$7.25 per hour on a 12 hour shift.

With regard to claimant's post-injury job search, claimant testified that he has applied for jobs with several fast food restaurants and temporary agencies. Claimant explained that while he has been looking for employment, he is not seeking a job that would require him to do anything that would re-injure his back. At the time of the hearing, claimant was waiting to hear back on a security type position for a local hotel near his home town in Tennessee.

In our opinion, a preponderance of the evidence fails to support a finding of wage-loss disability. Claimant has fully recovered from his injury, is no longer on prescription medications, and does not have any follow-up appoints with his treating physician. Claimant is capable of working in a heavy category of work for a full eight hour day. We find that the claimant possesses the qualifications and physical ability to work in numerous positions that pay comparable to his earnings with respondent at the time of his injury. Claimant's post-injury employment supports this finding. Claimant earned \$8.00 an hour working for Bost Human Development. Claimant was even seeking full-time work with this employer, but moved before additional clients

became available. Claimant has a valid driver's license and has held employment as an escort driver. Claimant can work in the fast-food industry and he has even identified a position with a hotel he that wants to secure.

Accordingly, for those reasons set forth herein, we find that the claimant has failed to prove by a preponderance of the evidence that his compensable injury has resulted in a decrease in his wage earning capacity. Therefore, we find that the decision of the Administrative Law Judge should be reversed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must respectfully dissent from the opinion of the majority finding that claimant has failed to prove by a preponderance of the evidence that he is entitled to any benefits for his loss in wage-earning capacity.

Claimant is 31 years old, quit school in the eleventh grade, and has no special skills or training. He sustained an admittedly compensable injury in the form of two herniated disks at L4-5 and L5-S1. Extensive surgery was performed, including a fusion. Claimant has been given a significant permanent anatomical impairment rating of 14% to the body as a whole. He experiences good days and bad days. Claimant's physical condition prevents him from returning to work for the employer, which is at least some evidence of wage-loss disability. He has applied for numerous jobs and honestly informed these employers of his back condition, but has not been able to obtain regular, gainful employment. On one of his good days, claimant gave a determined and sincere effort in completing the functional capacity evaluation.

Based on the above evidence, I find that claimant has proven by a preponderance of the evidence that he is entitled to at least some benefits for wage-loss disability. The opinion of the Administrative Law Judge should be affirmed. Accordingly, I must respectfully dissent.

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SHELBY W. TURNER, Commissioner