

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009367

NOLAN W. WILSON,
EMPLOYEE

CLAIMANT

CONAGRA FROZEN FOODS,
EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 11, 2004

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

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

Respondents represented by HONORABLE BILL H. WALMSLEY,
Attorney at Law, Batesville, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondents appeal from the decision of the
Administrative Law Judge awarding 24% wage-loss disability
to claimant. Based upon our de novo review of the entire
record, the Full Commission finds that the decision of the
Administrative Law Judge should be affirmed.

Claimant, a feed truck driver, sustained an
admittedly compensable injury on August 14, 2000 when he was
injured in a motor vehicle accident and sustained injuries
to his cervical and lumbar spine. Claimant underwent a
cervical fusion in September, 2000 and a lumbar diskectomy

in March 2001. On June 14, 2001, Claimant underwent a functional capacity evaluation conducted by a physical therapist, which indicated that he was able to perform work classified as "medium" by the U.S. Department of Labor. The functional capacity evaluation notes that claimant experienced "pain in the lower back, numbness, tingling, burning, & loss of control of left hand" during the exam. The functional capacity evaluation was a broad evaluation of claimant's abilities and described a grade "medium" as the ability to sit, stand, and walk for one-third to two-thirds of the work day.

On June 20, 2001, Dr. Anthony Russell, claimant's treating physician, determined that claimant's permanent anatomical impairment rating was 17%. Dr. Russell released claimant to return to work half days for two weeks beginning June 25, 2001, with the restriction designated in the functional capacity evaluation. Claimant submitted the return to work release to his employer, but did not return to work and was terminated. On July 16, 2001, Dr. Russell issued a new release with more specific findings that are consistent with claimant's testimony regarding his present, post-surgery condition. Dr. Russell's July, 2001 release was consistent with the functional capacity evaluation, but

more specifically stated that claimant's ability to sit, stand, or walk is limited to a maximum of no more than four hours during an eight hour work day and for no more than 10 to 30 minutes at a time. Respondent's witness, Greg Williams, testified that working as a truck driver for respondent would require claimant to exceed the sitting limitations that Dr. Russell placed on claimant.

As for claimant's educational background and work experience, claimant dropped out of high school during the eleventh grade and entered the Navy where he served for seven years. Claimant completed his GED while in the Navy and received some training in the Navy, but has not been able to transfer those skills to the civilian work force. In the early 1980s, claimant worked as a cable television technician and was a subcontractor on cable construction projects. Outside of his military service, the only other classroom training that claimant has completed was in 1987 when he attended an eight-week truck driving school to obtain his commercial driving license.

After obtaining his commercial driving license, claimant drove a concrete truck, a dump truck, and drove over the road for various employers. In September, 1998, claimant began driving a feed truck and loading and

unloading feed for respondent. Claimant testified that he cannot return to his previous employment or drive over the road in his present physical condition because of the limited length of time that he can sit without feeling numbness in his back and leg. He testified that after 45 minutes to an hour of driving that his lower back and left leg go numb. Claimant credibly testified that he continues to experience pain in his lower back, hips, neck, left foot and leg, and left shoulder:

I still have real bad lower back and hip pains and spasms and sharp shooting pains from my lower back, stiffness, and immobility on my neck. There's times when I can turn it further, and I can't turn it further, it pops. I still get numbness in my left fingers and hand at times when it just goes to sleep on me, and the same thing with my left foot and leg. It gets numb and goes to sleep on me, you know, just random. I still have a hearing problem. I have-it sounds like a bee in my head, ringing in the ears, both ears. Its worse on the right ear than the left ear. Its like a dial tone, as best I can explain it. And also my left shoulder, I have an open socket on it where somewhere along the line when I was seeing Dr. Ackerman, he was either changing my medication up or something, and I had a dizzy spell and took a fall.

(R. 18-19).

Claimant also testified that his pain varies from day to day and prevents him from being able to sleep more

than an hour or two before waking up due to pain. Since the work-related accident, claimant has not been pain free in his back or neck. He testified that he does not know of any employment that he can do in his present condition on a full-time basis. The medical records submitted from Dr. Russell also establish that claimant's ability to obtain another commercial driving position is significantly limited because claimant cannot sit for any more than 30 minutes at a time. Claimant has not worked since his injury with the exception of light-duty work on his father's farm. Claimant testified that he cannot do the type of work he previously did and is unaware of employment opportunities within his physical limitations.

We find that the factors favoring a wage-loss disability award are satisfied and the Administrative Law Judge appropriately awarded claimant 24% wage-loss disability. We also find that Ark. Code Ann. § 11-9-522(b)(2) does not bar claimant from receiving permanent partial disability in excess of his physical impairment rating because claimant was not ever offered a return to full-time employment making as much or more than he was earning at the time of the accident.

The wage-loss factor is the extent to which a compensable injury has affected 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) (Supp. 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).

In Second Injury Fund v. Exxon Tiger Mart, 70 Ark. App. 101, 104 (2000), the court affirmed the Commission's award of 37% wage-loss disability where the claimant's functional capacity evaluation indicated that she was able to perform work classified as "medium" by the U.S. Department of Labor. The claimant there was 57 years-old, did not complete high school, obtained a GED, had previously been employed in manual labor jobs, had missed several year of work following her injuries, and experienced pain in her back and legs that manifested itself when she lifted,

bended, stooped, stood, and sat to the extent that she felt unable to work. In affirming the Commission's wage-loss disability award, the court reasoned that "[a]lthough expert opinion, such as that contained in the functional-capacity evaluation performed by the occupational therapist in the present case, is admissible and frequently helpful in workers' compensation cases, it is not conclusive." The court affirmed that wage-loss award and held that "[i]n light of the evidence of claimant's physical condition and wage-loss factors, there is substantial evidence to support the Commission's finding of 37% wage-loss disability."

We likewise affirm the Administrative Law Judge's award here. While Claimant was also assessed as "medium" on the functional capacity evaluation by a physical therapist, Dr. Anthony Russell, claimant's treating physician, stated more specific conclusions in his evaluation of claimant. The evaluation completed by the physical therapist broadly states that, as a grade "medium," claimant can sit, stand, and walk for one-third to two-thirds of the work day. While Dr. Russell also concluded that claimant can sit, stand, or walk for a total of no more than four hours during an eight-hour work day, he more specifically determined that claimant

cannot stand, sit, or walk for more than 10 to 30 minutes at a time.

With regard to respondents' argument that claimant is not motivated to return to work, we find that this argument is contradictory to the evidence in the record. As explained above, claimant's testimony and the medical evidence show that claimant is not able to perform the only tasks for which he has training and work experience. Additionally, the record reflects that claimant has made some effort to re-enter the work force to the extent he is able through promotion of and employment with his father's farm.

We find that claimant's physical condition as a result of the compensable injury, coupled with his limited education and lack of transferable job skills, will greatly impair claimant's ability to obtain future employment. We further find that claimant has, in fact, experienced persistent documented physical limitations in his back consistent with his hearing testimony, which will have a permanent negative effect on claimant's ability to work in manual labor. Thus, considering claimant's age, education, work experience, physical impairment, and his lack of transferable skills, we find that the 24% wage-loss

disability award, which is only 7% above claimant's physical impairment rating, seems abundantly fair and is, accordingly, affirmed.

For the foregoing reasons, we affirm the Administrative Law Judge's award of 24% wage loss to claimant. 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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant sustained a 24% impairment to his wage-earning capacity in excess of the 17% anatomical impairment. Based upon my de novo review of the entire record, and without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a decrease in his wage-earning ability.

In accordance with the Functional Capacity Evaluation, Dr. Russell authored a return to work slip on June 20, 2001, releasing the claimant to return to work on June 25, 2001, with the following remarks:

Released to return to work ½ days
(4 hours) X 2 weeks. Should follow
guidelines stipulated in FCE with
designated restrictions on motion and
lifting in medium work status.

Claimant provided this return to work slip to his employer within a day or two after receiving it from Dr. Russell. Claimant testified that he left the slip with the secretary as Greg Williams, the Feedmill Manager was unavailable. According to the claimant, Mr. Williams never called him to schedule claimant for work. This testimony is in direct conflict with the testimony of Greg Williams and Billy Joe Turney. Mr. Turney was the dispatcher for

respondent-employer. Mr. Turney testified that he overheard Mr. Williams on the telephone with the claimant telling the claimant to come to work on Monday morning and they would have a truck loaded and ready for him. Mr. Turney further testified that upon Mr. Williams ending the telephone conversation, Mr. Williams specifically instructed Mr. Turney to schedule the claimant a load for Monday June 25, 2001. Mr. Williams corroborated Mr. Turney's testimony.

The claimant never reported to work after providing the return to work slip to Mr. Williams' office. After three consecutive days without reporting to work or calling in, the claimant was officially terminated.

After failing to report to work on June 25, 2001, claimant obtained a second release from Dr. Russell dated July 16, 2001, which imposes greater restrictions upon the claimant than the previous release dated June 20, 2001. However, the record fails to disclose a contemporaneous medical examination of the claimant on or about July 16, 2001, outlining a change in condition justifying or explaining the more stringent restrictions. Reference was made to the record of payment submitted into evidence by respondent to indicate that Dr. Russell charged respondents for a service date July 16, 2001, however, the charges for

this date of service is not consistent with the charges from known office examination dates. Accordingly, the payment records do not confirm a contemporaneous examination with the July 16, 2001, restrictions.

I do not find claimant to be motivated to return to work. Claimant convinced Dr. Ackerman that he was sincere in returning to school and returning to work. However, there is not a scintilla of evidence to suggest that the claimant made any effort whatsoever to return to either school or work. Claimant dropped off the return to work slip in June of 2001, yet he did not report to work on June 25, 2001. The notice of termination was received by the claimant on July 16, 2001, ironically the same date as the second work restriction issued by Dr. Russell. Claimant testified that he thought there must have been some misunderstanding so he called his employer about the termination. However, the claimant's telephone records reflect that the claimant did not call the Clinton office until July 23, 2001, one week after he received the termination notice.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunctions with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The record reflects that the claimant's job as a feed truck driver falls within the claimant's restrictions as outlined in the Functional Capacity Evaluation. Respondents have further offered proof that the claimant was offered work in this capacity in accordance with the June 20, 2001, release signed by Dr. Russell. However, this release is only for ½ days for two weeks. Although I find the testimony of Mr. Williams and Mr. Turney to be credible and I find that the claimant was offered work within the restrictions imposed by Dr. Russell, there is no evidence upon which to rely to find that the claimant was ever offered a return to full time employment making the same or greater wages he earned at the time of his accident. Therefore, A.C.A. § 11-9-522(b)(2) does not operate to bar the claimant from receiving permanent partial disability in excess of his physical impairment rating. However, the respondent's offer of proof establishes that work is available for the claimant within his medium working restrictions.

The claimant has a stable work history. At 48 years of age he is relatively young. Claimant possess a GED, and can read and write. Claimant has military experience, having served 7 years in the United States Navy. In addition, claimant received formal training from

attending truck driving school. Claimant was assigned a 17% anatomical impairment as a combination from his cervical and lumbar injuries. The medical records clearly indicate that the claimant has successfully recovered from the cervical fusion and lumbar diskectomy. The last medical record from claimant's treating surgeon regarding claimant's cervical injury indicated that the claimant is "back to normal" following surgery. In addition, Dr. Russell's medical records introduced into evidence reveal that the claimant reached maximum medical improvement effective July 2, 2001, and that the claimant was released to resume normal activities with the exception of the findings in the Functional Capacity Evaluation. Although Dr. Russell authored a subsequent work restriction on July 16, 2001, there is no evidence in the record to corroborate a medical need for a more restrictive release.

The claimant is physically and mentally capable of being retrained should he so desire. The claimant's medical records indicate that he is able to work in a medium duty capacity, even though Dr. Russell later provide an unexplained, more restrictive release. The claimant has shown no initiative to return to work as he has made no effort to re-join the workforce. Even upon his termination, the claimant displayed a lackadaisical approach to inquiring

into this termination. In short the claimant is simply not motivated to return to work.

After I consider the claimant's age, education, work experience, and the nature of his injury, the claimant's negative attitude in returning to work, including his failure to return to work on June 25, 2001, for ½ days, and all the other relevant factors, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained any loss in his wage-earning capacity. Accordingly, I must dissent from the majority opinion awarding permanent partial disability benefits in excess of claimant's anatomical impairment rating.

KAREN H. MCKINNEY, Commissioner