

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102506

DAVID HENSON,  
EMPLOYEE

CLAIMANT

QUICK LAY PIPE COMPANY,  
EMPLOYER

RESPONDENT #1

FREMONT INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT #1

SECOND INJURY FUND

RESPONDENT #2

OPINION FILED MAY 4, 2005

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

Claimant represented by HONORABLE J. RANDOLPH SHOCK,  
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by HONORABLE JOHN WEBSTER,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

Respondents No. 1 appeal and claimant cross-  
appeals from an opinion filed herein by an Administrative  
Law Judge on May 12, 2004.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 26, 2004 and contained in a prehearing

order filed January 27, 2004, are hereby accepted as fact.

2. Respondent #1 is entitled to a credit for any temporary total disability benefits and related attorney fees paid to claimant subsequent to August 7, 2003.
3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits as a result of his compensable injury in an amount equal to 33% to the body as a whole. This includes a 13% impairment rating and a loss in wage earning capacity in an amount equal to 20% to the body as a whole.
4. The Second Injury Fund is not liable for payment of permanent partial disability benefits.
5. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 33% to the body as a whole.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct 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.

We therefore affirm the May 12, 2004 opinion of the Administrative Law Judge, including all findings of fact

and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. 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.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding the claimant sustained a 20% wage loss disability

for which respondent no. 1 is liable. In my opinion the claimant has failed to prove by a preponderance of the evidence that he has sustained a decrease in his wage earning capacity as a result of his compensable injury.

The claimant sustained an admittedly compensable to his lower back injury on February 14, 2001, for which he has received temporary total disability and medical benefits. The claimant eventually underwent a 360 degree bilateral fusion with the insertion of cages and a bar on April 28, 2003. Claimant's treating physician, Dr. G. David Casper, released the claimant to return to light duty work on August 7, 2003, with restrictions of no lifting over 10 pounds, no stooping, bending, squatting, kneeling, climbing, or operating a vehicle. On September 18, 2003, Dr. Casper opined that the claimant had reached maximum medical improvement.

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.

Currently, the claimant is working for his brother as a relief worker driving a truck and is paid \$250.00 per week. Although the claimant testified that he can no longer unload trucks, he has applied for full time jobs with various trucking companies and he believes that he is physically capable of driving a truck. Should the claimant secure a full time truck driving job, the claimant testified that he will be able to earn anywhere from \$500 to \$1000 per week. At the time of the hearing, the claimant did not have enough full time driving experience to be insurable and was therefore not an attractive applicant to many companies.

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). The claimant is 32 years of age.

He has a high school education and college training as a truck driver. The claimant has been released to return to work with medium duty restrictions and he has not sought or required any medical treatment for his compensable injury since he was released by his physician. I 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.

Moreover, the evidence reveals that the claimant can return to the type of work he was performing at the time of his injury, driving a truck. Claimant's post-injury employment supports this finding. Claimant even testified that he is physically capable of driving a truck full time and that he has sought full-time employment as a truck driver. According to the claimant he will be hired once he has accumulated three months of experience and is insurable. As noted by the claimant, the truck companies are always hiring and looking for drivers with experience. Accordingly, 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 as a result of his compensable injury. See Mark Polk v. Quality Rentals, Full Commission Opinion filed May 14, 2004 (F103941).

Therefore, I respectfully dissent from the majority opinion finding that the claimant is entitled to wage loss disability.

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KAREN H. MCKINNEY, Commissioner