

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302332

TOMMY L. HARMON,
EMPLOYEE

CLAIMANT

HULSEY LOGGING,
EMPLOYER

RESPONDENT NO. 1

BITUMINOUS CASUALTY CORP.,
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JUNE 21, 2005

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

Claimant represented by the HONORABLE NEAL L. HART,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE RANDY P.
MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L.
PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed August 24, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The claim was accepted as a compensable
injury by Respondent No. 1 on February
4, 2003.

2. The permanent partial disability rate that has been paid to the claimant is \$221.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury supported by objective evidence on February 4, 2003.
4. The claimant has proven by a preponderance of the evidence that he sustained a 5% permanent anatomical impairment rating that was properly paid by Respondent No. 1.
5. The claimant has proven by a preponderance of the evidence that he sustained a 25% diminished wage earning capacity in excess of his anatomical rating.
6. Respondent No. 1 is responsible for the 25% wage loss benefits awarded.
7. Second injury Fund is not liable for wage loss benefits.
8. Additional attorney's fees for the claimant prevailing on compensability of the claim cannot be assessed against the Second Injury Fund relying on Ark. Code Ann. §11-9-715.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are

correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 24, 2004 decision 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 on appeal.

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. After his examination of the claimant on December 30, 2003, Dr. Moore rendered a 5% anatomical rating to the claimant's body as whole. In his report of that visit, Dr. Moore stated that the claimant had "hit a plateau" and had reached MMI. However, Dr. Moore also noted in his report that the claimant showed no visible signs of impairment upon physical examination.

He [the claimant] comes in without a limp. Straight leg raising to 90 degrees. Reflexes are symmetrically hypoactive. Peripheral pulses are well perceived. No point of tenderness. Back range of motion does not appear restricted. No evidence of edema. No spasm is palpable.

Furthermore, the claimant carried a diagnosis of back strain/sprain throughout his course of treatment.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to

determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Crow, supra.

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2002) provides that any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Objective findings are defined as those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16) (Repl. 2002). Although, as with any evidence, we can not arbitrarily disregard the testimony of any witness, we are not limited solely to medical evidence in making determinations regarding the existence and extent of anatomical loss of use.

Dr. Moore assigned the claimant a 5% impairment rating. We are not limited solely to this medical evidence in making determinations regarding the claimant's alleged impairment. The results of the

claimant's objective medical tests consistently showed evidence of the claimant's back injury which he sustained in 1999, and for which he was not assigned a permanent impairment rating. During his examination of March 9, 2003, the doctor detected "a little bit of palpable spasm" in the claimant's lumbar spine area. Other than that one reported incident of muscle spasm, the record is devoid of objective medical evidence to support a finding that the claimant sustained a permanent impairment. Rather, the claimant's chief complaint throughout the course of his treatment was pain with occasional numbness and tingling in his lower extremities, none of which could be measured objectively. According to Ark. Code Ann. § 11-9-102(16) (Repl. 2002), the Commission cannot consider complaints of pain when determining physical or anatomical impairment. Furthermore, the claimant apparently did not give a maximum effort during his functional capacity evaluation. Therefore, it is virtually impossible to accurately ascertain the extent, if any, of loss of use to his body as a whole that the claimant may have sustained from his alleged back injury. Assuming for the sake of argument that the claimant sustained a compensable injury in February of 2003, he has failed to prove that he suffered any permanent physical impairment as a result of that injury.

Pursuant to the plain language of Ark. Code Ann. §11-9-522(b)(1), the percentage of permanent physical impairment must be established before the Commission can consider a claim for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment. Similarly, any consideration of the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity may not occur until the Commission has first determined the percentage of permanent physical impairment. Wal Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727(2000). Therefore, should it be found that the claimant has not sustained any permanent physical impairment from his alleged injury of 2003, he will not be entitled to wage loss benefits. However, should it be found that the claimant has sustained permanent physical impairment, then the wage loss factor must be considered.

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). As stated above, 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). 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). 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 addition, the Commission may take motivation, post-injury income, credibility, demeanor, and a multitude of other factors into consideration when determining wage loss. 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). 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 testified that he has been unable to work since February of 2003. However, the claimant openly admits that he has served in the capacity of a church pastor since that time; a position for which he has refused compensation. Furthermore, the claimant has been released to return to work by his treating physicians, and it has been

shown that, at the very least, the claimant can return to a sedentary type position. In addition, the claimant is in his early 40's, he has a high school education and is literate, he has good computer skills, and he has past experience and skills that could easily transfer to a less strenuous type position offering comparable compensation. The claimant testified that he has applied for several jobs in his small hometown to no avail due to the fact that employment opportunities are limited there, especially in light of his lifting restrictions. The claimant further testified that he searches the newspaper daily for employment opportunities in nearby Hot Springs. The claimant admits, however, that he would not be willing to move to Hot Springs should he find employment there, and that it is too far for him to commute to Hot Springs from his hometown. Furthermore, the claimant has made no attempt to seek vocational rehabilitation services, and he has applied for Social Security Disability benefits. Based upon the above and foregoing, the claimant has failed to prove that he is entitled to permanent wage loss disability.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner