

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302010

ERNEST MOORE, EMPLOYEE	CLAIMANT
CONTINENTAL EXPRESS, INC., EMPLOYER	RESPONDENT
GIBRALTAR NATIONAL INS. CO., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 16, 2005

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

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

Respondent represented by HONORABLE JOHN D. WEBSTER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 18, 2005.

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

1. The employer/employee/carrier relationship existed on February 5, 2003.
3. [sic] The claimant sustained a compensable injury on February 5, 2003.

4. The claimant was earning sufficient wages to entitle him to the maximum compensation rate.

5. The respondents accept liability for a 13% permanent anatomical impairment rating to the claimant's whole body.

6. The Change of Physician Order to Dr. Contreras previously entered by Administrative Law Judge Michael White is hereby vacated and the issue of change of physician is reserved by the parties until a later date.

7. The claimant has failed to establish that he is entitled to benefits for any degree of permanent anatomical impairment in excess of the 13% permanent anatomical impairment accepted by the respondents.

8. The claimant has sustained a 12% impairment to his wage earning capacity in excess of the 13% anatomical impairment accepted by the respondents.

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 of fact

made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the opinion of the Majority affirming and adopting the Administrative Law Judge's decision that the claimant has failed to establish entitlement to an anatomical impairment rating in excess of 13% and an award of 12% impairment to the claimant's wage earning capacity.

_____Based upon my de novo review of the record, it is my opinion that the Administrative Law Judge's decision should be modified to reflect a 20% anatomical impairment and wage-loss benefits of 50% for a total permanent partial impairment rating of 70%.

_____At the time of the hearing the claimant was 44 years old and had completed the ninth grade. He reads, writes, is able to perform basic mathematics, and has a Certified Driver's License. He has worked as an over-the-road truck driver for more than thirteen years.

_____The claimant began working for the respondent-employer in 1993, and has worked for them on three separate occasions. The claimant's job with the respondent-employer required him to be able to drive for at least 10 hours straight, to load and unload freight when necessary, to meet all D.O.T. regulations, to do book work, and anything else the company asked him to do. The claimant was paid weekly and by the mile. He was paid approximately 34 cents a mile. He earned between \$45,000 and \$50,000 a year with benefits and fuel provided by the respondent-employer.

_____ On the morning of February 5, 2003, the claimant stopped outside of Missoula, Montana to get fuel. As he was exiting his truck, he slipped on ice that had built up on his truck ending up down in between the fuel pumps and on the concrete edge that's there. The claimant contacted the respondent-employer to report his injury, and then continued on his route. It took the claimant almost seven days to get home and during that time he was stiffening up and began to have pain in his right leg. The respondent-employer arranged for the claimant to be seen by Dr. English in Dallas. Dr. English prescribed physical therapy, medication, and an MRI. The claimant's March 5, 2003, MRI revealed:

IMPRESSION:

1. Degenerative disc disease L4 level and 3.5 mm diffuse disc bulge producing moderate right neural foraminal stenosis and mild to moderate left neural foraminal stenosis.
2. Degenerative disc disease and mild diffuse disc bulge at L5 without neural foraminal stenosis.
3. Degenerative change involving the facet joints at L4-5.

COMMENT:

L4 level shows decreased signal in the disc and very slight loss of disc height. There is diffuse disc bulge of approximately 3.5 mm. This indents the anterior thecal sac and produces moderate neural foraminal stenosis on the right and mild to moderate neural foraminal stenosis on the left. There is degenerative change noted in the facet joints at L4-L5.

L5 level shows loss of signal in the disc and diffuse disc bulge indenting the anterior thecal sac but without significant neural foraminal stenosis.

In May of 2003, the claimant began treatment with Dr. Kenneth Reesor, an orthopedic surgeon, who initially recommended epidural steroid injections at L4-5 and L5-S1 and physical therapy. In his July 2, 2003 office note, Dr. Reesor states that the epidural steroids have not helped and that exercise seemed to make the claimant worse. Further, Dr. Reesor recommended a discogram at the L3-4, L4-5 and L5-S1 level. On July 24, 2003, Dr. Reesor indicated that the discogram markedly reproduced the claimant's pain at L4-5 and L5-S1 and recommended a two level fusion surgery. The claimant's surgery was performed on August 26,

2003, and the procedure involved: (1) Lumbar diskectomy L4-5 and L5-S1; (2) PLIF L4-5 and L5-S1; (3) PLIF L4 to S1; (4) Vitoss autologous bone graft; (5) Posterior instrumentation L4 to L5-S1; (6) Posterior bone graft left iliac crest.

The claimant entered a work hardening program in December of 2003. On December 29, 2003, the claimant underwent a Functional Capacity Evaluation, which revealed that the claimant tested at a "Medium/Heavy PDC level of work ... and [met] all job specific criteria as defined by [Respondent-Employer]." The Evaluation opined that the claimant "should avoid repetitive bending, stooping, and prolonged flexed postures," but the claimant was discharged "to pursue job reintegration with his previous employer."

The claimant had a follow up visit with Dr. Reesor on January 9, 2004. At that time it was Dr. Reesor's opinion that the claimant would be unable to do the job as described. Dr. Reesor also stated:

He still has quite a bit of pain as far as his back is concerned. Given the job description as far as loading other trucks, he will not be able to do that.

Driving at this time frame is only tolerated for about an hour. In my opinion, patient needs to be re-trained for a light job at this time. At about a year from surgery it is recommended that he be evaluated for removal of hardware. A lot of time the hardware will cause increased soreness in the back. Once this hardware is removed, it takes about 3-4 months to recover from that particular surgery if it is solidly fused. Another FCA test will need to be performed at that time frame.

On or about January 15, 2004, the claimant returned to Dr. English for an impairment rating. In his report, Dr. English noted that the claimant has undergone a two-level fusion. He then wrote that "[e]xamination of range of motion model and the Fourth Edition, he would have received 13% based on his limited range of motion."

Dr. English then continued that:

Using the DRE categories, as it is customary under the Fourth Edition, Mr. Ernest would fall into the category IV loss of motion segment integrity. This is the area where two-level fusions are generally placed. Consequently, this impairment rating receives 20% impairment based on his category IV placement.

Thus, Dr. English assigned a 20% whole body impairment rating, and he concluded that the claimant had reached maximum medical improvement on January 15, 2004. On January 23, 2004, Dr. Reesor placed a fifty pound lifting restriction on the claimant and recommended a maximum of medium duty.

The claimant began driving in an owner-operator program for Dart on March 27, 2004. He is not required to load or unload freight, and he is able to drive hours that meet his restrictions. He is required to pay his expenses out of the amount he makes per mile which include: the truck note, maintenance, equipment, insurance, stickers, base plates, gasoline, and personal expenses.

The respondents assert that during one quarter, the claimant hauled approximately 35 loads and averaged approximately 1888.8 miles per load. This figure, in my opinion, is incorrect. According to the documents in the record the claimant actually hauled approximately 35 loads and averaged approximately 735.97 miles per load during that quarter (25,759 miles/35 loads). The claimant earns between

85 and 95 cents per mile and drives approximately 8 hour in a 24 hour period. The claimant testified that he would bring home approximately 5 to 10 cents per mile and expects to gross approximately \$17,000.00.

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether her earning capacity is diminished or not. Id. Any finding of permanent impairment must be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c)(1)(B). It must also be shown that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a). The Commission has adopted the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993) for use in assessing the extent of

permanent anatomical impairment. A.W.C.C. Rule 34 (July 1, 1995).

As was stated in Murry v. Riceland Foods, Full Commission Opinion, Filed January 20, 1999 (Claim No. E516632):

Permanent impairment is any permanent functional or anatomical loss remaining after the end of the healing period has been reached. Quachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Also, in Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968), the Arkansas Supreme Court held that physical functional loss may best be measured through physical examination by competent medical specialists. The Commission must first evaluate the medical evidence and determine if the permanent impairment is supported by objective and measurable findings. Reader v. Rheem Manufacturing Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992).

Dr. Richard English states in his January 7, 2004 Impairment Rating Report:

Using the DRE categories, as it is customary under the Fourth Edition, Mr. Ernest would fall into the category IV loss of motion segment integrity. This is the area where two-level fusions are generally placed. Consequently, this impairment rating receives 20%

impairment based on his category IV placement.

In arriving at his rating, Dr. English utilized Table 72 of the AMA Guides, 4th edition, and what is known as the "Injury Model." According to page 94 of the Guides, this is the preferred and most accurate method for calculating permanent impairment. While it appears true that Dr. English took at least some range of motion measurements, it is also true that his 20% rating is not based upon that data. The final page of Dr. English's rating report states that the Injury Model Impairment is 20% whole person and the "Injury Model Impairment override ROM Model Impairments - the two are not combined."

Although the Range of Motion Model is used more often than the DRE Model in assessing impairment ratings, I have found no indication that the Commission prefers one method over the other.

The respondents sent the claimant to Dr. English. Dr. English prepared an impairment rating report that was well thought out and documented and should be given the

appropriate amount of weight. In my opinion, the respondent has met his burden of proving by a preponderance of the evidence that his impairment is supported by objective and measurable physical or mental findings and that the compensable injury was the major cause of the disability or impairment. Therefore, in my opinion, the Administrative Law Judge's decision should be modified to reflect the 20% impairment rating given to the claimant by Dr. English.

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 respondent 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).

The claimant has proven by a preponderance of the evidence that he sustained permanent physical impairment as a result of his compensable injury. At the time of the hearing, the claimant was 44 years old with a ninth grade education. The majority of his work experience is as an over-the-road truck driver. As a result of his compensable injury, the claimant underwent a two-level fusion surgery. The claimant has returned to trucking working as an owner/operator. The respondents have the burden of proving that the claimant is making wages equal to or greater than his average weekly wage at the time of the accident.

The claimant's credible testimony sets forth that prior to his compensable injury he was earning 34 cents per mile with the respondent employer. The claimant drove 70 hours a week (ten hours a day, seven days a week) and earned approximately \$45,000 to \$50,000 a year. The claimant also testified that his post compensable injury earnings for 2004 would be approximately \$17,000. The claimant stated that after all of his expenses were deducted from his per mile rate he actually brought home between 5 and 10 cents per

mile. The respondents offered no evidence at the hearing to refute this testimony.

The respondents introduced into the record only one pay record for the claimant from his current employer. In my opinion, this record does not prove by a preponderance of the evidence that the claimant is earning wages greater than his average weekly wage at the time of the accident. The wage record reflects that the claimant is earning approximately 95 cents per mile, but does not accurately reflect the expenses that are deducted from the rate per mile. The claimant testified that his expenses include his truck note, insurance, base plates, stickers, truck maintenance, fuel, and other miscellaneous expenses.

The respondents asserted in their brief and at the hearing that the claimant hauled approximately 35 loads and averaged approximately 1888.8 mile per load for the quarter. This calculation is inaccurate. The record reflects that the claimant did in fact haul 35 loads in the quarter, but the average mile per load was actually 735.97 miles per load (25,579 QTR miles/35 loads). The respondents inadvertently

used the claimant miles to date for the year of 66,108 to arrive at the average per load.

As to his current position, the claimant stated:

Q. I want you to tell Judge Churchwell what business you are in and what you do for your job.

A. I'm driving a truck again but I went to a lease/owner-operator program to where I can pick my loads and I don't have to unload no freight and I drive my own periods. I take my own loads, which I can't take the long ones but I take the shorter loads to where I have time to do my rests and everything like that. I have a sleeper on my truck to where I can just pull off in a rest area and get in the back and lay down if I have to. I do not unload no freight or nothing else.

The claimant testified as to his current symptoms.

Q. Tell Judge Churchwell, if you will, some of the symptoms that you have concerning your back, the duration of the symptoms, and when they do or do not occur.

A. You know, like I drive a truck and most of - like I have to sit. Like I have to sit in this chair, I have to sit up on the edge because I can't lean back and I can't sit for a certain length of time because it

seems like it stiffens up and then you just can't hardly move. That's like when I drive, I drive for a couple of hours and then I stop to lay down in my bunk for a while, and then I get up and drive again. That's the way I have to do things to coincide with my back, because the longer I sit or the longer I drive, or even if I stand too long, that's when it seems like it stiffens right back up. It gets so bad sometimes that I have to put something behind my back to kind of push a little pressure to it.

The claimant further testified to the length of his runs and the time he spend on the road.

- Q. You told us earlier that at Continental Express the longer the run, the more the money. Is that still the case in this particular job?
- A. Yes.
- Q. Do you ever take a long run or are all your runs short?
- A. Most of my runs average between 400 and 800 miles. I don't get none of the longer runs because they are more - how do you say it, time sensitive, because they are such a long ways and you've got to be able to roll that 10 hours everyday to make your scheduled appointments.

Q. I understand. How many hours total now, Ernest, do you think that you actually spend driving per day?

A. For the total of the whole day?

Q. Yes.

A. Out of a 24 hour period, I average maybe 8 hours, but that's not steady. That's drive maybe 2 or 3 hours, stop for a couple of hours, drive some more, because I've got to keep within a 14 hour period with the Federal D.O.T. and everything.

The claimant described how his current position has affected his income.

Q. I'm glad you are back at work, Ernest, but has this affected your income compared to before your injury?

A. Oh, yes.

Q. I want you to tell Judge Churchwell how that is and why it has affected your income because I think that is important.

A. I don't make as much money as I did because I can't drive the long hours no more and I can't unload because, see, when you unloaded freight you got paid extra money to do this, and the longer the trips,

the more miles you run, the more money you made. I can't do that so it puts me back into what I consider a lower class, but I still do it because that's what I can do, you know, so that I can still try to send home money to my family.

...

- Q. I want to know how it is different now. I want to know based on the bottom line, the net result, the amount of money you bring home after expenses are paid and after you have to pay taxes.
- A. Most weeks it runs from \$250 to \$300, some weeks I don't bring home nothing. I believe he's got a copy of one of my statements where it shows that I have a loan out through them where I had went in the hole and had to borrow money from the company just to survive for a week.

The claimant did his best to clarify the one pay record that was introduced at the hearing.

- Q. I want to show you, Ernest, and have you explain because I think you understand it better than we do. If you would just kind of tell us what those numbers mean, please.
- A. This shows your load and your miles. Like this load, you know, it

shows how much they paid me for the whole week. It was \$1,200. The settlement figure at the top, that should be what I take home, which is zero, but if you go down and look where it's got your revenue and everything is, it's got to where it takes all your money and shows you where every dime they take goes, but it also shows where you buy your fuel and how much fuel you buy for the loads and how much you pay for it and everything. Here is your escrow account, this is how much they take out for maintenance and put into your account, but you can't touch this money unless your truck is broke down. This is your lease pay, just to be leased onto Dart, that's what they charge you out of it just to lease on it.

...

- Q. And so this Dart company that we show listed, assuming that we know what we are looking at here, where they show deadhead pay .85 and loaded miles .85, whereas you might have been making whatever you said, say 35 cents a mile for Continental, they were paying all of the expense?
- A. They was paying everything, the fuel, everything. It wasn't costing me nothing. I worked for them and they paid me to drive. That's what I got paid by the mile for

Continental. They paid for the fuel and for everything else.

Q. And if I understand correctly, this 85 cents a mile from Dart, all of your expenses would come out of that?

A. Yes. Everything.

In my opinion, the respondents have failed to prove by a preponderance of the evidence that the claimant is making wages equal to or greater than his pre-injury income. It seems apparent to me that the claimant will actually make substantially less income in his current position. The record indicates that the claimant drove a total of 25,759 miles in one quarter. As a comparison, the claimant testified that pre-injury he could drive 10 hours a day seven days a week, assuming he drives 65 miles per hour, the claimant could drive approximately 650 miles per day. If the claimant averages 650 miles per day, he could feasibly drive as much as 58,500 mile in one quarter (650 miles per day x 90 days). It is clear from this comparison that because of his restrictions the claimant is driving

substantially less than pre-injury which would translate into reduced wages.

Based on the wage loss factors, it is my opinion that the claimant proved by a preponderance of the evidence that his in entitled to wage loss benefits of 50%.

For the foregoing reasons, I must respectfully dissent from the Majority opinion. It is my opinion that the Administrative Law Judge's decision should be modified to reflect a 20% anatomical impairment and wage-loss benefits of 50% for a total permanent partial impairment rating of 70%.

SHELBY W. TURNER, Commissioner