

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F010438

GERVIS D. RAYBON, EMPLOYEE	CLAIMANT
IMPERIAL BLDG. CONTRACTORS, INC., EMPLOYER	RESPONDENT
ALLIANCE NATIONAL INDEMNITY CO., CARRIER	RESPONDENT

**OPINION FILED MAY 11, 2005**

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, 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 May 25, 2004.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that he

has sustained wage loss in excess of his anatomical impairment rating.

4. The respondents have controverted this claim in its entirety.

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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The claimant sustained an admittedly compensable injury on August 28, 2000, when he was struck by a falling pipe weighing an estimated 1,000 pounds. In the accident, the claimant suffered a fracture to his right hip and various other less severe injuries. The respondent has, to date, paid the claimant's medical expenses, temporary disability benefits and permanent disability benefits based upon a 10% anatomical impairment to the claimant's whole body. I respectfully dissent from the Majority's denial of any wage loss benefits.

At the time of the hearing, the claimant was 50 years of age. His past work history was in construction or similar jobs involving the operation of heavy equipment and welding, and requiring heavy manual labor. The claimant has no specialized vocational training or advanced educational degrees.

The claimant's treating physician was Dr. Richard Hilborn, a Texarkana orthopedist. Dr. Hilborn surgically reset the claimant's fractured hip using compression and

canalated screws. Dr. Hilborn opined that the claimant reached the end of his healing period on January 4, 2001. The claimant was also evaluated by Dr. Barry Green, another Texarkana orthopedist. Dr. Green saw the claimant for the purpose of determining his anatomical impairment. Dr. Green assessed an impairment of 10% to the body as a whole as a result of the claimant's hip injury. Dr. Hilborn later concurred with Dr. Green's anatomical impairment assessment.

The claimant testified that he had attempted to work following his release by Dr. Hilborn. One of those jobs was working in a "tool shed" during a construction job. This job consisted of signing tools in and out to other workers. However, this was a temporary job which lasted only ten days. The claimant testified that he obtained this employment through a friend in the construction business and that it was a limited duration job of ten days only. As the claimant explained, these types of jobs did occur occasionally in construction operations but were only sporadic and provided to the most senior individual on the crew. The claimant stated that he was lucky to have found the job and only did so because of a friend.

The claimant also testified that he obtained employment in the shipping department for the Manila Envelope Company. In getting this job, he did not advise his employer about his hip injury or his limitations. According to the testimony, the claimant left this job after two to three months because he was unable to keep up with the other workers and would have soon been fired.

The only other employment the claimant mentioned was jobs doing light plumbing or other repair work for relatives. The claimant was of the opinion that he could not do his former jobs because of the lifting and standing requirements. The claimant acknowledged that he had advised his doctor and others that he would try to return to work as a welder if he could remain seated. However, he admitted this was probably an unrealistic goal in that welders were required to walk, stand, lift heavy objects and pull the welding apparatus, all of which were tasks beyond his physical abilities. The claimant also stated that, at the time of the hearing, he was receiving Social Security Disability benefits.

Another witness who testified was Kathleen Pipkin, who stated that she was the Vice President of the respondent

employer. Ms. Pipkin testified that, while they could have provided the claimant a short term, temporary "light duty" job, her company did not have any permanent job which they would have been willing to offer the claimant given his physical restrictions.

In a very brief discussion of the claimant's vocational capabilities, the Administrative Law Judge, whose decision the Majority is adopting, essentially concluded that, since the claimant was not totally disabled, he would not be entitled to any wage loss disability. In reaching this conclusion, the Administrative Law Judge notes that the claimant's tool shed job was for \$18.00 per hour and he then comments, "if he were to find a similar full time job, at even half that pay, he would still be earning more wages than he was earning at the time of his injury." However, this conclusion ignores the fact that the full time jobs for which the claimant has the background and experience to perform are well outside his physical limitations.

Significantly, the respondent employer's Vice President testified that her company could not provide the claimant a job within his restrictions regardless of the wages. The Administrative Law Judge's off-handed comment about the

claimant being able to find such jobs displays a surprising lack of understanding as to the realities of the job market.

Further evidence of the Administrative Law Judge's unrealistic expectations in this case is his statement to the effect that the only limitation on the claimant obtaining a light duty, sit down job was because "the job market is poor and his lack of motivation to work. . .". It is curious that those two limiting factors, i.e. poor job market and his lack of motivation, are used to explain a denial of wage loss benefits. In the first place, a poor job market for someone with the claimant's limited ability and lack of formal training or education, would be a factor suggesting that he did suffer a wage loss. Prior to his injury, he had a productive and successful working career in the construction and maintenance industries relying, to a great degree, on his self-taught experience as welder and heavy equipment operator. However, it is not surprising that in the Ashdown area, the claimant, who has no formal education beyond high school nor any specialized vocational training or certification, is unable to find a job requiring little or no manual labor or lifting which would let him remain seated for most of the work day. The fact that these

jobs are not available to the claimant strongly suggests that his wage earning capacity has been severely limited by his injuries, not the other way around.

I also find it odd that the Majority accuses the claimant of being poorly motivated when his attempts to return to work, both in construction and in a factory setting, are relied upon to conclude that the claimant is capable of being employed. This claimant attempted to return to the regular work force but was unable to maintain regular employment because of his physical limitations. However, in spite of those attempts, he is still being branded as a malingerer. It appears that the claimant would have been better off had he not made any attempt to return to work. At least then, his attempts to return to work could not be used against him as evidence of his wage earning capacity.

The standard for awarding wage loss disability was set out by the Arkansas Supreme Court more than 40 years ago and has remained essentially unchanged since. In Glass v. Edens, 233 Ark. 786, 46 S. W. 2<sup>nd</sup>, 685 (1961), the Supreme Court noted that in unscheduled injuries, individual disability could not be determined by relying solely upon medical factors such as anatomical impairment. The Court

held that in addition to someone's anatomical impairment, the Commission must also consider their age, education, experience, and other matters effecting wage loss.

When the Glass standards are applied to the present case, it is obvious that the claimant is entitled to a substantial amount of wage loss disability benefits. The claimant is restricted to light work, that is, jobs in which he can remain seated and that do not require any lifting or any other strenuous activities. The representative of the respondent employer specifically stated that her company could not provide the claimant with any job within his restrictions. Nonetheless, the Majority seems to believe that the claimant merely has to apply and he will receive some type of light, office duty type job which he can perform. The fact that these jobs do not appear to be readily available are explained because of a "poor job market." I agree that the job market is very poor for disabled 50 year old men, with limited education, no specialized training, no management or supervisory experience, and whose physical disabilities require the use of a cane.

The claimant was also criticized by the respondent and the Administrative Law Judge for not offering a plan of vocational retraining or rehabilitation. This criticism led to the charge that the claimant was poorly motivated. However, it has been specifically held that the failure of a claimant to propose a plan of rehabilitation was not grounds for barring wage loss benefits under the Workers' Compensation Act. See Second Injury Fund v. Furman, 60 Ark. App. 237, 961 S. W. 2<sup>nd</sup> 787, (1998). Another factor which has been cited to indicate poor motivation was the claimant's receipt of Social Security disability benefits. However, it has also been found that a claimant's receipt of such benefits is not a basis for denying a claimant wage loss disability. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S. W. 2<sup>nd</sup> 130 (1990). I also note that it would seem unfair to hold this against the claimant since his attempts to obtain employment were unsuccessful and he was forced to seek some method of supporting himself.

I find that the claimant clearly established that the limitations from his injury, when considered in conjunction with his age, educational background, past job experiences, and other related factors, has caused him to

suffer a significant loss of his wage earning capacity. This wage loss is clearly demonstrated by the claimant's long and productive job history prior to his injury, as compared to his inability to find regular, gainful employment afterward. Obviously, the claimant's physical limitations preclude him from finding the type of employment which he would need to restore his income potential to his pre-injury wages. For those reasons, I respectfully dissent from the Majority opinion.

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SHELBY W. TURNER, Commissioner