

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304006

VINCENT B. RUFFIN,
EMPLOYEE

CLAIMANT

MAVERICK TUBE, LP,
EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 24, 2005

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

Claimant represented by HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by HONORABLE RICHARD A. REID,
Attorney at Law, Blytheville, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondent appeals an Administrative Law Judge's opinion, which was filed on August 19, 2004. The Administrative Law Judge found, among other things, that "The claimant has permanent physical impairments in the amount of 15% to the whole body relative to his internal organs injuries and 37% to the right leg growing out of the compensable April 11, 2003, accidental injuries. When the claimant's age, education, permanent physical restrictions and limitations are considered in addition to his anatomical

impairments, the evidence preponderates that the claimant has suffered a loss of earning capacity in the amount of 70% to the whole body. The respondent has controverted the payment of permanent disability benefits in excess of the 37% to the right lower extremity."

After reviewing the entire record *de novo*, the Full Commission affirms, as modified, the opinion of the Administrative Law Judge. Specifically, the Full Commission affirms the finding of the Administrative Law Judge that the respondent has controverted the payment of permanent partial disability benefits in excess of the 37% to the right lower extremity. However, we modify the decision of the Administrative Law Judge finding that the claimant is entitled to a 70% wage-loss disability. Instead, the Full Commission finds that the claimant has proven that he is entitled to wage-loss disability in the amount of 35%.

I. History

The claimant, age 42, is a 1980 high school graduate of Blytheville High School. He has no specialized training, nor has he taken any college or vocational-type courses. The claimant has a prior work history as a factory worker, majority of which has been in the Mississippi county area. Specifically, the claimant worked as a material handler for

Magnet Tech, a company that produced light ballasts, from approximately 1988 until 1997, at which time they closed. According to the claimant, in his position as material handler, he was required to bring the ladies material and "schedule the run." Before going to work for Magnet Tech, the claimant had worked various restaurant and janitorial jobs.

The claimant began working for the respondent/employer on June 19, 1997. The respondent manufactures pipe of different lengths and sizes. The claimant's first position with the company was that of heat treat helper, which required him to stencil pipe. This job filtered out due to a drop in sales and the claimant was transferred to the structural building where he was required to operate the crane in the shipping department.

The claimant's most recent job with the respondent was located at the mill and it entailed him picking up bundles of pipe and transferring them to the appropriate place. The claimant described this job as heavy duty, which required him to do a lot of climbing, bending, and walking.

On April 11, 2003, the claimant sustained admittedly compensable injuries to his right lower extremity (right knee) and internal organ injuries (abdomen) as he picked up

a bundle of pipes. According to the claimant, he was in the process of picking up a bundle of pipe to put them on the trolley to be shipped out for scrap when an end of the bundle of pipe flipped over on him.

The claimant reported the incident to the respondent by way of the respondent's safety assistant manager, Jason Beck. Subsequently, Mr. Beck transported the claimant to Dr. John Williams's office for treatment of his injuries. Shortly thereafter, the claimant was transported to the emergency room of Baptist Hospital in Blytheville. After his admission, the claimant's condition worsened, therefore, the claimant was airlifted to The Med in Memphis.

X-rays of the right knee were taken on April 12, 2003, which revealed the following:

FINDINGS: Comminuted fracture of posterior aspect tibial plateau involving lateral and medial proximal tibia. Multiple small bone fragments displaced into the surrounding soft tissues. Tibial spines intact. Fibula and distal femur intact. Spur of superior aspect of patella seen. No soft tissue foreign bodies.

The claimant underwent surgery to his abdomen on April 13, 2003 in the form of an exploratory laparotomy, which resulted in a partial small bowel and sigmoid colon resection with primary anastomosis being done. The claimant remained in the Trauma Intensive Care Unit for the first

couple of days while he was there, but once his condition stabilized, he was transferred to a floor on April 19, 2003 where his pain was well controlled with Percocet.

On April 21, 2003, the claimant's condition had significantly improved, as he was afebrile, his vital signs were stable, and he was tolerating a regular diet, moving his bowels, and ready for discharge, which was done.

Further review of the medical evidence of record shows that the claimant underwent treatment to his right knee with Dr. Robert H. Miller from April 23, 2003 until December 30, 2003. Dr. Miller diagnosed the claimant as having the following conditions to his right knee, for which he recommended conservative treatment:

DIAGNOSIS:

1. Torn anterior cruciate ligament
2. Partial tear, posterior cruciate ligament with nondisplaced fractures of posterior tibia plateau at posterior cruciate ligament insertion
3. Tear of medial collateral ligament, Grade II instability
4. Strain of posterolateral corner
5. Abrasion, anteromedial tibia

On June 4, 2003, Dr. Miller released the claimant to light duty work with a sit-down type job. The claimant presented these limitations to the respondent and they accommodated him with a receptionist-type position until January of 2004.

The claimant underwent evaluation with Dr. Joseph C. Boals, III, on August 5, 2003 due to the injury to his right knee and abdomen. At which time Dr. Boals reported in relevant part, the following:

DIAGNOSIS:

1. Fracture right tibial plateau with ongoing treatment not at MMI.
2. Residuals from internal injuries requiring surgery with ongoing symptomatology at MMI.

EVALUATION/RECOMMENDATIONS: It is to soon to provide an impairment rating for the right knee injury. This can be obtained when his treatment is terminated and his physician has discharged him.

In regards to the internal injuries he can be assigned an impairment based upon the resected intestine that was described in the operative report. This is an impairment of 9% of the whole person for the small intestine resection and 5% of the whole person for the colon resection. This is supported using the AMA Guides Fourth Edition. Tables 2 and 3 on pages 239 and 241 are utilized and the impairment is assigned under Class 1 in each section. The combined impairment would equal to 14% of the body as a whole. This impairment is supported by the described length of bowel resected and the intermittent problems posed with diarrhea and constipation.

Dr. Miller reported in relevant part, the following concerning the claimant's final follow-up visit with him, which occurred on December 30, 2003:

.....We're going to give him permanent restrictions of no standing or walking over 30 min. per hour. There should be no climbing, stooping or lifting over 10 lbs. He will need

probably chronic anti-Inflammatory such as Vioxx 25 mg. one p.o.q. day with a meal. He will also probably need periodic pain medication of Lortab 5 mg. Today, based on the AMA Guides, Fourth Edition, he would have an impairment due to loss of flexion of 10% of the lower extremity, 4% of the whole person. Extension loss is 20% of the lower extremity, 8% of the whole person and ligamentous injury to medial and collaterals and cruciates would be 7% of the lower extremity, 3% of the whole person due to mild residual laxity. This would give him a 37 percentage impairment to the lower extremity or 15% to the whole person. He'll return to see me on a PRN basis.

The claimant presented the aforementioned permanent restrictions to the respondent via Danny Harris, the loss control manager. Mr. Harris allowed the claimant to work the remainder of the week, but advised that he would be placed on layoff, as they had no permanent light-duty work available at that time. However, Mr. Harris assured the claimant that he would not contest his rights to any unemployment insurance benefits, and that he would recall him to work once a light-duty job became available.

On March 8, 2004, the claimant underwent an evaluation with Dr. James Clay Wellborn, Jr., at the request of the respondent, due to abdominal pain. Dr. Wellborn report in relevant part, the following:

Impression:

I believe this gentleman probably has adhesion from his previous surgery in his abdomen. I have

explained to him that with this type of surgery he had, which involved a rupture of the hollow viscus, as well as a secondary wound infection having to be packed open, that he is somewhere between a 10 and 20% chance of a hernia, particularly with any type of heavy lifting. This of course would be spread out over a lifetime, and I think that the heavier the work he does, the more likely he is to develop a hernia in his incision. He also has about a 10% risk of having a bowel obstruction at some time from the previous surgery. There is no real therapy we can offer at present for either of these events, as they are statistically likely to occur over the rest of the patient's life. Both of these events would require operative therapy. I have also explained to him that the adhesions can give continued pain, although this may improve somewhat over the years, but it is likely that he will have some degree of pain for the rest of his life. Accordingly, in evaluating him, I would say that he has roughly 15% residual disability from his abdominal wound. This mainly involves pain and the risk of herniation, and the risk of bowel obstruction that is spread out over an expected lifetime, and with the codicil that the chances of a hernia occurring is much greater with the harder he works. He would be advised to be employed in a circumstance where he does not have to lift over 15-20 pounds on a routine basis, which would markedly increase his chances to have an abdominal hernia that would require operative repair. Accordingly, I rate him 15% impaired on the basis of his abdominal injury.

The respondent accepted the claimant's April 11, 2003 injuries to his right knee and abdomen as compensable, and paid appropriate temporary total disability compensation, medical benefits, and the permanent physical impairment rating of 37% for his right lower extremity. However, although on August 5, 2003, Dr. Boals had assessed the

claimant with a 14% permanent physical impairment to the body as a whole due to his internal organ injuries (abdominal), the respondent did not pay this rating. Instead, the respondent sought an independent medical evaluation of this matter.

Specifically, in the Respondent's Response to Prehearing Questionnaire, the respondent stated that the issue to be litigated was "Whether the claimant sustained a permanent partial disability to the body as a whole." The respondent also acknowledged having received a rating from a doctor (Dr. Boals) to whom the claimant's attorney had sent the claimant. In addition to this, the respondent stated that they had scheduled an examination with Dr. Clay Wellborn and were seeking to obtain written information from The Med in Memphis regarding the verbal statements that there was no disability as a result of the injuries to the claimant's stomach or general area which was injured.

Therefore, due to the respondent's position regarding this issue, the Commission scheduled a hearing for May 28, 2004, by way of a Prehearing Order, which was dated March 2, 2004. This order specifically stated that the issues to be decided were: permanent physical impairment relative to the claimant's internal organ injuries; rehabilitation; wage

loss/permanent total disability benefits, and attorney fees. However, prior to the hearing, the respondent paid the claimant a 15% permanent partial disability rating to the body as a whole for his internal injuries after having received Dr. Wellborn's assessment of a 15% permanent partial disability to the body as a whole for these injuries.

A hearing was in fact held in this matter on May 28, 2004. At the hearing the claimant testified that prior to April 11, 2003, he had not received any medical treatment for his right knee or internal organs. According to the claimant, since his injury, he has not been able to work, as he underwent two surgeries to his stomach due to his compensable injury. The claimant further testified that following his injury, he worked as a receptionist for the respondent, wherein he primarily performed paperwork-type job duties for the drivers and ladies. He was also required to radio in the different departments. However, the claimant was terminated from this job in January 2004, as respondent/management was unable to retain him in this position on a permanent basis.

Prior to the hearing, the respondent recalled the claimant to work as a janitor. The claimant went through

four days of classes and one day of training for this position. As a janitor, the claimant was required to clean offices, the break rooms, toilets, and run a floor sweeper through the main aisle way for the factory. Although the claimant had not been required to lift anything weighing more than 20 pounds; the claimant testified that he did not know whether or not he would be required to do lifting of 20 pounds regularly in this position. However, the claimant felt this job was inconsistent with the restrictions given to him by Dr. Wellborn because he was required to be on his feet and do bending. As a result, the claimant quit the job because he did not believe he could do the work.

In addition, the claimant testified that at the time of his injury his hourly rate of pay was approximately \$10.31, and for the janitorial position, his hourly rate of pay would have been \$8.75.

Danny Harris, the loss control manager, also gave testimony during the hearing. According to Mr. Harris, the claimant worked light-duty work from June of 2003 until January of 2004. At which time, the claimant was discharged because he could no longer maintain the claimant on temporary light-duty status on a permanent basis once he had reached maximum medical improvement (MMI). In addition to

this, Mr. Harris testified that he considered the janitorial position to be one within the claimant's restrictions.

A Prehearing Conference was conducted in this claim on March 2, 2004, from which a Prehearing Order was filed on that same day. The parties agreed to the following stipulations:

- 1). That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2). That the employee/employer relationship existed on April 11, 2003, at which time the claimant sustained a compensable injury.
- 3). The claimant earned sufficient wages to entitle him to weekly compensation benefits at the rates of \$285 for temporary disability benefits and \$221 for permanent partial disability benefits.
- 4). That the respondent has paid total disability to the claimant, as well as payment of permanent and partial disability benefits to correspond with a permanent physical impairment of 37% to the right leg.

During the Prehearing Conference, the parties agreed that the issues to be litigated at the hearing were limited to the following:

- 1) Wage loss.
- 2) Controversion.

During the hearing, the claimant contended that as a result of the compensable injury and residuals therefrom, he is entitled to the payment of wage-loss benefits in excess

of his anatomical impairment, to include possibly permanent total disability. The claimant further contended the respondent has controverted his entitlement to the payment of permanent partial disability benefits relative to his internal organ injuries, which was had only as a result of the efforts of an attorney. As a result, the claimant contended entitlement to controverted attorney's fees on the anatomical impairment relative to the internal organ compensable injuries, as well as wage-loss disability benefits.

In contrast, the respondent contended that once the rating was obtained from Dr. Wellborn relative to claimant's internal organ injuries, payment of the same was had immediately. The respondent denies that the afore was controverted and notes that the rating of Dr. Wellborn was greater than that of Dr. Joseph C. Boals, III.

After a hearing before the Commission, the Administrative Law Judge found, among other things, that "The claimant has permanent physical impairments in the amount of 15% to the whole body relative to his internal organs injuries and 37% to the right leg growing out of the compensable April 11, 2003, accidental injuries. When the claimant's age, education, permanent physical restrictions

and limitations are considered in addition to his anatomical impairments, the evidence preponderates that the claimant has suffered a loss of earning capacity in the amount of 70% to the whole body. The respondent has controverted the payment of permanent disability benefits in excess of the 37% to the right lower extremity."

The respondent appeals to the Full Commission.

Adjudication

A. Controverion

Whether or not a particular claim is controverted is a question of fact for the Commission. Aluminum Co. of America v. Henning, 260 Ark. 699, 543 S.W. 2d 480 (1976). The Commission's finding on the issue of controversion will not be reversed absent a lack of substantial evidence to support the finding or a gross abuse of discretion by the Commission. New Hampshire Ins. Co. v. Logan, 13 Ark. App. 116, 680 S.W. 2d. 720 (1984).

In the instant matter, the Administrative Law Judge found that the respondent controverted the payment of permanent disability benefits in excess of the 37% to the right lower extremity (knee). The Full Commission affirms this finding. It is undisputed that the respondent accepted and made payment of permanent partial disability benefits

due to an impairment rating in the amount of 37% to the right knee, which resulted from the claimant's compensable injury of April 11, 2003. However, it is specifically noted that although the respondent instituted prompt payment of permanent partial disability benefits to the claimant for a 15% permanent impairment rating to the body as a whole for his internal organ injuries (abdominal) after Dr. Wellborn assessed him with a 15% impairment rating for these injuries, the record clearly shows that the respondent initially took the position that it was not liable for a permanent partial impairment rating to the body as a whole for any of the claimant's internal organ injuries, as is evidenced in its response to the prehearing questionnaire. Specifically, according to the Respondent's Response to Pre-hearing Questionnaire, the respondent stated that the issue to be litigated at the hearing was "Whether the claimant sustained a permanent partial disability to the body as a whole, if any." Considering this position, the Full Commission finds that the respondent's actions in the present matter concerning the claimant's entitlement to permanent partial disability benefits to the body as a whole for his abdominal injuries, which he suffered in his April 11, 2003, compensable injury did constitute controversion.

Therefore, we find that the Administrative Law Judge's finding that the respondent controverted the payment of permanent disability in excess of the 37% to the right lower extremity should be affirmed.

B. Wage-Loss Disability

The burden rests upon the claimant to prove the existence and extent of any permanent disability for a loss of wage earning capacity. In the instant claim, the Full Commission finds that there is insufficient evidence establishing a finding that the claimant's future wage earning capacity has been impaired by 70%. Instead, we find that the claimant sustained wage-loss disability in the amount of 35%.

In the present matter, on April 11, 2003, the claimant was involved in an accident that resulted in two permanent partial injuries to different portions of his body. One of these injuries was to the claimant's lower right extremity (knee), which is a scheduled injury under Ark. Code Ann. § 11-9-521 (Repl. 2002). The other compensable injury resulted due to injuries to the claimant's internal organs (abdomen). This would be an unscheduled injury, which would be controlled by Ark. Code Ann. § 11-9-522.

The Full Commission specifically notes that for a scheduled injury, absent a finding of permanent total disability, a claimant is limited to the benefits provided for that scheduled injury. Rash v. Goodyear Tire & Rubber Co., 18, Ark. App. 248, 715 S.W. 2d. 449 (1986). In other words, wage-loss disability may be considered only with regard to the permanent partial disability to the body as a whole or the unscheduled injury. However, in the present matter, the Administrative Law Judge considered among other things, the claimant's 37% impairment rating to the right lower extremity and resulting limitations therefrom in making a finding of 70% wage-loss disability. Accordingly, the Full Commission finds that the Administrative Law Judge erred in considering the claimant's scheduled injury (knee) impairment rating of 37% and resulting limitations therefrom when making a determination of wage-loss disability, as this matter should have been considered only with regard to the claimant's permanent partial disability to the body as a whole for his unscheduled compensable injury to his internal organs (abdominal).

Specifically, the loss of use of the body as a whole involves two factors, the first is the functional or anatomical loss and that percentage is fixed by medical

evidence, secondly, there is the wage-loss factor, which 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 benefits 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).

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the physical impairment, such factors as the employee's age, education, work experience, and other factors reasonably expected to affect his or her future earning capacity. 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 the Commission's full assessment of the claimant's loss of earning capacity.

In order to receive wage-loss disability, the claimant must first prove that he has sustained a permanent physical impairment as a result of his compensable injury. In the present case, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he sustained a 15% permanent anatomical impairment to the body as a whole as a result of his compensable injury.

Specifically, we note that although Dr. Boals assessed the claimant with a 14% permanent partial impairment rating to the body as a whole due to his abdominal injuries, the respondent has accepted and paid the 15% impairment rating assessed by Dr. Wellborn for these injuries and has not raised this as an issue on appeal. Therefore, based on the expert opinion of Dr. Wellborn and considering the fact that the respondent has accepted and paid this permanent partial anatomical impairment rating, we find that the claimant has established by a preponderance of the evidence that he sustained a 15% permanent partial impairment to the body as a whole due to his April 11, 2003, compensable injury to his abdomen.

The respondent essentially argues that an award of a 70% wage-loss disability is excessive and should be reduced to 7½%, if any. The Full Commission agrees that the 70% wage-loss disability award is excessive and should be reduced. We find that the claimant sustained a wage-loss disability in the amount of 35%. It is specifically noted that the claimant is only 42 years of age and possesses a high school diploma. The claimant has an extensive past work history consisting primarily of factory work and various other janitorial and restaurant jobs, which were exclusively of unskilled manual labor. On March 8, 2004, Dr. Wellborn noted that he had explained to the claimant that "The adhesions could give continued pain, although this may improve somewhat over the years, but it was likely that he will have some degree of pain the rest of his life." Dr. Wellborn further noted that the claimant would be advised to be employed in a circumstance where he does not have to lift over 15 to 20 pounds on a routine basis. It is specifically noted that the claimant has not been directed "to refrain from lifting anything over 15 to 20 pounds," he has merely been directed "not to lift over 15 to 20 pounds on a routine basis." Moreover, it is noted that the claimant has no other limitations placed on him as a result of his

unscheduled injury, and nor has any doctor directed him not to return to work or manual labor.

Therefore, after having taken into account the claimant's anatomical impairment rating of only 15% to the body as a whole for the injuries to his internal organ (abdomen), the resulting limitations therefrom, age, education, and work experience, the Full Commission finds that the claimant sustained wage-loss disability in the amount of 35%.

Based on our *de novo* review of the entire record, the Full Commission affirms the Administrative Law Judge's decision finding that the respondent has controverted the payment of permanent disability benefits in excess of the 37% to the right lower extremity. However, we modify the decision of the Administrative Law Judge finding that the claimant is entitled to a 70% wage-loss disability. Instead, the Full Commission finds that the claimant has proven that he is entitled to wage-loss disability in the amount of 35%.

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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part from the principal opinion. Specifically, I concur with respect to the finding that respondents controverted the impairment rating assessed for claimant's internal abdominal injuries and the award of 35% wage-loss disability benefits. I find, however, that claimant is entitled to wage-loss disability benefits in excess of the 35% awarded and, accordingly, dissent with respect to the failure to award additional

benefits. Based on my review of the record, I find that claimant is entitled to additional wage-loss benefits in order to adequately compensate him for his loss in wage earning capacity as a result of his compensable abdominal injury. Claimant's employment history consists entirely of manual labor positions. Claimant, age 42, has no training beyond obtaining his high school diploma. As a result of his compensable abdominal injury, claimant's is significantly limited in his ability to lift on a routine basis as a precaution against incurring an abdominal hernia. I, therefore, find that claimant is entitled to additional wage-loss disability benefits and that the award of 35% does not adequately compensate claimant.

For the foregoing reasons, I concur in part and dissent in part.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority opinion. Specifically, I concur in the majority's finding that the claimant is not entitled to a 70% loss in wage earning capacity. However, I must dissent from the majority's finding that the claimant is entitled to

a 35% loss in wage earning capacity and a finding that the respondents controverted the claimant's impairment rating assessed for his internal injuries. In my opinion, the claimant has failed to meet his burden of proof.

My review of the evidence demonstrates that the claimant is only entitled to, at most, a 7½% (seven and one-half percent) loss in wage earning capacity. The claimant has a 15 to 20 pound lifting restriction and he was only restricted from doing this on a routine basis. The claimant was offered a job and returned to work for the respondent employer immediately upon a job becoming available in a janitorial position. The janitorial position did not require any type of lifting on a routine basis. The claimant, in my opinion, is able to work. The janitorial position was only a 7 ½% reduction in pay for the claimant. Based on the claimant's assessment by Dr. Wellborn, the claimant should be able to perform those job duties.

Therefore, for all the reasons set forth herein, I respectfully concur in part and dissent in part from the majority's opinion.

KAREN H. MCKINNEY, Commissioner