

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207730

BENNY REYNOLDS,
EMPLOYEE

CLAIMANT

CONSOLIDATED FREIGHTWAYS CORP.,
EMPLOYER

RESPONDENT NO. 1

UNITED STATES FIDELITY & GUARANTY
INSURANCE COMPANY, (SEDGWICK
CLAIMS SERVICES, TPA), INSURANCE
CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED NOVEMBER 9, 2005

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

Claimant represented by the HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WHITNEY
MOORE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 waived appearance before Administrative
Law Judge.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed June 22, 2005. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. All of the stipulations agreed to by
the parties herein are accepted as fact;

2. Claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable injury of June 21, 2002;

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability experienced over and above the 10 percent impairment rating accepted herein by respondents No. 1.

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.

Therefore we affirm and adopt the June 22, 2005 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

The claimant appeals the decision of the Administrative Law Judge denying wage loss benefits exceeding her previously agreed upon impairment rating of 10%. The claimant argues that he should be entitled to permanent and total disability benefits, or that alternatively, he should be entitled to wage loss benefits in excess of his anatomical rating. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own. In relying on the decision of the Administrative Law Judge, the Majority concludes that the claimant lacks the motivation to return to work and therefore should not be entitled to receive wage loss benefits in excess of his impairment rating. I find that the claimant did have the motivation to return to the workforce. I further find that even if the claimant lacked motivation, his injury was such that he should still be entitled to receive wage loss benefits in excess of his anatomical rating. For these reasons, I respectfully dissent.

On June 21, 2002, the claimant was hooking a set of double trailers. He picked up the tongue of the dolly and injured himself. Ultimately the claimant was

found to have a herniated disc at L4-5. He later underwent surgery in 2002 in the form of a laminectomy and diskectomy. On September 19, 2002, Dr. Scott Cathey indicated that he anticipated the claimant would be able to return to work on October 28, 2002. The respondent accepted the claim as compensable and accepted a 10% impairment rating to the claimant's back.

The claimant continued to present with pain and problems related to his admittedly compensable injury. Dr. Cathey discussed the option of having an additional fusion surgery with the claimant. The claimant testified that Dr. Cathey told him that he would not undergo the surgery and would learn to live with the pain. The medical reports indicate that the claimant was reluctant to undergo the surgery and later decided not to have the surgery when the respondent's insurance carrier denied payment for the surgery.

A Functional Capacity Exam (FCE) was performed on October 19, 2004. The FCE indicated that the claimant gave a reliable effort and that the claimant was able to work at a "Light" category job. The FCE further found that the claimant was able to lift or carry up to 30 pounds on an occasional basis and limited the claimant to no repetitive bending or twisting of his lower spine. Lastly, the FCE suggested that the

claimant would benefit for limiting lifting below the level of his knees.

Heather Naylor, Vocational Rehabilitation Specialist testified that she interviewed the claimant and reviewed his FCE report. She indicated that the claimant was able to work in a light duty capacity and that his job in trucking did not comply with that categorization. She further indicated that her job search found positions that would enable the claimant to make up to \$9.26 per hour.

The claimant testified that his back still hurts every day and that he takes pain medication such as Hydrocodone on a daily basis. The claimant further testified that while he could formerly mow his lawn, do mechanical work, use his boat to fish, and hunt deer, his abilities to engage in those activities has been reduced since being injured. The claimant also indicated that his ability to drive and to bend, walk, and stoop have been hindered by his injury.

The claimant is fifty nine years old and has worked for the respondent since 1983. The claimant said that until his injury in 2002, he worked without interruption after graduating high school. At the time of his injury the claimant was making approximately \$19-\$20 per hour. The claimant has a high school degree and attended a vocational carpenter course at the age of 16.

After graduating high school, the claimant worked as a bricklayer, as a wheat harvester, and as a machine cleaner. The claimant then served as a tank driver in the Army for two years.

While working for the respondent, the claimant worked as a city driver. His job required him to work on the dock, load trailers and to drive within a 70 mile distance of Little Rock. The claimant was required to do heavy lifting and for loading or handling items weighting in excess of 100 pounds.

The claimant indicated that he was receiving retirement benefits, but that he planned on working at least six more years before retiring in order to increase his retirement payment. The claimant further indicated that he was drawing disability social security benefits in the amount of \$1,600 per month.

The claimant said that he would prefer going back to work instead of drawing disability benefits, but that he could not find a job. The claimant went on to testify regarding various jobs that he applied for to no avail.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss

disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury.

Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability.

See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The Commission has the authority to increase an anatomical impairment rating and find a claimant permanently and totally disabled based on wage loss factors. Whitlach v. Southland Land & Development, CA 03-736 (Ark. App. 1-21-2004); Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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).

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). 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.

In the present case, the claimant argues that he is entitled to permanent and total disability benefits and that he will not be able to return to work at all. The Majority, by virtue of adopting the decision of the Administrative Law Judge as their own, finds that the claimant is not entitled to any wage loss benefits in excess of her previously accepted 10% impairment. In supporting this finding the Majority argues that the claimant lacks the motivation to return to work. More specifically, the Majority argues that

because the claimant did not "follow up" on job applications, told his doctor he was going to apply for disability rather than returning to work, and because he was only taking narcotic medication on an "occasional" basis, he lacked the motivation to return to work and should therefore be denied all wage loss benefits. I find that this evidence ignores the evidence indicating that the claimant is willing to return to work, but simply is unable to return to work due to his condition. I further find that even if the claimant lacks the motivation to work, that should not serve as a total bar to receipt of wage-loss benefits.

First, with regards to the Majority's argument that the claimant did not "follow up" on job applications, I note that there is no dispute that the claimant did apply for various jobs. Additionally, to my knowledge, there is no requirement that the claimant "follow up" on his applications in order to be motivated in his pursuit for a job. In, my opinion, the claimant provided ample testimony that he did everything in his power to try to find a job. The claimant testified that he applied for the jobs supplied by Naylor. When looking at the list supplied by Naylor, there appears to be some 15 jobs detailed on that list. Additionally, Naylor's report from October 28, 2004, the date of her initial meeting with the claimant indicates that the

claimant had already been seeking work. The report indicates that the claimant, "has registered with the Employment Security Office, called Arkansas Rehabilitation Services, and applied at Direct Print, Arcross, and Arkansas Electrical. He has not heard back from any of these employers."

Though the Majority would argue that Naylor's October 28, 2004 report indicates the claimant said he, "did not intend to return to work," I note that Naylor's next report on November 16, 2004 indicates that the claimant believed he would be unable to return to work. She also later testified that the claimant, "basically indicated that he did not think he would be able to return to work." This indicates that the claimant did not lack a desire to return to work, as asserted by the Majority. Instead, I find that it is more probable than not the claimant simply did not believe he would be able to return to work due to his condition and employers being unwilling to hire him due to his condition.

With regards to the Majority's assertion that the claimant told Dr. Cathey he was going to apply for disability benefits rather than returning to work, I note that the claimant had already attempted to find a job and testified that he was advised by the union that he could not return to work while taking narcotics. Additionally, I note that the Clinic Note from April 7,

2003, indicates that the claimant was taking narcotics on a daily basis.

Lastly, the Majority argues that because the claimant was only taking narcotic pain medication on an occasional basis, he could return to work. This argument overlooks the fact that the claimant's work experience was in manual labor and that even "occasional" use of narcotic medication would likely preclude the claimant from being able to return to a position where he was able to operate heavy machinery or equipment.

Even if one believes that the claimant is not permanently and totally disabled or is not motivated to return to work, a finding which I do not make, that should not act as a complete bar to her receiving wage loss benefits. The Courts and this Commission have consistently held that even in situations where a claimant is not motivated to return to work, they are still entitled to receive wage loss benefits in excess of their anatomical ratings. See Douglas Tobacco Products, Co. v. Gerrald, 68 Ark. App. 304(1999); Johnson v. Latex Construction Co., 2005 AWCC 163, Claim No. F301922; McKinney v. Plastics Research & Development, . 2004 AWCC 201, Claim No. E901881; Cumbie v. Bost Human Development Services, 2004 AWCC 126, Claim

No. E913515; Weber v. Best Western of Arkadelphia; 2006 AWCC 210, Claim No. F100472.

In the present case, there is no dispute that the claimant's ability to return to his old job is not possible. In the respondent's closing argument they indicated,

the evidence before us today shows that he can in some capacity, and it's a light-duty capacity. He might not be able to do exactly what he was able to do before he was injured, but he can work, thus he doesn't meet the definition of permanently and totally disabled.

This acknowledgment by the respondents that the claimant's working classification changed, coupled with the joint exhibit of the FCE, indicating that the claimant gave a reliable test result and could only perform light duty work, indicates that the claimant's ability to return to work and earn the same wages as before, was in fact hindered. The FCE report indicates that the claimant's previous job with the respondent was in the "Medium" category and that the claimant would now be able only to work in "Light" category jobs. The report further restricts the claimant from repetitive bending and twisting and limits him to occasional stooping, crouching and kneeling. Likewise, the report restricts the claimant from crawling or handling more than 30 pounds. When these restrictions are considered in light of the claimant's prior work history, it is

clear that the claimant's ability to return to work at his prior rate of income has been limited. Perhaps most significantly, the FCE report indicates that the claimant's earning ability would be drastically be reduced. Specifically, the report indicates, "his starting wages would most likely be in the range of \$6.00 - 7.00/hr." Additionally, the list of jobs provided to the claimant had wages that were less than half of his previous wages with the respondent.

Ultimately, I find that the claimant was an extremely credible witness and that he has been unable to return to work because of his medical condition, rather than due to any lack of desire to return to work. When considering the claimant's medical condition, age of 59, education of having a high school diploma, and lack of work experience in any area that would accommodate his current medical restrictions, I find that the claimant should be declared permanently and totally disabled or in the very least awarded wage loss benefits in excess of his anatomical rating.

SHELBY W. TURNER, Commissioner