

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. E507146 & E517684

RAYMOND STEELE, EMPLOYEE	CLAIMANT
SEBASTIAN COUNTY EMS, EMPLOYER	RESPONDENT
ASSOCIATION OF ARKANSAS COUNTIES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED DECEMBER 29, 2005

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

Claimant represented by HONORABLE EDDIE WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE PAUL GEHRING,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

Respondent no. 2, the Second Injury Fund, appeals and the claimant cross appeals, a decision by the Administrative Law Judge finding that the claimant is entitled to a 60% loss in wage earning capacity in excess of his previously accepted 26% permanent anatomical impairment rating. Based upon our de novo review of the record, we find

that the claimant sustained a 30% loss in wage earning capacity. Accordingly, we modify the decision of the Administrative Law Judge.

Prior to the hearing, the Second Injury Fund accepted liability for the claimant's wage loss disability benefits in the amount of 30%. At the February 28, 2005, hearing, the claimant contended that he was permanently and totally disabled, or in the alternative, entitled to wage loss disability benefits in excess of the permanent disability previously accepted in this claim. Additionally, the claimant contended that he was entitled to an attorney's fee on any wage loss awarded. Respondent no. 1 contended that the claimant was not permanently and totally disabled, or alternatively, was not entitled to wage loss disability benefits in excess of the 30% accepted by the Second Injury Fund. Additionally, Respondent no. 1 contended that the Second Injury Fund was liable for any additional wage loss and attorney fees. The Second Injury Fund contended that the claimant was not entitled to additional wage loss disability

benefits in excess of the 30% previously accepted by the Second Injury Fund.

The Administrative Law Judge found that the claimant was not permanently and totally disabled; that the Second Injury Fund was liable for an additional 30% wage loss benefit in excess of the 30% previously accepted by the Second Injury Fund. The Administrative Law Judge also found that the Second Injury Fund was responsible for an attorney's fee on the additional 30% wage loss disability.

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 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.

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).

In our opinion, a review of the evidence demonstrates that the claimant only sustained wage loss disability in the amount of 30% as accepted by the Second Injury Fund. When we take into consideration the claimant's

age, education, work experience, and the medical evidence, as well as the claimant's lack of motivation and cooperation in efforts to reenter the work force, we find that the claimant is not permanently and totally disabled. The evidence demonstrates that the claimant lacked cooperation in the work conditioning program. Juanita Humphries, the physical therapist's assistant who actually worked with the claimant unequivocally testified that the work conditioning results were not reflecting of the claimant's true abilities. She explained that she used a heart rate monitor to objectively determine whether someone was giving a full effort during the aerobic activities. The rise in the monitor of only one or two points reflected that the claimant was not giving his full effort to the work conditioning program. Ms. Humphries explained that there were times when the claimant was completely uncooperative with her attempts to monitor his heart rate. Specifically, he would hide the monitor so she could not look at it.

Ms. Humphries also described the claimant's lack of cooperation with the work conditioning program. The

claimant obtained copies of Ms. Humphries's clinic notes. She explained that the claimant's efforts and abilities significantly deteriorated after he received the clinic notes. She stated:

...[W]hat I noticed in my note was if I put a particular exercise that he had no difficulty with, after he received those notes, he had difficulty with that particular exercise.

Ms. Humphries was questioned by the claimant's attorney regarding whether or not there was a personality conflict between her and the claimant and that could have been the reason for the claimant's poor attitude. Ms. Humphries testified that she thought the problem was that the claimant was unhappy with the whole program to start with. She stated that she did not think that he understood that it was for his benefit. In our opinion, the claimant's lack of cooperation prevents the Commission from giving a fair and accurate assessment of the claimant's physical capabilities to make a determination of the claimant's wage loss.

The testimony of Ms. Gay Signoff, the vocational rehabilitation specialist, hired by the Respondent employer, also demonstrates that the claimant sustained a 30% loss in wage earning capacity. Ms. Signoff's report demonstrates that the claimant has worked as an insurance salesman and a convenient store clerk since his 1995 compensable injuries. The claimant has also been self-employed in the telemarketing business, conducted medical training, as well as assisted his family in a vending business. All of these employments qualify as sedentary to light job types for which the claimant has been released to return to work. The claimant testified that he was unable to continue the job as an insurance salesman because of memory and concentration problems. However, he testified that those problems had improved with a recent medication change.

The claimant's work history and transferable skills both before and after his 1995 injuries also demonstrate that the claimant cannot prove that he is entitled to more than 30% loss in wage earning capacity. The claimant has management and organizational skill which is

evidenced by his job performance as Sebastian County's First Responders organizer. The claimant also has numerous computer skills, including knowledge of Microsoft Word, Microsoft Works, QuickBooks Pro, Turbo Tax, and Excel. He can compose and type correspondence and business proposals of up to 80 words per minute. He is also even self-taught in repairing DOS based computer systems. Further, the claimant's vocational retraining capacity was verified as recently as the year 2000 when he studied, tested and became certified to sell insurance. The only reason the claimant gave for not going back to school to further his education was lack of money.

The claimant is a 40 year old man with 25 plus years of employment still ahead of him. The evidence in the record demonstrates that he has poor motivation and attitude which is evidenced by his lack of cooperation with the work hardening program. Simply put, we cannot find that the claimant is entitled to any additional wage loss disability benefits in excess of the 30% offered and accepted by the

Second Injury Fund. Accordingly, we affirm, as modified, the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority, in their decision, reduces the claimant's wage loss benefits from 60% above his permanent anatomical rating to 30% over the rating. Based upon a de novo review of the record, I find that the claimant should be entitled to wage loss benefits greatly in excess of that awarded by the Majority. In my opinion, he should be deemed permanently and totally disabled or at the very least entitled to wage loss benefits equal to or higher than the amount awarded by the Administrative Law Judge. While the Majority opines that the claimant lacks motivation to

return to work, in my opinion, the claimant is motivated to return to work. Furthermore, I find that the Majority does not give enough weight in considering the ramification of the claimant's extensive injuries and his resultant inability to work in determining his wage loss. Accordingly, I must respectfully dissent.

The Majority opines that the claimant lacks motivation to return to work and that his current activities are such that he could return to work in a light or sedentary capacity. Specifically, they rely on the testimony of Juanita Humphries in arguing that the claimant did not give maximum effort in completing his physical therapy. In my opinion, Humphries was not a credible witness. Humphries gave inconsistent testimony regarding various issues, including her work qualifications and the effort the claimant gave in physical therapy.

The first inconsistency occurred when Humphries testified that she was a licensed physical therapist. Despite this testimony, she later admitted that she was a

licensed physical therapist assistant rather than a licensed physical therapist.

The next inconsistency occurred when Humphries testified that the claimant had a bad attitude and did not give maximum effort in his therapy. She indicated that this belief was based on the fact that the claimant's heart rate did not increase as she thought it should. She also asserted that the claimant asked for copies of his notes and that he subsequently altered his behavior, seeming to have increased difficulty performing his therapy. When questioned about her notes regarding the claimant, Humphries indicated that her notes did not show the claimant had a bad attitude.

On closer inspection, the claimant appeared to be having difficulty long before asking for copies of his notes. Humphries testified that her first note after treating the claimant was on October 21 and that the note mentioned that the prior day the claimant reported dull aches and stabbing pains. She said the note further indicated the claimant reported he did not feel worse than

day before. The next note from October 22 indicates that the claimant had, "The - -very slow speed on the treadmill." Humphries testified that she tried to convince the claimant that he could walk faster but that he reported he could not. Humphries went on to indicate that on October 22 and October 23 her notes made no mention of the claimant having a poor attitude.

On October 24 Humphries' notes indicate that the claimant put only, "fair effort seemed to be applied to the activities today." Humphries testified that the note from October 27 indicated, "Patient reports increased pain since starting the program, however he feels better. Notes that does not sound right, but that's the way it is." On October 29 the claimant reported feeling sore all over. Humphries noted that the claimant reported an increase in pain and had a "poor attitude" when asked to increase his pace or to perform certain tasks that day.

Humphries indicated that the claimant asked for his notes on November 11 and that after that time the claimant would have problems performing those tasks that

she had previously not assessed him as having problems with. Humphries indicated that she believed the claimant was waiting to get her attention prior to having difficulty performing those tasks he had previously not been assessed having difficulty with.

The inconsistency in Humphries' testimony is that her notes show that the claimant was noted as having a poor attitude both before and after asking for his notes; whereas her testimony was that the claimant's behavior changed after asking for his notes. The notes indicating the claimant had a poor attitude also show the claimant was making complaints of being sore and of suffering from pain due to his exertions prior to asking for his notes. This indicates any perceived "bad attitude" was due to the claimant being in pain but forced to continue rather than due to a lack of desire to complete his physical therapy. Also, in my opinion, since the claimant was aware that Humphries believed he was not giving full effort, it would not be logical for him to be so blatant in gaining her attention if he was attempting to be dishonest.

Humphries also testified that she believed the claimant's pain level was inappropriate and inconsistent with his condition. Humphries testified that the claimant reported pain all over and that it was in the same areas. She also indicated she disbelieved the claimant because, "I've never had a patient to have a numbness and a stabbing pain in the same area before." Despite this opinion, Humphries indicated that the claimant was only the second patient she had that had increasing chronic back pain symptoms. Additionally, Humphries admitted that a condition such as the claimant's would cause pain and when asked if the claimant would need to have a chronic pain management specialist Humphries testified, "I definitely agree with that." When Humphries' testimony is considered in light of other medical reports showing the claimant had a legitimate reason for pain it is apparent the claimant did not have a bad attitude, but rather was in pain.

The Majority also relies heavily on Signoff's conclusion that the claimant can perform sedentary work. Signoff's reports also indicate the claimant is able

perform some daily activities. Specifically, one report indicates, "a typical day consists of taking the children to school, doing laundry, sweeping, mopping, cooking, washing dishes, and chauffeuring the children to cheerleader and basketball practice and to basketball games."

In my opinion, the claimant's ability to take part in daily activities, albeit on a more limited basis, is in no way indicative that he is able to work. Signoff's own report indicated that the claimant would only be able to work part-time and noted that the claimant would need a half-day job where he could alternate positions every 25 to 30 minutes. Likewise, Signoff's report indicated that the claimant frequently alternated positions in her presence and that he indicated he could not sit for long periods of time without his legs going numb. Furthermore, Signoff's report noted, that the claimant indicated he would, "love to return to work", indicating that the claimant did have motivation to return to work. In fact, there appears to be no dispute that the claimant attempted to return to work as

an insurance salesman and as a clerk, but was unable to due to his physical condition.

Though the claimant is able to engage in some personal activities outside of work, in my opinion, there has been insufficient evidence to show the claimant could return to a position accommodating his physical needs. While the claimant is able to do things at home, it is undisputed that he regularly takes narcotics and will be required to take them in the future. Likewise, the claimant indicated that he has to take frequent breaks when active, which is consistent with the medical reports indicating that the claimant will likely suffer from chronic pain for the remainder of his life.

Humphries also admitted that patients with back problems have limited range of motion, muscle spasms and numbness. She also indicated that the claimant's work capacity would likely be limited to light duty which consisted of not lifting more than 10 or 20 pounds on an infrequent basis. Humphries was also unable to testify as to how long the claimant could perform those activities.

The Majority opines that the claimant's medication has changed since quitting insurance sales and that he could now work in that occupation. However, this argument overlooks the fact that the claimant indicated that his medication still interferes with his ability to concentrate. The argument also fails to refute the claimant's testimony that part of the reason he could not concentrate was due to pain. The claimant's testimony that he could not concentrate due to pain is consistent with the medical records and testimony by his physical therapist that he would have chronic pain directly related to his condition. Furthermore, his credible testimony that he often has shooting pains and numbness in his left leg and fingers indicates that he would likely be unable to work even in a sedentary capacity.

In contrast to the argument presented by the Majority, I find the claimant to be a motivated individual who was simply unable to return to work due to his medical condition. There is no dispute that the claimant returned to work after his injury in 1995. In fact, he worked for

five years after sustaining his initial injury. Likewise, after the claimant stopped working for Respondent #1, he attempted to return to two workplaces, despite the fact that the positions paid significantly less than he earned at the time of his injury. Furthermore, I note that Signoff's records contain nothing to indicate the claimant failed to comply with her instructions on finding work. Accordingly, I find the claimant was motivated to return to work.

In my opinion, the medical records also indicate that the claimant is unable to return to work. The medical records indicate the claimant will have ongoing pain and Humphries testified the claimant would not be able to lift more than 10 to 20 pounds on an infrequent basis. Additionally, the claimant testified he is unable to sit long periods of time without experiencing numbness in his extremities. The claimant's inability to work is further illustrated by the January 28, 2004 doctor's note from Dr. Boxell. The pertinent language indicates,

Again, I do not feel that this gentleman is totally disabled by his

condition. I think it is unlikely that he will be able to find work or be able to return to work, but the fact that he was able to complete a work conditioning program suggests that he could perform light duty sedentary work.

While at a quick glance this note does indicate that the claimant is not totally disabled, on closer inspection the language of the note seems to indicate that the claimant is actually unable to return to work. In fact, the note contradicts itself as to whether the claimant will be able to return to work. In my opinion, it seems to be given reluctantly and to be entirely predicated on the fact the claimant was able to complete a work-conditioning program. Presumably, this is the same program monitored by Humphries and in which the claimant had pain and difficulty in completing. The reluctance of the release to work is seen in the language indicating that the claimant will be unlikely to find or return to work. This language also indicates that the claimant's limitations are such that he will not be able to work. Likewise, the note later indicates that the claimant will suffer from chronic pain

which supports a finding the claimant will be unable to return to work. The note indicates,

I think it would be possible for this gentleman to work light-duty, sedentary work with the ability to change positions every 25 to 30 minutes for half days. That does not mean that the patient will not experience pain associated with the work or the performance of physical activity. I anticipate that he will anticipate chronic pain related to his neck and back for the remainder of his life.

Lastly, the severity of the claimant's injuries and his ability to replace his income show the claimant is unable to earn meaningful wages. The claimant has had three level fusions in both his cervical and his lumbar spine. It is undisputed that he will have chronic pain and residual problems from those surgeries for the remainder of his life. Though the Majority accurately indicates that Signoff reported the claimant would be able to perform sedentary work, I note that Signoff only indicated the claimant would be able to perform part-time work. The record shows that the claimant was earning \$540 at the time of his injury. His last employment was working three days a week and

earning from \$7.25 to \$7.35 per hour. This totals to \$176.40. The claimant was forced to quit even those jobs due to his medical condition.

There is no evidence in the record indicating that the claimant would be able to secure work that would allow him to make more than earned at either of those positions, much less in the amount he was earning at the time of his injury. When considering the severity of the claimant's condition, as evidenced by the medical records and the acceptance of a high impairment rating in the amount of 26% and the willingness by Respondent #2 to accept a high wage-loss amount of 30%, I find the preponderance of the evidence indicates the claimant has been permanently and totally disabled. For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner