BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E104918

DONNIE WALTON, EMPLOYEE	**CLAIMANT**
MACLEAN FOGG/HARVARD, EMPLOYER	**RESPONDENT**
WAUSAU INSURANCE COMPANY, CARRIER	**RESPONDENT**

OPINION FILED JULY 8, 2005

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

Claimant represented by HONORABLE JOHN BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondent from an opinion filed by an Administrative Law Judge on June 28, 2004. The respondent specifically appeals that portion of the Administrative Law Judge's opinion wherein he found that the claimant sustained a 15% permanent physical impairment of the body as a whole as a result of his compensable injury of May 24, 1990. In addition, the Administrative Law Judge found that the claimant suffered a loss of earning capacity in the amount of 40% in excess of his anatomical impairment as a result of his 1990 compensable injury.

Our de novo review of the record in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he sustained a 15% permanent physical impairment of the body as a whole as a result of his compensable injury of May 24, 1990. In addition, we find the claimant has failed to prove by a preponderance of the evidence that he has suffered a loss of earning capacity in the amount of 40% in excess of his anatomical impairment as a result of his 1990 compensable injury. Therefore, the decision of the Administrative Law Judge is hereby reversed.

The claimant fell and injured himself at work on May 24, 1990. The claimant's employer at that time was the respondent employer. As a result of his work related fall, the claimant eventually had one rib removed. The respondent employer accepted compensability of the claimant's injury, and the claimant received all appropriate benefits, including a 5% permanent impairment rating. After a period of recovery, the claimant returned to work for the respondent employer performing the same job for the same hourly rate of compensation. At the time of his compensable injury, the claimant earned $9.50 per hour. The claimant continued to work for the respondent employer until such time as the plant was acquired by a new owner. At that time,

the claimant began working for the new owner, where he continued to work for the next seven years. In June of 2003, the claimant and four other employees were laid off. At the time he was laid off, the claimant worked as a supervisor earning $15.86 per hour. After he was laid off by the respondent employer, the claimant received unemployment compensation benefits until such time as he obtained other employment with a company called Paslode. The claimant started out earning $9.65 per hour at his new job, where his duties include packing nails.

After the claimant was laid off by the respondent employer, he sought a permanent impairment rating from Dr. Danny Holt. The record reveals that Dr. Holt assigned the claimant a 12 to 15% impairment rating based primarily upon his complaints of pain. The claimant had previously been assigned a 5% permanent impairment rating by Dr. Richard Stevenson, and prior to that, he was assigned a 2% whole person permanent impairment from Dr. Dennis Luter.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur,

the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics,46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994).

Ark. Code Ann. § 11-9-704(c)(1) (1987) provides that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Although objective findings were not statutorily defined prior to 1993, the Court of Appeals, in Taco Bell v. Finley, 38 Ark. App. 11, 826 S.W.2d 313 (1992) determined that the word "objective" meant "based on observable phenomena or indicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted. Further, in Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992), the Court of Appeals held that "determination" as used in the statute refers to the Commission's determination of physical impairment and that the statute prohibits such a determination of physical impairment unless the record contains supporting "objective and measurable physical or mental findings."

In his letter to the claimant dated June 21, 2003, Dr. Holt admitted that he based his impairment rating on the claimant's complaints of pain alone.

> You asked me to give you an impairment rating based upon the pain that you have been experiencing in the left side of you abdomen, related to your rib injury in 1990. I have been working on this rather diligently, using the American Medical Association guides to the evaluation of permanent impairment, but because the area of involvement is in the rib and the abdominal musculature the guides are somewhat ambiguous. I have therefore made the determination of impairment based upon pain alone and not impairment of an organ system.

The record is devoid of medical documentation pertaining to the claimant's compensable injury or to his follow-up treatment. Therefore, there is no objective medical evidence presented in this claim to show that the claimant's physical condition has worsened or deteriorated as a result of his compensable injury over fourteen years ago. Moreover, there is no evidence presented in this claim, aside from the claimant's own testimony, to substantiate that his physical impairment rating has increased since he was rated by Dr. Stevenson. As previously mentioned, Dr. Holt rated the claimant's physical impairment based solely upon the claimant's complaints of pain. Because we cannot consider complaints of pain when determining physical or anatomical impairment, we must disregard Dr. Holt's impairment rating and look to those ratings assigned by

Drs. Stevenson and Luter. In a letter dated January 7, 1994, Dr. Luter opined that the claimant had sustained a "2% whole person physical permanent impairment in function as a result of his persistent intercostal neuralgia." In a letter dated December 17, 1991, Dr. Stevenson assigned the claimant with an approximate 5% permanent disability rating. Even though Dr. Stevenson admitted that he relied solely upon the accuracy of information provided to him by the claimant in making this determination, the respondent, accepted the 5% rating and paid the claimant benefits based thereupon.

The claimant has offered absolutely no objective, measurable medical proof to support the determination that the extent of his physical impairment exceeds the 5% previously assigned by Dr. Stevenson. Therefore, we find that the claimant has failed to prove that he is entitled to a 15% permanent physical impairment rating as was awarded by the Administrative Law Judge. Therefore, this finding is hereby reversed.

The Administrative Law Judge also found that the claimant is entitled to wage loss of 40% in excess of his anatomical impairment as a result of his 1990 compensable injury. 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 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). 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)(1987).

The claimant's employer accepted a 5% permanent impairment rating, and paid benefits accordingly. Therefore, the claimant has met his burden of proving that he sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, Supra. However, we find that the claimant has failed to prove that his compensable injury has affected his ability to earn a livelihood. After his compensable injury, the claimant returned to the same job making the same wages that he

earned prior to his injury. Thereafter, the claimant worked an additional 13 years during which time he received pay increases and promotions. Even when the company switched hands, the claimant continued to work there in the same capacity. When the claimant was ultimately laid off in June of 2003, it was due to changing economic conditions rather than a change in the claimant's physical ability to work. Moreover, after being laid off, the claimant became re-employed earning more money than he earned at the time of his compensable injury. Therefore, because the claimant returned to work at wages equal to or greater than his average weekly wage at the time of the accident, we find that he has failed to prove that his compensable injury has affected his ability to earn a livelihood, or that he is entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment that he has already been paid.

Finally, the claimant testified that he believed he was laid off due to his worker's compensation claim. However, the present employer's liability insurance carrier was not responsible for payment of benefits to the claimant in regards to his compensable injury. Medical expenses related to the claimant's compensable injury continue to be paid by the previous owner's liability carrier. Therefore,

the claimant's contention is without merit, and he has failed to prove that he was laid off for any reason associated with his compensable injury.

For the reasons set forth above, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 15% permanent physical impairment rating, or to and wage loss above and above his physical impairment. Therefore, we find that the decision of the Administrative Law Judge should be and hereby is, reversed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.