

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E811362

DANIEL LEROUX,
EMPLOYEE

CLAIMANT

L. A. DARLING CO.,
SELF-INSURED EMPLOYER

RESPONDENT NO. 1

SECOND INJURY FUND,

RESPONDENT NO. 2

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 3

OPINION FILED NOVEMBER 20, 2006

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

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

Respondent No. 1 represented by the HONORABLE RICHARD LUSBY,
Attorney at Law, Jonesboro, Arkansas.

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

Respondent No. 3 represented by the HONORABLE JUDY W. RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's
opinion filed March 24, 2006. The administrative law judge
found, among other things, that the claimant had suffered "a
loss of earning capacity or wage loss disability in the

amount of 55% in excess of his anatomical impairment as a result of the August 18, 1998, compensable injury." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding as modified. We find that the claimant sustained wage-loss disability in the amount of 20%.

I. HISTORY

Daniel Alan Leroux, age 48, testified that he had completed 12 years of school. Mr. Leroux testified that he worked as a painter for three years and worked at a service station for about a year. The claimant testified that he then worked "on Texas oil rigs" for four years.

The record indicates that the claimant was hired at Darling Store Fixtures in January 1988. The parties have stipulated that the claimant sustained a compensable lumbar injury on August 18, 1998. The claimant testified, "They was hanging beams and a beam fell off. I reached down and grabbed the beam and something popped in my back."

The claimant began treating with Dr. R. Edward Cooper, Jr. in October 1999. Dr. Cooper placed the claimant on "light duty, no heavy lifting or twisting" in November 1999.

In May 2000, Dr. Cooper performed a right L4-5 hemilaminectomy and diskectomy.

The claimant continued to follow up with Dr. Cooper after surgery.

Dr. Cooper stated on July 26, 2000, "I discussed return to work situation with him and also instructed him in how to take care of his back post surgery mainly to avoid heavy lifting, bending and twisting....We will return him to light duty work, no heavy lifting, bending or twisting greater than 5 lbs. on Monday."

The claimant returned to Dr. Cooper on January 15, 2001:

He continues to have some back pain off and on, but mainly when he does a lot of walking or with activities. He does not have any leg pain although he does have some numbness in the bottom of his foot when he lays in the wrong position and occasionally gets a charley horse in the bottom of his right foot and the right thigh.

Today on physical examination his incision is well healed. There are no other changes in his exam. I discussed his case with him at length including the possibility of restrictions, what he felt that he was capable of doing at work. Given his surgery and residual back symptoms which are likely coming from some facet joint arthritis and continued degenerative disc changes, that a 30 lb. weight limit on him would be reasonable and also I think

he should avoid trying to do tasks which require repetitive lifting and twisting.

Dr. Cooper planned the following: "1. We will release him to full work activity with the only exception being a 30 lb. weight limit and avoid repetitive lifting and twisting. 2. He will return to clinic prn if he develops any worsening of his symptoms and cannot tolerate his job."

Dr. Cooper assigned a rating on January 17, 2001: "He is S/P right L4-L5 hemilaminectomy diskectomy. According to the AMA Guidelines to the Evaluation of Permanent Impairment, 4th edition, page 113 for a single level surgically treated disc lesion he has 8% whole person impairment."

The parties stipulated that the claimant reached maximum medical improvement on January 17, 2001.

The parties stipulated to "payment by Respondent No. 1 of indemnity benefits to correspond with an 8% whole body physical impairment."

Dr. Cooper noted on July 11, 2001, "Mr. Leroux returns today. He was doing quite well until he was placed back on his normal job and taken off light duty. At that time he

began having recurrent back pain with radiation down the right posterolateral thigh, calf and into the sole of the right foot. He has now gone back to desk duty and has had some improvement, but continues to have considerable pain." Dr. Cooper's impression was "S/P right L4-L5 hemilaminectomy diskectomy doing well for approximately a year, but how with recurrence of symptoms since returning to full duty."

On October 1, 2001, Dr. Cooper planned additional diagnostic testing and held the claimant off work. Dr. Cooper noted on October 11, 2001: "On physical examination today there is no change in his physical findings....The MRI is unavailable for my direct review. However, the radiologist report with the Gadolinium study saw enhancing scar around the nerve root, but no significant true disc material was noted." Dr. Cooper gave the following impression: "S/P right L4-L5 hemilaminectomy diskectomy with some residual low back and right lower extremity pain. It appears that he has been adequately decompressed and there is only some mild epidural scar present there....We will refer him to the Chronic Pain Clinic to see if they can get

him some relief of his symptoms. I see nothing surgically that needs to be done."

The claimant began treating with a pain manager, Dr. Calin A. Savu, on November 26, 2001.

Dr. Ron D. Schechter reported on October 1, 2002, "Mr. LeRoux is being seen at the request of his work comp carrier as a second opinion for evaluation of low back pain and right lower extremity pain....At this point I would recommend that the patient see a surgical spine specialist for further work up and I agree with Dr. Savu's thinking, that I would anticipate that a spine surgeon would next need to consider selective disc injections to see how it affects his pain with the idea that he might be a candidate for a possible complete discectomy."

Dr. Savu performed discography on February 14, 2003 and noted, "It is very likely he will need to undergo prolonged physical therapy program which, if unsuccessful, would require a serious consideration for chronic narcotic treatment either p.o. or with an intrathecal system."

The claimant continued to follow up with Dr. Savu, who stated on September 4, 2003, "The recommendation for him at

this time will consist of continuous medical therapy and work hardening for at least six weeks. That should be done on a part-time basis in combination with part-time employment. At the end of those six weeks, I would recommend a full evaluation of his capacity by a specialized physical therapist. Based on that assessment, we will be able to decide in what capacity Mr. Leroux can continue his employment and clearly define his restrictions if any would be needed."

Dr. John D. Brophy independently evaluated the claimant on October 1, 2003 and gave the following impression: "1. Residual back and leg pain status post lumbar diskectomy without radiographic evidence of residual nerve root compression. 2. Probable distal right lower extremity venous insufficiency with resultant swelling and cutaneous changes." Dr. Brophy stated:

In my opinion, Mr. Leroux has undergone an appropriate evaluation for his residual postoperative pain status post right L4-5 diskectomy. In my opinion, there is no indication for surgical intervention. From the standpoint of his lumbar radiculopathy and lumbar disc surgery, I would suggest initiation of a serious weight loss program as well as beginning an

endurance exercise program. Based on his radiographic studies and physical examination, there is no objective reason why he could not return to work at full duty if he desired to do so. If his physicians feel that work restrictions are indicated, he should undergo a formal Functional Capacity Evaluation. I would suggest tapering and discontinuation of his narcotic requirement and initiation of a trial of anti-inflammatories. The standard rating for lumbar radiculopathy status post lumbar diskectomy is 10% whole body.

Mr. Leroux has a history of thrombophlebitis and based on his medical records, he has intermittent swelling of the distal right lower extremity. Based on his evaluation today, I suggested follow-up evaluation through his primary care physician or possible vascular specialist to determine if further treatment is indicated. His right lower extremity swelling and cutaneous changes are unrelated to his lumbar herniated disc and lumbar diskectomy procedure, and may be the source of some of his leg pain. It is also possible that work restrictions are indicated for his vascular problems.

The claimant underwent a Functional Capacity Evaluation on November 3, 2003 and the following limitations and conclusions were reported: "Mr. Leroux did not demonstrate maximal or consistent effort so therefore his true functional limitations remain unknown. He demonstrates the ability to Material handle 15 lbs. in each hand. He demonstrates poor tolerance to lifting from floor level and

demonstrates an inability to perform repetitive stooping and bending....Overall, Mr. Leroux demonstrates very inconsistent effort. He demonstrates the ability to work at least at the Light category over the course of an 8 hour workday. Until Mr. Leroux puts forth consistent effort on a maximal basis, no further recommendations are appropriate."

Dr. Savu informed the respondent-carrier on November 7, 2003:

I received the two evaluations concerning Mr. Leroux. They consist of Dr. Brophy's and Mr. Byrd's assessments.

They confirm my thesis that Mr. Leroux may return to work immediately at least while restricting him to light duties. A work hardening program would be very beneficial and I am convinced that he may make significant progress.

His diskogenic pain is unlikely to progress rapidly although some slight long-term worsening is possible. On the other hand, an active lifestyle with a consistent exercise program has been very beneficial for patients with severe diskogenic pain who refuse to undergo fusion surgery. I would like to meet Mr. Leroux and share that information with him while encouraging him to enroll in a work hardening program and hopefully progress from a light to a moderate or even a full duty job description....

The claimant followed up with Dr. Savu on January 22, 2004:

I was able to review the assessment of Mr. Leroux by functional testing centers. It reveals an unreliable effort with inconsistent range of motion and positive non objective signs. In my opinion, this is a reflection of fear avoidance behavior.

His light work category ability will enable him to enroll in a part-time job which, in my opinion, should be supplemented by half-time work hardening for at least two months. I encouraged Mr. Leroux to continue his exercises aggressively and fully cooperate with the work hardening effort. I also tried to explain to him that no perfect solution can be achieved for his situation and I would strongly encourage him not to pursue any form of long-term disability as I think it would be overall detrimental, to his overall well being. The perfect solution of part-time job combined with part-time work hardening for two months then followed by a full-time employment would offer him the best balance of self-reliance, financial independence, and physical ability which are very important factors in the long term success of chronic pain patients. I am not convinced Mr. Leroux is very willing to follow my advice but at least for now that's the best we can offer him. We will be available to offer advice on an as needed basis.

Dr. Savu indicated on a form dated January 22, 2004 that the claimant could resume light work.

The claimant testified that he worked three to four hours on January 22, 2004:

Q. And what conversation did you and Mr. Gossett have at that time?

A. He told me that I didn't have no more light work and no more restrictions - that Darlings didn't have no more work for me - that I needed to go home....So, Calvin Busby walked me to the door....

Q. Okay, so did you understand yourself to be fired as of January 22, 2004?

A. Yes, sir....

Q. And when you applied for unemployment benefits, did Darling Store Fixtures object or fight that claim?

A. No, sir....

Q. How long did you receive unemployment benefits?

A. Like four or five months.

Q. Okay. During that four and five-month period of time, did you apply for other jobs?

A. Yes, sir....

Q. Were you ever offered a job?

A. No, sir.

The parties stipulated that the claimant "could not have been permanently and totally disabled prior to January 22, 2004, the last day that he worked."

Gary Gossett, a human resource manager, testified for the respondents:

Q. Now, you've heard Mr. Leroux acknowledge today that after he came back to work or was released by Dr. Cooper to light-duty following the 2000 surgery, various forms of light-duty were provided to him by the company?

A. Yes, sir.

Q. And is that true?

A. Yes, sir.

Q. Is that L.A. Darling's policy with respect to injured workers?

A. In as much as we can, yes....

Q. And you did that in Mr. Leroux's case for approximately how long before he was returned to regular duty?

A. From 2000 until November of 2003.

Q. So, approximately three years, you're just finding light stuff for him to do and paying him a full salary - is that correct?

A. Yes, sir....

Q. In November '03, what did his job classification change to?

A. Metal Former in Department 275, Plan B.

Q. And that's - that is a regular job classification?

A. Right, that's a regular job classification....

Q. Did you terminate him on [January 22, 2004]?

A. No, sir, I did not....

Q. Was he eventually allowed to go home?

A. Yes, sir, he was.

Q. What - did he ever get terminated by L.A. Darling Company?

A. Yes, sir....Sometime in January, 2005. It would have been a year following the start of his medical leave.

Q. Okay. So, it was fully a year after the last night that he worked there that he was actually terminated by the company - is that correct?

A. Yes, sir....

Q. As far as L.A. Darling Company was concerned, did the company have a job available from Mr. Leroux within restrictions related to his back?

A. Yes, sir.

Q. And specifically, it was that job handling - working with the T5012 parts?

A. Yes, sir, in our opinion, yes....

Q. And that's the job that you personally observed Mr. Leroux doing on January 22nd of 2004, the night he complained he couldn't continue working?

A. Yes, sir.

A pre-hearing order was filed on October 11, 2005. The claimant contended that he was permanently and totally

disabled. Respondent No. 1 contended that the claimant had not sustained wage-loss disability resulting from a compensable injury; Respondent No. 1 contended that work was made available to the claimant which the claimant declined.

The administrative law judge found, in pertinent part: "When the claimant's age, education, permanent restrictions and limitations are considered, the evidence preponderates that he has suffered a loss of earning capacity or wage loss disability in the amount of 55% in excess of his anatomical impairment as a result of the August 18, 1998, compensable injury."

Respondent No. 1 appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-522(b) provides:

(1) 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 percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her earning capacity.

The administrative law judge found in the present matter, "When the claimant's age, education, permanent

restrictions and limitations are considered, the evidence preponderates that he has suffered a loss of earning capacity or wage loss disability in the amount of 55% in excess of his anatomical impairment as a result of the August 18, 1998, compensable injury."

The Full Commission finds that the claimant proved he was entitled to wage-loss disability in the amount of 20%. The claimant is only age 48 and he has a high school education. The claimant has a varied work history consisting almost exclusively of manual labor. Following the claimant's compensable injury in 1998, the claimant underwent a diskectomy in 2000. Dr. Cooper, the treating surgeon, assigned an 8% anatomical impairment. (The respondents do not appeal the administrative law judge's determination that the claimant sustained a 10% anatomical impairment.)

Dr. Cooper assigned permanent work restrictions for the claimant, that is, a 30 pound weight limit with no repetitive lifting or twisting. We recognize that the respondent-employer provided light work duty for the claimant for approximately the next three years. By October

2003, Dr. Brophy could find "no objective reason why he could not return to work at full duty if he desired to do so." The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). In the present matter, we are unable to elevate the findings of Dr. Brophy over the opinion of the treating surgeon, Dr. Cooper. There is no indication of record that Dr. Cooper ever removed the permanent work restrictions he placed on the claimant. Moreover, the 2003 functional capacity evaluation indicated that the claimant could perform light work, not full duty work. Finally, Dr. Savu indicated on January 22, 2004 that the claimant could perform light work, not full work duty.

The claimant is a 48-year-old manual laborer with permanent work restrictions and only a high school education. The record does not indicate that he can perform his previous regular work duties for the respondent-employer. The evidence also demonstrates, however, that the claimant is not motivated to return to work. This lack of motivation impedes our assessment of the claimant's loss of

earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984). The instant claimant does not appear interested in performing even light work duty.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding as modified. We find that the claimant sustained wage-loss disability in the amount of 20%. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the Majority opinion which reduces the claimant's entitlement to wage-loss benefits from 55% to 20%. The Majority's sole reason for reducing the amount of wage loss appears to be based on the finding that the claimant is not motivated. However, after a de novo review of the record, I find that the record does not show that the claimant is unmotivated to return to work. Rather, in my opinion, the claimant is a motivated individual that has worked throughout his adult life and continued to work even after the time of his admittedly compensable injury.

Additionally, I note that the claimant's injury was substantial and that the claimant continues to require ongoing treatment and medication for treatment of his condition. When considered in conjunction with the medical records showing that the claimant will be restricted to performing light duty work in the future, and in conjunction with the claimant's testimony that he was discharged due to

his physical inability to perform the assigned work and that he looked for work to no avail, I find that he is entitled to wage loss benefits greatly in excess of that awarded by the Majority. As such, I would have affirmed the decision of the Administrative Law Judge and must now respectfully dissent.

_____The Majority asserts the claimant is not motivated to return to work; however, in my opinion, the evidence shows the converse to be true. The claimant credibly testified that he has worked since high school and provided a long list of manual labor which he performed. Notably, with the exception of the claimant's absences related to the instant injury, there appear to be no lapses in the claimant's periods of employment. Additionally, the claimant and the respondent both admit that the claimant was willing to work after the instant injury for a period of three years, which indicates his willingness to work and directly refutes the Majority's finding that the claimant is not motivated to work.

In my opinion, it is apparent that even the claimant's last job was not severed of his own accord. Regardless of whether the claimant quit or was discharged, it is evident that his separation occurred after the

respondents refused to provide him work that was within the parameters of the claimant's physical restrictions, and particularly within that of Dr. Savu that was issued on January 22, 2004. Likewise, given the reason for the separation, I cannot find that the claimant's refusal to perform work against his work restrictions was tantamount to being unmotivated to return to work.

When reviewing the claimant's testimony of the events that occurred on his last day of work, a logical consistent occurrence of events is described. The claimant indicated that he was experiencing pain and that he had to see Dr. Savu. When he returned to work, he presented the note to management. Not surprisingly, there is a doctor's note in the record which is dated January 22, 2004, which was the claimant's last workday. That note indicated that the claimant was to work part-time and that the work would be light-duty work. The claimant indicated that when he presented that note, he was told no more light duty work was available and that he was instructed to go home. In fact, he was escorted to the door, which, in my opinion, indicates that the separation occurred at that point.

I find the claimant's testimony is entirely consistent with the respondents' assertion that they

believed the claimant could return to full-duty work after receiving the note from Dr. Brophy, indicating there was no objective reason the claimant could not return to work. Likewise, when considered in conjunction with Gossett's admission that he told the claimant to go home and that the claimant did not complete any FMLA papers, it is clear that the claimant was discharged. Accordingly, I find the preponderance of the evidence shows the respondents were dissatisfied that the claimant continued to complain about his physical condition, and when presented with the results of the IME and FCE, simply chose to sever the employment relationship rather than continue to provide light-duty work.

In contrast to the claimant's credible testimony, is the testimony of Gossett. While the respondents attempt to use Gossett's testimony to assert that the claimant was not discharged, I find Gossett's testimony was unclear, at best. First, I note that Gossett indicated that while he spoke with the claimant on January 22, 2004 he did not recall it well. Specifically, he indicated, "I don't recall the exact conversation, but we did - after we went out and looked at the job he was performing - we told Danny that he could go home if he couldn't do it." Yet, curiously,

Gossett asserted that the claimant was to somehow infer from that conversation that he had not been discharged. I note Gossett also admitted that the claimant never turned in paperwork in order to take a medical leave of absence and was unable to produce any documentation that the claimant was drawing short-term disability benefits or was on medical leave.

Perhaps the most persuasive testimony was Gossett's statements regarding the claimant's application for unemployment benefits. Gossett initially testified that he became aware of the claimant's application for unemployment benefits in February 2004. However, he then indicated that he did not become aware of the claimant's application until preparation for the present case. Then, he appeared to contradict himself again and testified,

Like I said, in February I became aware of the fact that there was some confusion with what Danny's status was.

Q: February, 2004?

A: Of 2004. There was communication between Brenda Cross, who is an HR staff member, Cassie Gilmore, who is an HR staff member, and myself. They were going back and forth on e-mails, as far as what Danny should be - should he be filing unemployment, should he be receiving unemployment, should he be receiving TTD because of a workers comp

claim, or should he be off on short term disability.

In my opinion, this testimony illustrates that Gossett's testimony was contradictory and shows that the claimant had not simply quit as the respondents contend.

Gossett also testified that he had no knowledge of whether the claimant's request for unemployment was contested. He then testified that the company would usually contest the receipt of such benefits when the worker voluntarily quit. When confronted with the question of whether he had participated in the benefits being contested, Gossett denied knowledge of how unemployment claims were handled or being involved in the claimant's process. As Gossett would have had direct knowledge of the events leading to the claimant's separation, it simply seems illogical that he would have no knowledge or participation in the claimant's request for unemployment benefits.

Additionally, the record is clear that the claimant's last job as a hat former was clearly outside of the work restrictions provided by the employer. In fact, I note the Majority opines that the claimant would be physically unable to perform his past regular work duties for the respondents. As such, even if the claimant did quit

(a finding I do not make), it is evident that the separation occurred because the respondents were requiring the claimant to work outside the scope of that prescribed by his physicians. At the time of discharge, the claimant had been given several restrictions. Dr. Cooper had restricted him from lifting more than 30 pounds, and from twisting or bending. The claimant's FCE indicated that he could perform light work, which was work with a restriction of no more than 20 pounds, and no more standing more than 25 or 35 minutes. Furthermore, on the day of the injury he was instructed that he could only perform part-time, light-duty work. Yet despite these restrictions, the respondents had the claimant performing a full-duty position which required him to either sit or stand for long periods of time. Though the claimant admitted he could sit or stand at will, I note that the claimant's job duties would still have required him to perform a full-duty job despite Dr. Savu's note indicating he should only work part-time.

Additionally, I note that on the day of the separation, the claimant did not simply stop working. Rather, he returned from the doctor and gave a manager the note with his restrictions. In my opinion, this was an obvious attempt to try to allow the employer to accommodate

his physical restrictions. Additionally, I note that the claimant returned to work that day, and did not leave until he was told to go home unless he could return to full-duty work, which was outside the parameters of his doctor's restrictions. Accordingly, I find that the claimant did not voluntarily quit and is not unmotivated to return to work.

Ultimately, in my opinion, the record shows a claimant that was motivated to return to work. This is supported by the fact that the claimant had a long history of working in manual labor before his injury, the fact that he continued to work after his injury, that he attempted to let the respondents accommodate his restrictions on the day of his separation, and by the fact that after the separation, the claimant filed for unemployment benefits and represented he could work, and then applied for jobs to no avail. Accordingly, I simply cannot find that he was unmotivated to return to work.

_____ Even if one finds the claimant was unmotivated, I find that his entitlement to wage-loss benefits should not have been reduced. As noted by the Majority, the claimant was a high school graduate, but only had experience in manual labor. The claimant was restricted to only perform light-duty work and was instructed to avoid bending and

twisting, which would likely exclude him being able to perform most types of manual labor. The claimant also provided testimony that he attempted to locate work after his separation, to no avail, which indicates that he will likely be unable to replace his wages. Finally, I note that at the time of the hearing, the claimant was still on narcotic pain medication for his symptoms. Accordingly, when considering each of the above factors, I find that the claimant is entitled to wage-loss benefits as awarded by the Administrative Law Judge rather than that awarded by the Majority.

_____For the aforementioned reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner