

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105152

ERNEST DALE LOHMAN, EMPLOYEE	CLAIMANT
SSI, INC., EMPLOYER	RESPONDENT
VILLANOVA INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 19, 2006

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

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

Respondents represented by the HONORABLE MELISSA ROSS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Full Commission in the above-styled matter and has remanded for further proceedings. *Lohman v. SSI, Inc.*, CA 05-1044 (March 15, 2006). Pursuant to the Court's remand, the Full Commission finds as follows:

Respondents appeal an opinion and order of the Administrative Law Judge filed August 5, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 6, 2003, and contained in a pre-hearing order filed October 7, 2003, are hereby accepted as fact.

2. The parties' stipulation that respondent was requested to provide claimant with a psychological evaluation and/or treatment but did not do so is also hereby accepted as fact.

3. Claimant is entitled to permanent disability benefits in an amount equal to 60% to the body as a whole as a result of wage loss from his compensable injury.

4. Respondent has controverted claimant's entitlement to all compensation benefits and claimant's attorney is entitled to a fee on all compensation benefits including those previously had.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 5, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion as the decision of the Full Commission on appeal.

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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a 60% wage loss disability. Based upon my de novo review of the entire record, I find that the claimant has not proven by a preponderance of the evidence that he sustained a wage loss disability of 60%.

Initially, this Commission had found that the claimant had failed to participate in or cooperate with an offered program of vocational rehabilitation, and was therefore barred from receiving permanent partial disability benefits in excess of his physical anatomical impairment. On appeal the Court of Appeals held that this claim was not barred by A.C.A. § 11-9-505(e) and remanded this claim to the Commission with instructions to make a determination whether the claimant is entitled to permanent partial disability benefits in excess of his physical impairment rating. The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54

Ark. App. 130, 923 S.W.2d 886 (1996). 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 his/her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. While the Court has held that the claimant did not refuse to participate in or cooperate in an offered program of rehabilitation and job-placement assistance, this finding does not diminish the fact that the claimant displayed a lack of interest in pursuing employment. The claimant was released to return to work by his treating physicians and he was offered vocational rehabilitation. Rather than follow his physician's advise and return to work, the claimant abused his prescription medication and was content to stay at home

and raise his three children. Although the claimant did not follow through with the offers of vocational rehabilitation, he was very active in his children's lives. A surveillance video of the claimant at one of his children's Pee Wee football games actually depicted the claimant carrying a young girl and running up and down the football field.

Accordingly, after I consider the claimant's young age, his 15% physical impairment rating, his release to return to work with a good prognosis from his treating physician, together with the claimant's negative attitude in actually returning to the work force, his failure to take advantage of the educational and rehabilitation assistance offered to him, and yes, his depression which is capable of being addressed, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained an increase in his permanent partial disability equal to 60% above and beyond his physical impairment rating. If anything, this rating is premature as one of the major factors preventing the claimant from returning to the work force is his depression which has greatly enhanced his negative attitude in this regard. This has not been established to be a permanent condition and thus I find

that the wage loss award is significantly skewed at this time.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner