

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. E014514 & E412347

JOHN W. PARKS, EMPLOYEE	CLAIMANT
ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIV., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 21, 2006

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM WHARTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed in part, affirmed in part, and modified in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant was entitled to a 40% loss in wage earning capacity in addition to his 10% anatomical permanent impairment. Based upon our de novo review of the record, we

find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. In addition, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 40% loss in wage earning capacity. We find that the claimant is entitled to only a 20% loss in wage earning capacity.

The claimant was employed by the respondent employer for approximately 31 years. The claimant sustained admittedly compensable injuries on July 30, 1990 and July 14, 1994. The claimant sustained injuries to his back on July 30, 1990 and to his neck on July 14, 1994. The respondent employer accepted both of these injuries as compensable and paid the claimant benefits. A 5% permanent impairment to the body as a whole was accepted and paid with regard to the July 30, 1990, injury. A 10% permanent anatomical impairment rating to the body as a whole was associated with the 1994 compensable neck injury.

Following the July 14, 1994, compensable injury, the claimant continued to work full time for the respondent employer until April 22, 2002. The last day the claimant worked for the respondent employer was June 3, 2003. The claimant has since retired from his position with the respondent employer.

The claimant contended that he was entitled to permanent and total disability benefits in excess of his permanent anatomical impairment rating. The respondent employer contends that the claimant was released to resume his regular work duties on June 2, 2003, and that the claimant is not entitled to any wage loss disability benefits. The respondent employer brought in the Second Injury Fund and contended that the Second Injury Fund was responsible for any wage loss in excess of the claimant's assigned permanent anatomical impairment rating. The Second Injury Fund contended that there was no pre-existing condition or disability to support a finding of Fund liability.

The claimant worked for the respondent-employer for thirty-one years as a "parts runner." His job was to drive to various destinations to pick up equipment parts and deliver them back to the district shop in Hope. He testified that his average trip was about 120 miles, though he sometimes drove 200 miles or more. On July 30, 1990, the claimant sustained a compensable injury to his low back while moving a 55-gallon drum. He was diagnosed with a back strain. An MRI exam revealed no sign of injury. He missed "nine or ten weeks from work" before he was released to return to work with restrictions. He underwent no surgery and was ultimately assigned a 5% permanent anatomical impairment rating, which the respondents accepted and paid. The claimant testified, however, that he continued to experience pain in his low back into his legs from then on, and that he continued to take medication for the pain.

On July 14, 1994, the claimant sustained a compensable injury to his neck in a motor vehicle accident. An MRI performed on August 23 revealed "mild disc

degeneration with a small broad based central disc herniation" at C6-7. After conservative medical treatment, the claimant was able to return to work with restrictions. By late 1994 the claimant had resumed his regular duties.

In the following years the claimant was able to work but he continued to have pain in his neck and right shoulder, and he eventually developed numbness in his right arm and fingers. By April 2002, he testified, he was unable to continue working because of the pain, and he took off from work. An MRI performed on April 30, 2002, revealed, "narrowing and posterior ridging at the C6-C7 level." A later CT exam found disc bulges at both C6-7 and C5-6.

After an EMG test the claimant was also diagnosed with carpal tunnel syndrome and underwent a carpal tunnel release on the right. The parties agreed that this condition was unrelated to his compensable injuries. Conservative treatment failed to alleviate the claimant's neck and shoulder problems, and an MRI performed on February 10, 2003, showed the bulging at C6-7 had grown progressively

worse, producing "a large narrowing of the disc space at C6-7 with widespread disc protrusion and some spinal stenosis of moderate severity."

On April 23, 2003, the claimant underwent surgery, an anterior cervical decompression and fusion at C6-7, by Dr. Steven Cathey. The claimant testified, and Dr. Cathey's notes corroborate, that the surgery did help his pain and eliminated the numbness in his right fingers. Dr. Cathey placed no restrictions on him and released him to full-duty work. The claimant returned to work on June 2, 2003. Within two days, he began having increased pain as well as difficulty sleeping. The claimant worked until June 9, when he chose to retire from the respondent-employer.

The claimant continues to take prescription medication under the direction of his personal physician. He described his current condition as follows:

I have - basically I ache from the middle of my back down into my hips. I have some sharp pains in my legs. My shoulder and neck, my neck has pain in it any time I move it.

Q. Does that pain feel exactly like the pain in your low back or is it a different feeling?

A. No, sir. It's a more steady pain. Instead of it being like an ache, it's more of a steady pain. It's sore back up in under my right shoulder blade.

Q. Do you have the same strength in your right arm as you do your left?

A. No, sir.

The claimant testified that he is able to do some minor housekeeping tasks but that he is unable to vacuum, sweep or mop. He has a workshop where he "piddles," making birdhouses and doing other woodwork. The claimant testified that he is able to work in his shop for only twenty or thirty minutes before he must rest. He is unable to hunt or fish anymore, and he testified that he drives as little as possible. The claimant stated that he spends on average two or more hours per day lying down and resting.

After the surgery, Dr. Cathey assigned the claimant a 10% permanent anatomical impairment rating, which the respondents accepted and paid. Though the respondents

controvert the claimant's entitlement to additional permanent disability benefits, they continue to pay for his medical treatment and medication.

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 addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major

cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

The claimant contends that he is permanently and totally disabled. The respondents contend that the claimant

is not entitled to any loss in wage earning capacity in addition to his permanent anatomical impairment. In our opinion, the claimant is entitled to a 20% loss in wage earning capacity.

To a point, the claimant exhibited a significant motivation to return to work. On three separate occasions he returned to work despite his continued complaints of back and neck pain. Furthermore the claimant had a significant financial incentive to continue working, in that by retiring he lost the opportunity to continue in the DROP program. This is a retirement benefit whereby the claimant was able to earn his regular salary from the respondent-employer while at the same time earning retirement benefits which were deposited in an interest-bearing account. Had the claimant continued working, in several years he would have received a substantial lump-sum payment consisting of those accrued retirement benefits. The claimant testified that he had intended to continue working for several more years but for his injury. By retiring earlier than he had intended,

the claimant lost the opportunity to continue earning both his salary and his retirement benefits. Given that he no longer has this financial incentive to work, and given his testimony at the hearing as to his work capabilities, we find that the claimant is no longer motivated to return to work.

The claimant is fifty-seven years of age. He has an eleventh-grade education and no specialized vocational training, though he does still have his CDL. He worked the same job for his entire thirty-one year career with the respondent-employer; before that he worked as truck driver and as a laborer. A functional capacity evaluation performed September 28, 2004, concluded that the claimant was capable of performing work at the Light level with occasional lifting and carrying of no more than thirty pounds, and that he was limited in his ability to sit for longer than forty-five minutes. The evaluation indicated that the claimant gave a "reliable effort," was "consistent throughout the evaluation," and gave "no signs of symptom magnification or

other inappropriate illness response." Dr. Young, the claimant's personal physician, opined that the claimant "cannot go back to work." We recognize that Dr. Cathey released the claimant to return to work without restriction; however, in light of the findings of the claimant's functional capacity evaluation we give those findings more weight than Dr. Young's opinion. Given the results of the claimant's functional capacity evaluation, combined with his testimony and the medical evidence, we are not convinced that the claimant is unable to earn any meaningful wages. We find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. However, given his age, education, work experience, medical treatment and diagnosis, we find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 20% over and above his permanent anatomical impairment rating of 10% to the body as a whole.

The claimant's testimony suggests that his compensable neck injury is the primary debilitating factor of his present condition. Though he does have low back pain, he was able to continue working for more than a decade in spite of it. His carpal tunnel syndrome appears to have resolved, and the record identifies no other condition that substantially impacts his ability to work, other than his compensable neck injury. We find that the claimant has proven by a preponderance of the evidence that his 1994 compensable neck injury is the major cause of his wage-loss disability. Accordingly, we find that the claimant has proven by a preponderance of the evidence that he is entitled to a 20% loss in wage earning capacity in addition to his 10% permanent anatomical impairment.

We also find that the Second Injury Fund has no liability in this case. Before the Second Injury Fund can be liable to pay for an injury, the employee's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements

of compensability existed as to the cause of the impairment. See Midstate, 295 Ark. at 6, 746 S.W.2d at 542. As the court in Midstate explained, “[i]t is the substantial nature of the impairment which is emphasized...” Id.

The claimant did have a prior permanent impairment partial disability as evidenced by the 5% permanent impairment rating paid by the respondent employer for the 1990 compensable back injury. Therefore, the claimant has satisfied the first prong and the second prong of the Mid-State test. However, we find that the third prong is not satisfied. The disability or impairment from the prior injury did not combine with the recent compensable injury to produce the claimant’s current disability status. The evidence demonstrates that the claimant was able to return to his regular work duties after his low back injury. He continued working for more than a decade after this injury. There is nothing in the evidence or the testimony to show that the claimant’s lower back condition is worse now than it was prior to the 1994 cervical injury. The claimant’s

testimony established that his shoulder and neck pain was the primary debilitating factor in his present condition. Therefore, we find that the respondent no. 1 has failed to prove by a preponderance of the evidence that the claimant's prior impairment combined with the recent compensable injury to produce his current disability. Therefore, we conclude that the Second Injury Fund has no liability.

The last issue to be considered is the payment of the Functional Capacity Evaluation. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the

proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The claimant has failed to prove by a preponderance of the evidence that the functional capacity evaluation was reasonable and necessary in connection with his compensable injury. The claimant has expressed no interest in returning to employment or a retraining program. The evidence demonstrates that the claimant retired and the functional capacity evaluation was not needed. Accordingly, we find that the claimant's functional capacity evaluation is not the employer's responsibility.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion. Specifically, I concur with the Majority's finding that the claimant's injury was the major cause in the wage loss disability benefits to which he is entitled. I also concur with the portion of their decision finding that the Second Injury Fund bears no liability. However, I must respectfully dissent from the portion of the decision finding that the claimant is not permanently and totally disabled and that he is only entitled to receive wage loss benefits in the amount of 20% in excess of his previously accepted 10% impairment rating. Likewise, I must respectfully dissent from the portion of their decision finding that the claimant is not entitled to medical treatment in the form of the Functional Capacity Exam.

After a careful de novo review of the testimony and the medical evidence, I find that the Majority should

have modified the decision of the Administrative Law Judge and awarded the claimant permanent and total disability benefits. In my opinion, the Majority should also have affirmed the portion of the decision awarding reimbursement of the FCE test.

The claimant performed the same job during his entire 31 year career with the Highway Department. His job was described as "parts runner." This job required him to obtain parts for Highway Department machinery whenever breakdowns occurred. In finding these parts, he might be able to obtain them at a local parts store, or he might have to travel from his duty station in Hope, Arkansas to Little Rock or even to other states. According to the claimant's testimony, the job required heavy lifting when the part was large. For example, his 1990 injury occurred while moving a 55 gallon drum of fuel. The job also required extensive driving. As indicated above, the driving might be to a local parts store, but often the trips were 100 miles or more.

After his 1990 back injury, the claimant returned to work after a few weeks off. His doctor eventually assessed him as having a 5% impairment to the body as a whole based upon the AMA Guides, Third Edition. The claimant continued to carry out his normal duties until his second compensable injury in July 1994. This injury occurred when the claimant had an automobile accident while carrying out his job duties. He was off a few weeks and later returned to work, even though he testified that his injuries continued to cause him problems. One of the claimant's biggest concerns was the pain medication he took affecting his driving ability.

The claimant testified that he continued to work as best he could in the years following his 1994 injury, but that his condition continued to worsen. Most of his complaints were related to his neck injuries. Specifically, he testified about pain in his shoulder and numbness that was occurring in his arms and hands. He also testified that

he was having an extensive amount of pain in his neck and shoulder as well as a loss of motion.

As his condition deteriorated, the claimant sought medical treatment from several different physicians. Eventually, the claimant underwent a cervical MRI and a CT myelogram which documented a progression of the claimant's cervical disc condition at C6-C7 and demonstrated that there was a degree of spinal cord compression. For treatment of this condition, the claimant was eventually referred to Dr. Steven Cathey, a Little Rock neurosurgeon. Dr. Cathey, indicated in a letter report dated April 7, 2003, that the claimant's recent studies, when compared with his 1994 cervical MRI indicated a significant progression from his disc condition and recommended the claimant undergo a cervical fusion at the C6-C7 level. This procedure was performed by Dr. Cathey on April 23, 2003.

Following his cervical surgery, the claimant attempted to return to work. He testified that he worked about five or six days and found that, because of the pain

and other physical limitations, he was unable to perform his job duties. He stated that he returned to Dr. Cathey in an attempt to obtain additional medical treatment or pain medication but that Dr. Cathey refused to acknowledge his continuing difficulty. Eventually, the claimant returned to Dr. Michael Young, a general practitioner in Hope, Arkansas, who had treated the claimant in the past. While the claimant was able to obtain some pain medication which provided some relief, he was still unable to perform his job duties. Eventually, after he had exhausted his sick and catastrophic leave, the claimant retired from the Highway Department.

In addition to his testimony, the claimant also offered the testimony from some of his former co-employees and his wife. Charles Varner and Donald Donaldson both testified that they worked with the claimant and had observed his inability to carry out his job duties because of his increasing symptoms. Both of them acknowledged that prior to his retirement, he had been an outstanding employee who had performed his job in an exemplary manner. Also

included was a letter from William Tyler, another co-employee who had been the claimant's immediate supervisor. Mr. Tyler commented on what a fine employee the claimant had been and stated that he had advised him to apply for disability or retirement because of his inability to perform his job. The claimant's wife, Cindy Parks, also testified as to the debilitating effects of the claimant's condition.

The claimant also underwent a Functional Capacity Examination at his own expense. The report resulting from this evaluation indicated that the claimant gave a good faith, maximum effort and that the results were valid. The evaluator was of the opinion that the claimant's work capacity was in the light category. That is, he was limited to the occasional lifting of 20 pounds and no more than 10 pounds frequently.

I believe the evidence in this case clearly establishes that the claimant has suffered a significant amount of disability so that he is unable to return to his former employment or any other gainful occupation. For that

reason, I find that he is permanently and totally disabled and is entitled to disability benefits accordingly.

In my opinion, the Majority's finding that the claimant had no motivation to return to work is in error. The courts of this state have made it very clear that a claimant's voluntary retirement does not, in and of itself, act as a bar in the receipt of wage loss disability benefits. This issue was dealt with in Curry v. Franklin Electric Company, 32 Ark. App. 168, 798 S. W. 2d 130 (1990). In that case, the claimant had, subsequent to her injury, voluntarily retired and had begun receiving Social Security retirement benefits. The Commission found that, in so doing, the claimant had removed herself from the job market and that she had not therefore, sustained any wage loss disability. The Court of Appeals reversed and remanded the case back to the Commission, holding that while receipt of such retirement benefits could be a factor considered by the Commission in determining an award of wage loss, it did not act as an actual bar to the receipt of such benefits. In

reaching that conclusion, the Court of Appeals relied upon MM Cohn Company v. Haile, 267 Ark. 734, 589 S. W. 2d 600 (1979), in which the Supreme Court considered a similar issue and also held that being eligible for, or receiving, Social Security benefits was not an exclusion as to the receipt of other workers' compensation benefits.

My review of the record convinces me that the claimant would not have ceased his work for the Highway Department if not for the disabling aspects of his injuries. As both he and his wife testified, he had a strong financial interest in continuing working. Prior to undergoing his cervical surgery, the claimant had already entered into his employer's DROP plan and was accumulating funds in that account. By stopping employment when he did, he substantially reduced the amount of funds he would have had to finance his retirement. Also, by continuing working, he would have brought himself closer to the time in which he could begin drawing Social Security retirement benefits to further enhance his retirement income. I also note that

following his 1990 and 1994 injury, the claimant returned to work as soon as possible (in both instances only a few weeks after the injury) and he continued working and performing essentially the same duties he had prior to his injuries. Further, based upon the testimony of his co-workers, Mr. Donaldson and Mr. Varner, as well as letters from Mr. Tyler and Mr. Donaldson, it was obvious that he continued working in spite of significant difficulties. It seems to me, this particular claimant was highly motivated to remain in the work force and would not have ceased his employment if he had been able to continue working.

Strangely enough, the Majority reaches the same conclusion, but then states that, "the claimant is no longer motivated to return to work." I find this conclusion odd in that I don't see how a claimant can be both highly motivated and unmotivated at the same time. I believe that the claimant's actions prior to 2003 clearly indicate that he did everything he could to remain a functioning employee of the Highway Department. I believe that it is unfair to

conclude that just because the claimant was no longer working, he was unmotivated. Using that reasoning, no seriously disabled worker could establish their entitlement to permanent and total disability benefits because it would be found that, since they are not working, they are not motivated. Clearly, an employee, such as the claimant, should not automatically be denied permanent and total disability benefits because they are not able to work, since being unable to work is a prerequisite to being totally disabled.

The facts of this case leave me firmly convinced that this claimant is not capable of returning to any form of gainful employment. He attempted to return to his past job and was unable to do so because of the pain, radicular symptoms, and loss of movement in his neck. Further, his employer made no attempt whatsoever to provide him with any type of modified duties, nor have they made any attempt to offer him job placement or any other assistance in finding new employment. Also, considering that he has a limited

education with no G.E.D., no college hours, no vocational training, no specialized certifications or licenses, and qualifications other than his experience as a parts runner for the Highway Department, and before that a truck driver and laborer. In my opinion, to find that the claimant is not permanently and totally disabled and that his entitlement to wage loss disability benefits should be reduced to 20% is to reach a decision that is in clear contradiction of the facts presented in this case.

With regard to the Majority's finding that the claimant is not entitled to reimbursement for the cost of his FCE, I find that the decision of the Administrative Law Judge should have been affirmed. In my opinion, the Majority fails to articulate any reason that the respondent is not liable for the evaluation other than their assertion that because the claimant had not attempted to be retrained or attempted to return to work.

While Functional Capacity Evaluations are not performed in every workers' compensation claim, they do

occur so often as to be considered routine. In many claims, as is the case here, an evaluation of a claimant's medical condition and how that relates to his ability to function in the workplace is critical to evaluating an injured workers' entitlement to permanent disability benefits. I also note that the Functional Capacity Evaluation was arranged by Dr. Michael Young, the claimant's treating physician. In my opinion, this was clearly reasonable medical treatment which should be the responsibility of the Highway Department.

For these reasons, I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner