

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E902248

DOUGLAS SMITH, EMPLOYEE	CLAIMANT
HAJOCA CORPORATION, EMPLOYER	RESPONDENT
TRAVELERS INS. CO., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 3, 2006

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 represented by HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed March 23, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 8, 1999, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on February 8, 1999.

4. The claimant is entitled to a weekly compensation rate of \$375.00 for temporary total disability and \$281.00 for permanent partial disability.

5. All temporary total disability has been paid.

6. The respondents have accepted and are paying an 11 percent whole body impairment rating.

7. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss in the amount of 11 percent over and above his 11 percent impairment rating. This would entitle the claimant to a disability rating of 22 percent to the body as a whole.

8. The respondents should pay the claimant for his additional wage loss in the amount of 11 percent to the body as a whole.

9. The respondents have controverted this claimant's entitlement to wage loss over his impairment rating.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority affirms and adopts the decision of the Administrative Law Judge finding that the claimant was entitled to 11% in wage loss benefits. That amount was in excess of a previously accepted 11% impairment rating to his back. After a de novo review of the record, I find that the claimant should be considered to be permanently and totally disabled or at a minimum, he should be entitled to receive wage loss benefits greatly in excess of the 11% awarded by the Majority.

The claimant sustained an admittedly compensable injury to his back on February 8, 1999. The injury occurred when the claimant moved heavy steel valves and suffered an injury to his back. On May 31, 2000, the claimant had laminectomies and fusions at levels L4-5 and L5-S1. The claimant had ongoing difficulties with his back after the surgery. On September 7, 2001, the claimant had a second surgery to remove hardware from the first surgery.

On July 25, 2003 a Functional Capacity Examination (FCE) was conducted. The Summary Report of the FCE indicated that the claimant had given full physical effort on the exam. The report further indicated that the claimant would not be able to lift items in excess of eight pounds and that he could not lift overhead. The report provided that the claimant would be able to do work classified as Sedentary. However, he would also need to change positions from sitting to stand frequently. Lastly, the report noted that the claimant was, "unable to work in a forward bent position or in a static standing position," and that he moved slowly and had to stop at one point.

The claimant testified that he returned to work after his initial injury, but subsequently ceased working before his first surgery. The claimant also said that he has not returned to work or attempted to locate work since his surgeries. He indicated this was due to ongoing pain and an inability to return to his previous profession.

Since his surgeries, the claimant has continued to suffer from pain in the back and has received care from a

pain specialist in treating his back. On November 13, 2003, the claimant's treating physician, Dr. Richard E. McCarthy, indicated the claimant had sustained an 11% rating and that he had reached maximum medical improvement.

At the time of the claimant's admittedly compensable injuries, he was approximately 38 years old. At the time of the hearing he was 43. The claimant is a high school graduate with work experience as a truck driver and as a heavy machine operator. For the 10 to 12 years prior to his injury, the claimant worked as a tractor-trailer rig driver. Before that the claimant worked as a heavy machine operator. More specifically, the claimant operated equipment such as dozers. The claimant has no other work experience.

The claimant testified that he volunteers at the Red Cross, which is approximately a ten mile drive. It is unknown how much time he spends volunteering, but it appears he answers the telephone, calls people, and cleans mannequins used for first-aid cases. The claimant indicated that he can currently sit for around 30 to 45 minutes before needing to stand. He further indicated that after driving

around one hour he would need to stop. Lastly, he indicated that in an eight hour period he would need to be off his feet approximately half the time. At the time of the hearing the claimant was taking Ultracet for pain two to three times per day.

The claimant's wife testified that the claimant would attempt to perform various chores around the house, however, he would be unable to complete them. As a result, she or her son would have to help him complete the tasks.

The sole issue on appeal is the extent of the claimant's entitlement to permanent disability benefits. In my opinion, the medical records and the claimant's testimony show that the claimant has been rendered unable to return to work in any capacity. Accordingly, I would have awarded the claimant permanent and total disability benefits or at the very least awarded him wage loss benefits greatly in excess of those awarded by the Majority.

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.

In the present case, the claimant has a clear history of performing hard manual labor in the form of working as a truck driver and as a heavy machine operator. There is no evidence in the record indicating that the claimant would be able to return to that type of profession. Instead, the record shows that the claimant's ability to return to work has been severely hindered and that at best he would be capable of performing sedentary work. I further note that even if the claimant performed sedentary work, he has no experience performing that type of work and would still require many modifications in order to comply with his physical restrictions. In my opinion, it is unlikely he will find work complying with those restrictions.

The FCE on the claimant showed that the claimant is only capable of performing work that is sedentary in nature. The FCE further restricted the claimant from doing

any work requiring overhead lifting or lifting in excess of eight pounds. Likewise, the report indicated that the claimant had to move slowly and that he was unable to work in a forward bent or static standing position. It also noted he needed frequent breaks to alternate between sitting and standing. In my opinion, these restrictions make it unlikely that the claimant will ever be successful in gaining employment in the future. Given the claimant's age, admittedly compensable injury, education, and his current physical restrictions, I find that it is unlikely he will be able to return to work.

In my opinion, the claimant is a highly motivated individual who has attempted to do those things within his physical abilities. The claimant attempted unsuccessfully to return to work after his initial injury. His wife also testified he currently attempts to do chores around the house only to fail. Likewise, he volunteers his time to a charitable organization, an activity that is certainly indicative that he is an individual that is willing to work. While I acknowledge that the claimant is currently able to

volunteer, there is no evidence in the record indicating how much time the claimant spends volunteering. Furthermore, in my opinion, the fact that the claimant is willing to donate his time to a charitable organization shows that he has a desire to do those things within his physical restrictions, especially since he is receiving no monetary compensation.

At best the claimant is capable of performing sedentary work that is sporadic in nature, does not require him to work in a bent position, and allows him to alternate between sitting and standing as needed. Even if the claimant, who has no work experience in that area of work could find a job, there is no evidence that he would be able to replace the income that he was making at the time of his injury. Considering the claimant's high weekly wage of \$562 at the time of the injury, I find that it is unlikely he would be able to find work that would replace that income.

In conclusion, after considering the claimant's prior education, his age, his work experience, and his current physical limitations due to his admittedly compensable injuries, I find that the Majority grossly

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underestimates the claimant's entitlement to wage loss benefits. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner