

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F411620

CARL L. WALDEN, EMPLOYEE	CLAIMANT
CENTRAL UTILITY PIPELINE, EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, CARRIER	RESPONDENT

OPINION FILED MARCH 2, 2006

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

Claimant represented by HONORABLE ROBERT BLATT, Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant was entitled to wage loss disability benefits in the amount of 40% in addition to his 20% permanent anatomical impairment rating. Based upon our de novo review of the record, we hereby modify the Administrative Law Judge's award to reflect that the claimant is entitled to a 20% loss in wage earning capacity in addition to his 20% permanent anatomical impairment rating.

The claimant was 74 years old at the time of his injury and has done construction work all of his working life. The claimant had been employed by the respondent employer for approximately 19 years as a working superintendent. The claimant explained that this required him to do the same manual labor as the people he supervised. The heaviest thing that the claimant lifted was probably a hundred pounds. The claimant sustained an admittedly compensable cervical injury on April 14, 2004, when he was rear ended in a motor vehicle accident. The claimant ultimately underwent a cervical fusion at C5-6 and C6-7 and was assigned a 20% permanent anatomical impairment rating. The claimant requests wage loss disability benefits in excess of his permanent anatomical impairment rating.

Since the claimant has recovered from his injury, he started working for the Wilburton Housing Authority in Wilburton, Oklahoma. He works four hours a day in general maintenance which involves putting in light switches, sewer maintenance and things that he stated were "pretty easy" in comparison to the work he was doing at the time of his

injury. He stated that the heaviest thing he was required to lift weighed approximately 25 pounds. The claimant is making \$8 an hour. It is of note that at the time of his injury the claimant was also receiving social security retirement benefits because he took early retirement at age 62.

The claimant testified that he did not think he could physically go back and do the work he was doing at the time of his injury. After the claimant was released by his surgeon, he did not even attempt to work for the respondent employer and he never asked the respondent employer or the respondent carrier to provide him with some type of job placement assistance or vocational rehabilitation assistance.

The medical records also support the conclusion that the claimant could attempt to do his previous work. In a July 26, 2004, report, Dr. Letcher, the claimant's treating physician, noted that the claimant was doing "extremely well" with "excellent stability to the fusion sites." According to Dr. Letcher, the claimant was told at that time he was entirely free of all physical restrictions.

By the time of a November 17, 2004, visit, the claimant was complaining of increased pain. Dr. Letcher was unable to explain the increase in pain but he stated that "this pain is not due to something that happened at the time of his original auto accident." In his last medical report dated January 31, 2005, Dr. Letcher reiterated stating that he did not have an explanation for the claimant's increase in neck pain.

The record is void of any evidence that the claimant was assigned any permanent lifting restrictions. Dr. Letcher, as soon as June 23, 2004, noted that the claimant could increase his level of activity back to normal but restrain from heavy physical labor and athletics. Subsequent medical reports have noted that the claimant was free from all physical restrictions.

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).

When we consider the claimant's age, education, work experience, medical evidence and all other factors affecting wage loss, we find that the claimant is only entitled to a 20% loss in wage earning capacity. The claimant was released from Dr. Letcher without physical limitations. He has never looked into vocational rehabilitation or job placement. His medical restrictions are based upon his own conclusions regarding his capability and not any restrictions placed on him by his treating physicians. Accordingly, we find that the claimant is only entitled to a 20% loss in wage earning capacity in addition to his 20% permanent anatomical impairment.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the Majority's Opinion modifying the Administrative Law Judge's award of wage loss benefits. After a de novo review of the record, it is my opinion that the Administrative Law Judge's award of 40% in wage loss benefits should be affirmed and adopted.

At the time of the hearing, the claimant was seventy-four(74)years old. He has worked primarily in the construction industry his entire adult life, in which heavy manual labor was required. Claimant was an employee of respondent employer for more than eighteen (18) years prior to April 14, 2004. Although claimant was considered to be a working superintendent, he was required to perform strenuous activities, including the lifting of pipe fittings weighing up to one hundred (100) pounds on a frequent basis. Claimant was a salaried employee, earning \$650.00 per week. Claimant was also receiving social security early retirement since the age of sixty-two(62).

Claimant sustained a cervical injury in a work-related motor vehicle accident on April 14, 2004. His primary treating physician has been Dr. Frank S. Letcher, a neurosurgeon in Tulsa, Oklahoma. Claimant required an anterior diskectomy and fusion at C5-6 and C6-7. It was stipulated at the hearing that claimant's healing period ended on July 26, 2004.

Dr. Letcher opined that x-rays reflected excellent stability to the fusion sites and permitted the claimant to return to work free of physical restriction. However, it is apparent from Dr. Letcher's June 23, 2004 report, that claimant was permitted to increase his level of activities back to normal with the exception of heavy, physical labor and athletics. It is equally clear from the claimant's job description that his work with the respondent employer involved heavy manual labor.

Accordingly, the claimant exercised good judgment by not returning to work for the respondent employer. It should be noted that the claimant was not offered a job or

vocational rehabilitation assistance from the respondent employer.

Claimant did show a strong work ethic by seeking to obtain work on his own. At the time of the hearing, claimant was employed by Wilburton Housing Authority in Wilburton, Oklahoma performing light duty, general maintenance. Claimant stated that he was not required to lift more than twenty-five (25) pounds at his current job and is now earning \$8.00 per hour working only part-time (20 hours per week). Claimant testified that because of pain in his neck and taking medication, he was unable to work full time for the Wilburton Housing Authority. It would also be reasonable that the claimant should avoid overhead work in light of his multiple level fusion.

Claimant sustained an injury to that portion of his body which is not scheduled under the Workers' Compensation Act. Therefore, claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury

incapacitates a worker from earning the wages which he was receiving at the time of his injury. When making a determination concerning the degree of a permanent disability sustained by the injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as a worker's age, education, work experience and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685(1961); Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130(1990); Cross v. Crawford County Mem. Hosp., 54 Ark. App. 130, 923 S.W.2d 886(1996). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a living at that time, he is entitled to compensation for permanent and

total disability. Minor v. Poinsett Lumber & Manf. Co., 235 Ark. 195, 357 S.W.2d 504(1962). There was not a request by the respondents to have the claimant undergo a functional capacity evaluation if they felt like he could do other work than that which he found on his own. Further, claimant did not seek, and respondents did not provide the services of a vocational rehabilitation consultant to determine the claimant's vocational potential.

In view of claimant's advanced age, seventy-four(74), his prior work experience, his significant physical impairment, and his restrictions against heavy lifting, it appears that the claimant, on his own, secured suitable employment, earning substantially more than minimum wage, yet significantly less than the wages he was earning at the time of his compensable injury.

For the foregoing reasons, it is my opinion, that the Administrative Law Judge's award of 40% in wage loss benefits should be affirmed and adopted.

SHELBY W. TURNER, Commissioner