

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407747

JOHN T. WOODS, EMPLOYEE	CLAIMANT
CARTER & COLE TIRE SERVICE, INC., EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INSURANCE CO., INSURANCE CARRIER, AIG CLAIMS SERVICE, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PTD TRUST FUND	RESPONDENT NO. 3

OPINION FILED AUGUST 30, 2006

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

Claimant represented by the HONORABLE MARC I. BARETZ,  
Attorney at Law, West Memphis, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL  
LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 did not appear at hearing before  
Administrative Law Judge.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

Respondents No. 1 appeal and claimant cross appeals  
an opinion and order of the Administrative Law Judge  
filed January 31, 2006. In said order, the

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

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. At the time of claimant's admitted compensable injury, his average weekly wage was \$657.77 per week, entitling him to compensation rates of \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability.
4. The claimant has failed to establish, by a preponderance of the credible evidence, that he is permanently totally disabled within the meaning of the Arkansas Workers' Compensation Laws.
5. The claimant has established, by a preponderance of the evidence, that, in addition to his admitted anatomical impairment of thirteen percent (13%) to the body as a whole, he also sustained a wage-loss disability of forty percent (40%) to the body as a whole, for an overall permanent partial disability of fifty-three percent (53%) to the body as a whole.
6. All of the claimant's permanent disability is directly and causally related to the July 15, 2004, admitted injury.
7. The Second Injury Fund does not have any liability in this claim.
8. Respondents #1 initially paid indemnity benefits at the erroneous compensation rate of \$347.00 per week from July 16, 2004, through December 16, 2004, at which time, through the efforts of claimant's attorney, the erroneous compensation rate was corrected and a lump sum payment made to offset the improper compensation rate. Respondents #1

controverted the accrued underpayment from July 16, 2004, through December 16, 2004, entitling claimant's attorney to a controverted attorney's fee on the accrued underpayment. Respondents #1 did not controvert the difference in the compensation rates after December 16, 2004, at which point it brought the claimant's benefits current.

9. It is undisputed that respondents #1 have controverted all wage-loss disability in this claim.

10. Respondents #1 are entitled to a credit for overpayment of indemnity benefits since December 16, 2004, having paid benefits at the maximum compensation rates rather than the proper compensation rates of \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability, respectively.

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 January 31, 2006 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney 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 in the majority's finding that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled, the finding that the respondents did not controvert the difference in the compensation rates after December 16, 2004, and the finding that the respondents are entitled to a credit for the overpayment of indemnity benefits. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a 40% loss in wage earning capacity in addition to his 13% anatomical impairment rating. In my opinion, the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury on July 15, 2004. The respondents have paid all appropriate benefits, including a 13% permanent impairment rating. The Administrative Law Judge awarded a 40% loss in wage earning capacity and the majority has affirmed this award. In my opinion, the

claimant cannot prove that he is entitled to any wage loss disability benefits.

The evidence demonstrates that the claimant has been released to return to light or moderate duty work more than a year ago. The claimant has extensive knowledge in automobile mechanics, but he has made absolutely no attempt whatsoever to return to work. At the hearing, the claimant testified to his current capabilities:

Q. [Ms. Worley] Okay. Now, you've talked to your attorney a little bit today about things that you do during the day and things you're able to do and not able to do. I kind of went through your deposition and the medical records and the information in the file. I mean, it looks like you're able to do your own shopping, is that correct?

A. [Claimant] Yeah - - well, sometimes, yes.

Q. And you drive?

A. Yes.

Q. You drive a car?

A. Yeah.

Q. Still have a valid driver's license?

A. Yeah.

Q. Do you still have your valid CDL license?

A. Yes.

Q. Okay. How long has it been valid?

A. I've had it ever since I first got it.

Q. Okay. You do your own cooking? You can do at least some - -

A. No.

Q. - - of your own housework?

A. Well, sometimes I do - -

Q. Okay.

A. - - not all the time.

Q. Okay.

A. Most of the time my girlfriend does.

Q. Okay. You talked about staying with your girlfriend. How often do you stay with her?

A. Pretty often.

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Q. Let's see. You also, I think, in your deposition said you ran around and hung with your buddies. What does that mean?

A. Just sometimes we go riding around or whatever.

Q. Go hanging out?

A. Yeah.

Q. I think the day before the deposition you had even gone fishing, is that right?

A. Yeah.

Q. That was in October of this year?

A. Uh-huh.

Q. You need to say yes for the record.

A. Yes.

Q. I think you indicated you caught about 35 crappie?

A. Yep.

Q. Okay. Have you been fishing again since then?

A. No.

Q. Were you bank fishing or boat fishing?

A. Boat.

Q. You able to read and write okay?

A. Yes.

The claimant further testified that he has made absolutely no attempt to further his education or to work while he has all this spare time. Admittedly the claimant dropped out of school in the tenth grade, but as his sister testified to, the claimant is smart. The claimant stated at the hearing:

Q. [Ms. Worley] In the last six months since you were released by Dr. Olinger, have you made any effort at all to return to work?

A. [Claimant] No, we don't have no light duty.

Q. And I'm not talking specifically about where you were working. Anywhere, have you made any effort to look for any work anywhere?

A. No. I mean, I can't with all the pain.

Q. And I believe when your deposition was taken in October of last year, 2005, you indicated that you didn't think rehabilitation or job placement assistance would be very successful, is that correct?

A. What do you mean?

Q. Retraining to some other type of job?

A. Well, I mean, you know, I don't know that. I mean, you know, it depends on what it would be, I guess. I - -

Q. Have you made any effort to find any retraining program or rehabilitation program to change job careers since July of 2005?

A. No.

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Q. I assume also since you've been in the mechanics field for quite some time according to your testimony, you're rather familiar with parts and stuff like that that cars or trucks or automobiles would have, is that correct?

A. Yes.

Q. So as far as being able to identify those, someplace that you would probably have a lot of knowledge in is a parts supply store, is that correct?

A. Uh-huh, well, yes.

Q. If somebody would come in and say, "I need a gasket," you wouldn't go, "I don't know what a gasket is," is that correct?

A. Well, no, I wouldn't say nothing like that.

Q. You would know what a gasket was?

A. Well, yeah.

Q. And if they needed that, you could get that for them, is that correct?

A. Yes.

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 my opinion, a review of the evidence demonstrates that the claimant lacks motivation to return to work. The claimant says he wants to return to work, but all the evidence in the record is to the contrary. The claimant has made no effort whatsoever to further his education or to find a job although he was released to return to work on April 27, 2005, for light to moderate work. Simply put, I cannot find that the claimant is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of 40% loss in wage earning capacity in addition to the claimant's 13% permanent anatomical impairment rating. In all other regards, I concur in the majority's findings.

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KAREN H. MCKINNEY, Commissioner