

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210837

JOHN COLEMAN,  
EMPLOYEE

CLAIMANT

PRO TRANSPORTATION,  
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

ORDER FILED JULY 30, 2007

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

Claimant represented by the HONORABLE KEVIN ODUM, Attorney  
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD  
WORLEY, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

In an opinion filed March 14, 2006, the Full Commission found, among other things, that the claimant proved he was entitled to a 4 ½ % anatomical impairment rating and wage-loss disability in the amount of 10%. The Arkansas Court of Appeals has reversed the Full Commission's findings and has held that the claimant is entitled to an 11% anatomical impairment rating. The Court of Appeals directs the Commission "to consider the wage-loss award in light of the

increase in light of the increase in Coleman's anatomical rating." See, *Coleman v. Pro Transportation, Inc.*, CA06-525 (Feb. 7, 2007).

In considering claims for wage-loss disability, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as "the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. §11-9-522(b)(1). In the present matter, the Court of Appeals has held that the claimant is entitled to an 11% anatomical impairment rating. The claimant is now only age 53 and has two years of college credits. The claimant sustained a compensable injury in September 2002. The respondents provided light-duty work for the claimant, available beginning December 2002, but the claimant did not avail himself of this opportunity for gainful employment. The claimant's demonstrated lack of interest in cooperating with the respondents is an impediment to a full assessment of the claimant's wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The claimant testified at the September 2004 hearing that he was working at Lowe's. Based on the claimant's age, education, work experience, lack of motivation to return to work for the respondents, and the 11% physical impairment assigned by Dr. Prychodko, the Full Commission finds that the claimant sustained wage-loss disability in the amount of 25%.

Pursuant to the remand from the Arkansas Court of Appeals and the record before us, the Full Commission finds that the claimant proved he was entitled to an 11% anatomical impairment rating and wage-loss disability in the amount of 25%.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner Hood concurs in part and dissents in part.

CONCURRING & DISSENTING OPINION

I respectfully concur with the principle decision to the extent that it awards the claimant wage loss benefits in the amount of 25%. However, I cannot agree with the decision to deny benefits in excess of

the amount of 25%. Therefore, I respectfully concur, in part, and dissent from the principle opinion.

At the time of his injury, the claimant was employed as an over-the-road truck driver earning in excess of \$47,000.00 per year. Following his injury, he was off work for an extensive period of time because of limitations placed upon him by his physician. However, in late September 2003, he was released to return to work and given a list of restrictions. Even Dr. Moore, a consulting physician chosen by the respondent, opined that he would not be able to return to his duties as a truck driver. In fact, Dr. Moore recommended, in his letter of November 11, 2003, that the claimant could only return to work as a dispatcher.

Testimony regarding the claimant's possible return to work for the respondent was provided by Jim White, the Safety Director of the respondent employer at the time of the claimant's injury. According to Mr. White, while the respondent did have a light duty work program, these were only intended as temporary jobs and the respondent did not have any permanent jobs for the claimant to return to given his restrictions.

Given the claimant's background, it is obvious to me that he is not going to be able to return to any employment with an income anywhere near his pre-injury wages. The claimant's educational level includes a GED and two years of college. However, he has no academic degrees, nor any vocational education or certification other than a commercial driver's license. All of the claimant's past employment required heavy lifting and other activities precluded by his medical restrictions. In short, the claimant, who is presently 52 years of age, has no specialized training or job skills that would permit him to readily find other employment anywhere near the salary range he had prior to his injury. However, because he had no other source of income, the claimant sought employment shortly after being released by Dr. Prychodko. As the claimant testified at his hearing, he applied for employment at numerous locations and finally found work through a temporary employment agency at a neighborhood Lowe's store. By the time of the hearing, he had become a full-time employee of Lowe's and was earning approximately \$8.25 per hour.

Obviously, the claimant's income has been significantly reduced as a result of his compensable injury. While the respondent asserts that he could find higher paying jobs using his commercial driver's license, there is no evidence of this other than the respondent's assertion. In this regard, I note that the claimant, who is obviously motivated to return to work, would have sought and obtained a higher paying job if he had been able to do so. This Commission has frequently penalized claimant's because of what is called a "lack of motivation" when they have not returned to work at the time of the hearing. In this case, this claimant had sought and obtained custodial employment at a Lowe's store in which he spends the day dusting shelves, moving shopping carts, and performing similar tasks. These duties are within what the doctor prescribed for him and, unfortunately, this employment provides an income of approximately one-third of what he was earning prior to his injury.

The issue to be decided here is whether the claimant, because of restrictions from his compensable injury, is able to return to his former wage earning

capacity. Both Dr. Prychodko, the claimant's treating physician who is most familiar with his case, and Dr. Moore, the consulting physician chosen by the respondent, were of the opinion that the claimant could not return to his truck driving duties. Further, it was opined, based upon the claimant's FCE and the opinion of his doctors, that the claimant could only work in a medium category. This includes the type of activity he was undertaking in his custodial job at Lowe's.

While it is true that the claimant can perform activities sufficient to carry out his employment duties at Lowe's, the actual limitations placed upon him preclude him from finding the types of jobs with an earning potential comparable to truck driving. Quite simply, the claimant is unlikely to find a custodial job or similar employment that pays \$47,000.00 per year. Most likely, his job future will be with employment similar to what he has obtained now which are paying him substantially less than \$20,000.00 per year. In my opinion, that is sufficient evidence to establish that the claimant has sustained a wage loss in the amount of

at least 45% in excess of the claimant's anatomical rating.

Accordingly, I respectfully concur, in part, and dissent, in part.

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a wage-loss disability in the amount of 25%. Based upon my *de novo* review of the entire record and after consideration of the opinion of the Court of Appeals, I am not persuaded to find that the claimant sustained a wage-loss disability greater than the 10% awarded by this Commission in its March 14, 2006, opinion. As we noted in our initial opinion, the respondents provided light duty employment for the claimant, but he did not avail himself of this employment opportunity. The claimant is an intelligent gentleman and he has two years worth of college credit, thus evidencing that he is capable of retraining. The claimant did not demonstrate maximum

effort in his Functional Capacity Evaluation performed on August 27, 2003, nevertheless, he was found capable of working in the MEDIUM physical demand classification. Merely because the claimant is now found to have sustained an 11% physical impairment rating does not change my finding that the claimant sustained a 10% wage-loss disability. The impairment rating is but one factor to be considered. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner