

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403213

PAUL HARP, EMPLOYEE	CLAIMANT
ATLANTIS PLASTICS, INC., EMPLOYER	RESPONDENT
FIRST LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 29, 2007

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

Claimant represented by the HONORABLE LAURA MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE JEFFERY RICKARD, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed December 14, 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 of this claim.
2. On January 9, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On January 9, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$212.00 for total disability and \$159.00 for permanent partial disability.

4. On January 9, 2004, the claimant sustained a compensable injury to his low back in the form of a herniated disc with free fragment and resulting radiculopathy.

5. There is no dispute over the claimant's entitlement to reasonably necessary medical services at the respondents' expense and all such services accruing to date have or will be paid.

6. There is no dispute over the payment of temporary total disability benefits, and all such benefits accruing to date have been paid.

7. The claimant's healing period from the effects of his compensable injury ended on or about June 28, 2004.

8. The claimant has experienced a permanent partial disability of 18% to the body as a whole, as the result of the permanent effects of his compensable lumbar injury. This includes a permanent partial disability of 8% for permanent physical impairment and a permanent partial disability of 10% for permanent functional disability or loss of wage earning capacity.

9. The claimant is not prevented from receiving permanent partial disability benefits for permanent functional disability or loss of wage earning capacity by the provisions of Ark. Code Ann. §11-9-522(b)(2). Specifically, on and after August 2, 2004, the respondents had not returned the claimant to employment at wages equal to or greater than his average wage at the time of his accident. When the respondent returned the claimant to his preinjury position as a forklift driver, the respondent did not returned [sic] the

claimant to suitable employment that was within his physical restrictions and limitations caused by his compensable injury. When the respondent subsequently transferred the claimant to the "heat stake" position, which required him to fill in as a machine or press operator, the respondent did not return the claimant to suitable employment that was within his physical restrictions and limitations. When the claimant refused to continue to perform the "heat stake" position, including filling in as a machine or press operator, in October of 2004, such a refusal did not represent misconduct in connection with the work and did not represent a voluntary cessation of work by the claimant without good cause connected with the work.

10. The claimant has failed to prove by a preponderance of the evidence, that he is entitled to the additional benefits provided by Ark. Code Ann. §11-9-505(a). Specifically the claimant has failed to prove that the respondent had available suitable employment that was within his physical restrictions and limitations.

11. The respondent has denied the claimant's entitlement to any permanent partial disability benefits for permanent functional disability or loss of wage earning capacity and his entitlement to any benefits under Ark. Code Ann. §11-9-505(a).

12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted permanent partial disability benefits herein awarded for permanent functional disability or loss of wage earning capacity.

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 December 14, 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 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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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 equal to 10% to the body as a whole. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of proof.

A hearing was held on September 19, 2006, to determine the extent of the claimant's permanent functional disability; whether the claimant is entitled to benefits under A.C.A. § 11-9-505(a); whether the claimant unjustifiably refused suitable employment; and attorney's fees. With regard to these issues the claimant contended that, in addition to the benefits

already received, he is entitled to A.C.A. § 11-9-505(a) benefits, permanent partial/total disability benefits, and a controverted attorney's fee. Conversely, respondents contended that they have paid the claimant all benefits to which he is entitled; that the claimant voluntarily quit his employment on October 14, 2004, after having been released to return to work by his treating physician with permanent restrictions; and that the respondent employer offered the claimant appropriate work at an average weekly wage equal to or greater than his pre-injury wages within the restrictions placed upon the him by his treating physician at the time, but that the claimant voluntarily terminated is employment. In an opinion delivered December 14, 2006, the Administrative Law Judge found that the claimant failed to prove entitlement to benefits under A.C.A. § 11-9-505(a). The claimant did not appeal this finding. The Administrative Law Judge further found that the claimant sustained a wage loss disability equal to 10% to the body as a whole; that the respondents failed to prove that they returned the claimant to suitable employment at wages equal to or greater than his average weekly wage at the time of his injury or that the claimant's refusal to continue to perform the "heat stake" job represented

misconduct in connection with the work or that the claimant's cessation of work was without good cause. Respondents' filed a timely notice of appeal from these findings. On appeal, respondents contend that the Administrative Law Judge erred in finding that the claimant is entitled to a 10% wage loss disability. I agree with respondents.

It is undisputed that the claimant sustained a compensable injury to his lower back on January 9, 2004. The claimant underwent surgery by Dr. Joseph Queeney on March 19, 2004. On April 19, 2004, Dr. Queeney released the claimant to return to light duty work with a 25-pound lifting restriction. On June 28, 2004, Dr. Queeney found the claimant to have attained maximum medical improvement and released him with a permanent lifting restriction of no greater than 50 pounds.

At the time of his injury, the claimant was employed as a forklift operator. After his surgery the claimant returned to work in a light duty capacity and was assigned to "heat stake". After being released with a permanent restriction of no lifting over 50 pounds, the claimant was returned to the position of forklift operator. Later the claimant was placed back on the "heat stake" where he was occasionally asked to fill in

as a press operator when they were short staffed. Claimant testified that he could operate some of the presses, but that others required him to bend over too much causing his back to swell and cause pain. When this would happen, the claimant explained that he would tell his supervisor or the MO Tech that he was hurting and needed to go home and that he was never refused this "request."

With regard to the claimant's rate of pay, the claimant testified that he was earning \$8.61 per hour and that he was dropped to \$8.23 per hour when he was removed from the forklift to the "heat stake" after his surgery. Respondents requested and were granted permission to leave the record open after the hearing to submit the claimant's payroll records into evidence. The claimant did not have any objection. Via correspondence dated September 21, 2006, counsel for respondents transmitted the claimant's payroll records to the Administrative Law Judge with a copy to counsel for claimant. These records were marked as received by the Fort Smith Workers' Compensation office on September 22, 2006; however, these records were not marked as having been admitted into evidence as was indicated and permitted during the hearing. Thus, it does not appear

as if the Administrative Law Judge took these records into consideration in rendering his opinion. As per the intent of the parties, these payroll records have been Blue-backed and admitted into evidence as Respondents' Exhibit No. 2. A thorough review of these payroll records clearly indicate that the claimant was earning \$8.36 per hour in January 2004 when he sustained his compensable injury. It was not until the claimant returned to work after his surgery that the claimant's pay was increased to \$8.61 per hour as reflected in the pay stub for the week ending March 13, 2004. The claimant's base pay decreased to \$8.23 per hour beginning with the pay period ending August 14, 2004.

The claimant contends that the last day he worked for the respondent employer was either October 18<sup>th</sup> or 19<sup>th</sup>. With regard to his alleged termination, the claimant testified that he left work early one day because the work was causing him pain and that:

I come in the next time my shift was to come to work; Mike Lewis met me at the door; he said, "I want to see you at my office." I said, "Okay." He got on his radio, called for Richard, the MO tech, to meet him up in the office. He went up there and said, "You're fired. Here's your check, and here's your vacation pay."

With regard to the claimant's cessation of employment, Respondents presented the testimony of the two people who the claimant alleges were present when he was fired. Mike Lewis, the claimant's supervisor in October of 2004 testified that he did not fire the claimant. According to Mr. Lewis, the claimant's employment ended because the claimant walked off the job and did not return to work. Mr. Lewis corroborated the fact that he spoke with the claimant in his office about running the press, but he denies firing the claimant or handing the claimant his paycheck or vacation pay check. Contrary to the claimant's testimony, Mr. Lewis testified that he was present on the day the claimant left work early and, in fact, spoke with the claimant in his office about the claimant not wanting to run the press. In this regard, Mr. Lewis testified that after he assigned the claimant to operate a press, the claimant attempted to run the press, and later came to him and stated, "I can't do it" and walked out.

Likewise, Richard Foster, the MO technician, testified that he was present when Mr. Lewis spoke to the claimant about running the press. In this regard, Mr. Foster explained that whenever an employee leaves the floor and goes into the supervisor's office, it was

common practice to have a witness in the office with them. Mr. Foster testified that the claimant was not terminated during this conversation, and he never recalled seeing the claimant again after that meeting.

The record is unclear as to when the claimant last worked for respondents. However, the claimant believes it to have been either October 18<sup>th</sup> or 19<sup>th</sup>. The record is further unclear with regard to whether the claimant had any scheduled days off after the last time he "walked off" the job early. However, if the claimant's story is to be believed, then he was permitted to leave early, and that when he came back to work, he was met at the door, fired, and handed his last paycheck and vacation time check. While Mr. Foster's testimony is not real clear as to the full extent of the conversation when he was called as a witness, he was unequivocal in the fact that the claimant was not fired at that time. Likewise, Mr. Lewis adamantly denied firing the claimant, explaining that the claimant's employment ceased when the claimant walked off the job and never returned to work. When I review the payroll records, I am inclined to find that Mr. Lewis's and Mr. Foster's testimony is entitled to greater weight. The payroll records reveal that the claimant was paid on

October 28<sup>th</sup> for 28.75 hours of work for the pay period ending October 23, 2004. A check was also issued on October 28, 2004, for 59 hours of vacation time. A second check for 21 hours of vacation time was issued on November 1, 2004. Assuming the claimant walked off the job on Tuesday, October 19<sup>th</sup>, and that he returned to work on his next scheduled work day and was handed his last payroll and vacation time check, the claimant would have been scheduled off for eight days, before returning to work on Thursday, October 28, 2004, the date these checks were issued. There was no testimony that the claimant worked one week on, one week off. On the contrary, the evidence revealed that the claimant usually worked at least 76 hours every two weeks, with occasional overtime. Likewise, the claimant's account fails to explain why he received a second check for overtime pay dated November 1, 2004. Accordingly, based upon the credible evidence of record, I find that the claimant was not fired, but voluntarily terminated his employment with respondent when he walked off the job.

The next issue then becomes, whether the claimant justifiably terminated his employment with respondents. Although the claimant testified that he tried to return to the Cooper Clinic after he was

released by Dr. Queeney, and was told he needed to obtain authorization, I do not find this testimony to be credible. The claimant clearly took action on his own behalf when he felt that he was in too much pain as evidenced by his walking off the job. Had the claimant been in pain, needing medical treatment, or truly seeking further care and reassessment of his physical restrictions, I find that the claimant would have taken matters into his own hands and followed up with this care. As the old adage goes, "It is far easier to seek forgiveness after the fact than permission before hand." There is no evidence whatsoever that the claimant returned to Dr. Queeney's office after he was released to return to work with a permanent lifting restriction of 50 pounds. In my opinion, I find that the claimant's actions of terminating his employment before ever seeking to discuss his restrictions with his treating physician were not reasonable or justifiable. Clearly, the respondent employer showed a willing attitude in working with the claimant on his physical restrictions. The claimant even admitted that there was nothing about any of the jobs he performed for the respondent employer that exceeded the restrictions placed upon him by Dr.

Queeney. Whenever his job required lifting beyond his limitations, assistance was always provided.

According to the claimant, it was not the lifting requirements of the press operator jobs that he was unable to handle, but the bending and stooping that caused him pain. Dr. Queeney never placed any restrictions upon the claimant's ability to bend or stoop. Granted the FCE that was performed after the claimant walked off the job recommended the claimant for Medium physical capacity work with limited prolonged positioning into bending or stooping, this restriction was not known to the respondent employer when the claimant quit work. The Administrative Law Judge stated that physical restrictions or limitations from bending or stooping "would be reasonable and logically expected from an injury such as that experience by the claimant" and expressed surprise that Dr. Queeney did not place such restrictions upon him. Whether it would be reasonable and logical to have placed such restrictions upon the claimant, the fact remains that when the claimant was released by Dr. Queeney, such restrictions were not placed upon the claimant. The respondents operated within the restrictions they were provided in assigning work for the claimant. Was this reasonable?

Yes. Did the claimant still complain of pain from the bending and stooping? Yes. Was it reasonable to just quit work because of this pain? No. Other less drastic measures should have first been pursued. Accordingly, I find that the claimant was not justified in quitting work when he did.

Finally, the issue of whether respondents provided the claimant with suitable employment must be answered. As noted above, the respondent employer consistently provided the claimant work withing the physical restrictions placed upon him by Dr. Queeney. On June 28, 2004, Dr. Queeney released the claimant to return to work for 12 hours per day with a lifting restriction of 50 pounds. The respondent employer complied with these restrictions. Therefore, I find, that given the information provided to the respondent employer at the time of the claimant's release, the respondents provided the claimant with suitable work. Hindsight is always 20/20. The FCE performed in November of 2004, reveals that restrictions of no prolonged bending or stooping were also necessary, but this information was not provided to the respondent employer by the claimant or his treating physician in June of 2004. Furthermore, once the claimant discovered that he

was having difficulty with the bending and stooping, the claimant did not take any action to obtain a modification of this restrictions. The respondents cannot be blamed for the claimant's failure to act. Again, hindsight suggests that maybe the respondent employer should have obtained an FCE when the claimant was released by Dr. Queeney, but Dr. Queeney, himself, did not order such an evaluation and he had already assessed the claimant's limitations by placing a lifting restriction upon him. Therefore, I find that the respondent employer's actions in offering the claimant employment based upon Dr. Queeney's release of the claimant without obtaining an FCE were reasonable.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 his employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that he sustained a 10% wage loss disability as a result of his compensable injury. The claimant sustained a compensable injury for which he was assessed an 8% anatomical impairment. The claimant underwent successful surgery for this injury and was released to return to work shortly after surgery. Initially the claimant was restricted from working greater than eight hours per day or lifting more than 25 pounds. However, within two months of surgery, the claimant was allowed to return to working 12-hour shifts and lifting up to 50 pounds. The claimant was able to work within these restrictions. The only complaint the claimant currently has with regard to his ability to work is that prolonged bending or stooping causes pain in his back. The FCE reveals that

the claimant is capable of working in the Medium physical capacity with limited prolonged positioning into bending or stooping. The claimant returned to work after his compensable injury earning wages at the same or even greater rate of pay than he was earning at the time of his compensable injury. However, the record reflects that the claimant's rate of pay was decreased from the \$8.36 per hour at the time of his injury to \$8.23 per hour when he voluntarily terminated his employment. This is less than 13 cents per hour. The record reflects that the claimant worked on average 38 hours per week. At 13 cents per hour for 38 hours per week, this "reduction" amounts to only \$4.94 per week. Even assuming that the claimant routinely worked overtime, this reduction does not support a finding of 10% wage loss as awarded by the Administrative Law Judge. The claimant is only 50 years old. He completed the 11<sup>th</sup> grade and half of his Senior year of High School. The claimant has held several jobs in the manufacturing industry having worked for Tucker Duck & Rubber Company and Siesta Mattress Company prior to going to work for this respondent employer. The claimant has had a good recovery from his compensable injury and surgery and was only assigned an 8% physical anatomical

impairment rating. The claimant returned to work performing the same duties he was performing prior to his injury with the exception of lifting greater than 50 pounds. Admittedly, the claimant's pay was reduced when he was moved from operating a forklift to the "heat stake" position, but that was only because the "heat stake" position was a lesser paying job, not because the claimant could not earn at his previous pay rate. The record is silent with regard to why the claimant was moved from the forklift position to the "heat stake" position. The claimant testified that he was moved to that position, but he never offered an explanation as to why. Thus, it would require speculation and conjecture to find that the move was due to the claimant's compensable injury and not some other economic reason. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The claimant is physically capable of driving the forklift. He is physically capable of running the "heat stake." And, but for the bending required with a few of the presses, the

claimant is physically capable of operating many of the presses. Accordingly, while the claimant may be restricted from currently working in any capacity that requires "prolonged positioning into bending or stooping", I do not find that this restriction has created a wage loss disability for the claimant. After consideration of the claimant's age, education, work experience, post injury work, medical condition, motivation, credibility, and all other matters which might reasonable affect the claimant's wage earning capacity, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained any wage loss disability. Accordingly, I find that the decision of the Administrative Law Judge awarding a 10% wage loss disability must be reversed. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner