

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106883

JAMES R. HENSON, EMPLOYEE	CLAIMANT
GENERAL ELECTRIC, EMPLOYER	RESPONDENT NO. 1
SEDGWICK CMSI, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 13, 2007

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

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed the Full Commission in part and has remanded for further consideration of the amount of the claimant's wage-loss disability. *Henson v. General Electric*, CA06-1356 (May 30, 2007). After further consideration, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%.

I. HISTORY

James Roy Henson, age 56, testified that he was a high school graduate. Mr. Henson testified that he was hired as a factory worker at General Electric in 1970.

The record indicates that Dr. Rebecca Barrett-Tuck performed a left L5-S1 partial hemilaminectomy and discectomy in December 1995 and a re-do left L5-S1 partial hemilaminectomy and discectomy in April 1996. Dr. Barrett-Tuck stated in July 1996, "Impairment rating recommendations for his initial disk rupture is 10%. An additional 2% should be added for his recurrent rupture which would total a 12% impairment rating to the body as a whole."

The parties stipulated that the claimant sustained a compensable back injury on June 12, 2001. The claimant testified that he heard his back pop while lifting a gear box. The claimant testified, "I got down, went straight to the nurse, walked out of GE, and that was the last time I done any work." In August 2001, Dr. Barrett-Tuck performed a lateral recess decompression L4 and L5 and discectomy L4-L5 on the left. Dr. Barrett-Tuck's postoperative diagnosis was "Lateral recess stenosis and disc rupture L4-L5 on the left."

Dr. Barrett-Tuck noted in November 2001, "Mr. Henson is a very cooperative patient and has done all that he should to try to recover from his injury."

Dr. Barrett-Tuck performed additional surgery in January 2002: "Re-do discectomy on the left, L4-L5. Posterior lumbar interbody fusion, L4-L5. Stabilization using ray-threaded cages, 16.0 x 26.0 mm. Harvest left iliac crest graft." Dr. Barrett-Tuck's postoperative diagnosis was "Severe degenerative disc disease, L4-L5 with recurrent ruptures L4-L5 on the left."

The claimant underwent a left knee arthroscopic medial meniscectomy in June 2002.

The parties stipulated that the claimant's healing period ended on October 10, 2002.

Dr. Manuel F. Carro independently evaluated the claimant in January 2003 and assessed the following: "1. Lumbar post laminectomy syndrome. 2. Neuropathic pain in the L5-S1 distribution in the left lower extremity. 3. Degenerative disc disease of the lumbar spine. 4. Lumbar myofascial pain." Dr. Carro stated, "I don't think this gentleman is currently capable of returning to the work force in any capacity at this point in time."

The claimant underwent coronary angioplasty in February 2004 and the following results were reported: "1. Coronary artery dominance is right. 2. Left main coronary is normal. 3. Left anterior descending reveals mild irregularity. 4. Left circumflex contains an in-stent restenosis in the proximal half of the stent to the obtuse marginal intermediate. In addition, there is 90% stenosis in the atrioventricular groove artery. 5. The right coronary contains 2 stents in the middle portion that are open and fine. There was some proximal spasm in the vessel relieved with nitroglycerin. 6. Left ventricular angiogram is normal."

Dr. Barrett-Tuck wrote to Yvonne L. Richard on April 28, 2004:

In regard to Mr. James Henson and his impairment ratings related to his back injuries. As you had stated he was indeed issued a 10 percent impairment rating for his first disc rupture at L5-S1 in 1996. An additional 2 percent was assigned for a second operation. In 2001 he suffered another disc rupture requiring a third operation. According to the AMA guides for evaluation of permanent impairment an additional one percent impairment rating to the body as a whole would be issued for "additional surgeries". In 2002 Mr. Henson required a single level lumbar fusion with residual symptoms. According to the AMA guidelines 4th edition, a 12 percent impairment rating is appropriate for the fusion in 2002.

In summary, 10 percent for the first lumbar laminectomy, 2 percent for the second, one percent for the third, and 12 percent for the single level fusion. All of these numbers are to the body as a whole. I last saw Mr. Henson 5/8/02 at which time he was four months post-op still having difficulty. He was referred to orthopedics for evaluation of continued knee pain and I have had suggested the possibility of pain management to Mr. Henson. It is a bit difficult for me to assign a maximum medical improvement date since I did not see him in the interim. However, in general, a fusion patient will wear a brace of some type for at least six months and I think it would be reasonable to assess maximum medical improvement at about nine months post-op. Again, you must understand, that I did not have the opportunity to actually see Mr. Henson for re-evaluation or assessment of his personal medical improvement date.

The parties stipulated that the claimant was assessed a 12% whole-body impairment.

The record indicates that Heather Naylor, a Vocational Rehabilitation Consultant, began contacting the claimant and identifying job opportunities in about December 2004.

A pre-hearing order was filed on April 7, 2005. The claimant contended, among other things, that he was permanently totally disabled or, alternatively, that he had sustained "substantial wage-loss disability in excess of the thirty-five percent (35%) to the body as a whole which has been acknowledged by respondent #2[.]" Respondent No. 1

contended, among other things, that "any wage-loss disability over and above the twelve percent (12%) impairment rating is the responsibility of respondent #2....Respondent #1 maintains that any and all wage-loss is the responsibility of respondent #2, including, but not limited to the thirty-five percent (35%) accepted by the Fund."

Respondent No. 2 contended, among other things, that "the Fund stands ready, willing, and able to pay the thirty-five percent (35%) wage-loss disability which it maintains is appropriate based upon the facts of this claim. Respondent #2 concedes that if any wage-loss disability in excess of thirty-five percent (35%) to the body as a whole is awarded, it has controverted same for purposes of attorney's fees, but has not controverted the wage-loss acknowledged. Finally, respondent #2 points out that it was joined as a party respondent prior to the assessment of permanent impairment."

A hearing was held on May 27, 2005. The claimant testified, "I'm not able to do nothing. I'm not able to bend over, pick up anything. I can't sleep at night." The claimant testified that he had trouble while trying to sit,

stand, climb, or lift. The claimant testified on direct examination:

Q. You understand that General Electric provided a person to assist you to try to find a job?

A. Yes, sir.

Q. Let's first of all talk about the job searches that you've done yourself. Have you attempted to locate something that you possibly could do from a sedentary standpoint?

A. Yes, sir.

Q. Describe what attempts you have made on your own.

A. I have made attempts to get jobs at automotive places, any kind of light duty jobs, going after parts, with several, several people. Even automotive places, muffler shops, construction jobs, going after parts or doing any kind of light duty jobs that I thought I was able to go and do, and have not been successful yet.

Q. Now, did you cooperate with the vocational person that attempted to try to find you some work?

A. Yes, I did....

Q. Let me ask, you yourself, you know your physical condition, is there a sedentary job that you feel like you could perform 40 hours a week in your current condition?

A. No, sir, I don't believe there's nothing in my condition. I wish it hadn't happened. I wasn't ready to quit work. I just wished it hadn't happened, but it did, and I'm not able to do nothing. I can't bend over. I can't lift nothing

without it hurting my back. I am not able to do nothing.

An administrative law judge found, among other things, that the claimant failed to prove he was permanently totally disabled. The ALJ found that the claimant had shown he sustained "a wage-loss disability of sixty percent (60%) to the body as a whole which was caused by the combined disabilities or impairments, together with the June 12, 2001, compensable injury....Respondent #2 is responsible for all wage-loss disability, specifically, the sixty percent (60%) wage-loss disability awarded herein.... Respondent #2 has accepted a thirty-five percent (35%) wage-loss disability in this claim. Respondent #2 has controverted all wage-loss in excess of the thirty-five percent (35%) acknowledged."

All of the parties appealed to the Full Commission. In an opinion filed August 31, 2006, the Full Commission found, among other things, that "the claimant is only entitled to a 35% loss in wage earning capacity that has been accepted by respondent no. 2." The claimant has appealed to the Court of Appeals, which has reversed and remanded to the Full Commission.

II. ADJUDICATIONA. Wage Loss

Ark. Code Ann. §11-9-522(b) provides:

(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation 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 earning capacity.

In the present matter, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%. The claimant, a 56-year-old high school graduate, began working for the respondent-employer in 1970. The parties stipulated that the claimant sustained a compensable back injury in June 2001, and the parties stipulated that the claimant's healing period ended in October 2002. The parties have stipulated that the claimant was assessed with a 12% whole-body impairment. The claimant testified that he never returned to work after the compensable injury. The Full Commission recognizes that the claimant has significant physical restrictions and limitations as a result the compensable injury and 12% anatomical impairment rating. The record does not

demonstrate, however, that the claimant is permanently and totally disabled. The primary treating physician, Dr. Barrett-Tuck, did not opine that the claimant was permanently and totally disabled as a result of the 12% anatomical impairment rating. Although the claimant may not be able to return to full-time factory work for the respondent-employer, the preponderance of evidence shows that the claimant should be able to secure employment within his physical restrictions. For instance, the claimant testified that he is able to drive a motor vehicle. The record contains correspondence to the claimant from Heather Naylor, the vocational rehabilitation consultant, for the dates of December 1, 2004 and December 8, 2004. Ms. Naylor in good faith identified several jobs for the claimant within the claimant's physical restrictions. Although the claimant testified that he had not yet found appropriate work, the record does not show that the claimant will never be able to secure appropriate employment within his physical restrictions.

Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant sustained wage-loss

disability in the amount of 40%. The claimant did not prove he was permanently and totally disabled. We note the stipulation by Respondent No. 2 that it accepted 35% wage-loss disability, and Respondent No. 2's admission that it controverted any wage-loss disability exceeding 35%. The Full Commission finds that Respondent No. 2, Second Injury Fund, is liable for 35% wage-loss disability. We affirm the administrative law judge's finding that the claimant did not prove he was permanently totally disabled, but we find that the claimant proved he was entitled to 40% wage-loss disability rather than the 60% amount awarded by the administrative law judge. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

This claim is before the Commission on remand from the Arkansas Court of Appeals. The issue is the extent of the claimant's permanent disability/wage loss.

The Administrative Law Judge found that the claimant sustained significant impairment to his lower back, entitling him to receive wage loss disability benefits in the amount equal to 60% to the body as a whole. Both parties appealed this finding, and the Commission modified the Administrative Law Judge's finding and found that the claimant suffered only a 35% wage loss. The claimant appealed the Commission's finding, contending that he should be awarded permanent and total disability benefits, or at a minimum, 60% in wage loss benefits. On appeal, the Court of Appeals affirmed with regard to other issues, but reversed and remanded to the Full Commission on the issue of wage loss, finding that we relied upon a document that was not in the record. The Majority now finds the claimant is entitled to 40% wage loss. While I agree that the

claimant's impairment from the back injury is severe and substantial, I find that the Majority's opinion fails to adequately compensate the claimant, due to the fact that he should be found to be permanently and totally disabled or awarded benefits greatly in excess of those as provided 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. The Commission is charged with the duty of determining disability. 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 worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's 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), 54 Ark. App. 130, 923 S.W.2d 886 (1996). It is well established that a claimant's prior work history and education are factors to be considered in determining eligibility for wage-loss benefits. See Cross v. Crawford County Memorial Hosp.; Glass v. Edens; City of Fayetteville v. Guess; Curry v. Franklin Electric, supra. If the employee is totally incapacitated from earning a livelihood, 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 claimant began working for the respondent in approximately 1970. During that time, he sustained two injuries to his lower back, the first in 1995 and the second in 2001. The combined effects of these two injuries, as well as a knee injury the claimant sustained were the basis of the Fund's liability. As a result of these two accidents, the claimant underwent four spinal surgeries over a period of six years including a spinal fusion at the L4-L5 level and three discectomies at L5-S1 and L4-S5. I also note from

reviewing the various MRI scans and CT scans of the claimant's lower back in addition to the surgical treatment, he has been diagnosed as having a bulging disc at L2-L3 and L3-L4. In addition, he has been diagnosed as suffering from failed back syndrome and has consistently and credibly testified as to severe and debilitating lower back pain.

There is no question that the claimant's physical impairment has substantially limited his job opportunities. The claimant's past job experience is that of a heavy equipment repair man with some specialized training in hydraulics. As this job requires frequent, heavy lifting and strenuous exertion, he clearly cannot return to this employment. The claimant had been employed by respondents for thirty-one (31) years at the time of the accident, and his only education is through twelfth grade and some vocational school that the respondents offered. As such, his skills are not versatile, he has limited work experience, and he is not highly employable.

Furthermore, the claimant sustained a severe cut in income when he became injured. The undisputed testimony, supported by payroll and other documents,

indicate at the time of injury, the claimant was earning in excess of \$1,100.00 per week, and earning approximately \$60,000 per year. Even though the claimant was earning \$19.00 per hour plus overtime when the injury occurred, the majority of jobs now even available to the claimant would reduce his wages to \$6.00 or \$7.00 per hour, which would be approximately \$13,000 to \$15,000 per year. As such, it is abundantly clear that the claimant sustained a substantial wage loss when he was injured.

In order to evaluate the claimant's vocational ability, Respondent No. 1 retained Heather Naylor, a vocational rehabilitation consultant to assist the claimant in returning to work. After interviewing the claimant, Ms. Naylor provided him a number of jobs which she believed would be within his physical capacity. The claimant testified that he had applied for a number of those jobs, both personally and by telephone. However, the claimant testified that he had not been offered employment by any of those employers. This is not surprising considering the claimant's age, education, past work experience, and severe limitations.

The claimant testified extensively about the disabling effects of his back pain. He stated that he was unable sit or stand for any significant periods of time without changing his position or otherwise moving around. He also stated that he had difficulty driving or engaging in any strenuous activities including walking or standing. Also, he was taking strong narcotic medication so as to maintain some functionality. Obviously, few employers would be interested in hiring 55 year old man who has no specialized training other than as a heavy equipment mechanic who are unable to sit, walk, stand, or otherwise engage in vigorous activities, and who are taking regular doses of strong narcotic pain medication. This is particularly true given his lack of education and limited range of skills.

I find the facts of this case clearly establish that the claimant is unemployable. Despite the best efforts of Ms. Naylor, she was simply not able to find any jobs that the claimant was able to obtain, given his restrictions and need for medication. During the hearing, the Fund's attorney repeatedly asked the claimant why he had not contacted Ms. Naylor for

additional help. As the claimant explained, he had already gone to all the jobs that she had provided for him and she had closed her file. If Ms. Naylor was not able to locate an employer willing to hire the claimant, and his longtime employer was not able to accommodate his extensive restrictions, I do not see how the claimant could be considered anything other than permanently and totally disabled. In my opinion, to find that the claimant anything else is contrary to the evidence presented in this case.

The Majority erroneously finds that Ms. Naylor identified several jobs for the claimant within his physical restrictions, and therefore the claimant should be able to secure employment. The Majority fails to give adequate weight to the fact that the claimant applied for the positions that Ms. Naylor presented and failed to obtain a single job. The Majority resorts to sheer speculation in asserting the claimant might be able to secure employment in the future. In my opinion, this ignores the evidence to the contrary. Furthermore, the Majority errs in finding that the claimant should be able to secure employment because he can drive a motor vehicle. As previously noted, the claimant takes

narcotics on a daily basis. As such, it would likely be impossible for the claimant to pass an Arkansas Department of Transportation test, which would ultimately prevent him from obtaining work as a driver.

Furthermore, the claimant's healing period ended in October of 2002, and in January of 2003, Dr. Carro stated, "I don't think this gentleman is currently capable of returning to the work force anytime soon." It is therefore apparent that even the claimant's physician felt that the claimant's current physical condition prevented him from returning to work. As such, to find that the claimant is able to return to work in any capacity is contrary to medical opinion.

The claimant's monthly income further evidences the claimant's motivation to return to work. The claimant draws \$1400 per month in Social Security Disability benefits, because even the federal government recognized that he cannot return to the workforce. Certainly this is evidence that the claimant has sustained a significant impairment. The claimant also receives \$876 per month in disability retirement, \$150 per month in long-term disability retirement, and at the time of the hearing was receiving \$308 per month in

worker's compensation benefits. The claimant's total income only adds up to \$2,734.00 per month. Notably, the claimant's receipt of this money is substantially less than what he was earning at the time of his employment. Additionally, the respondents have been awarded a credit for at least the long term disability and the disability retirement benefits. As such, it is unlikely that the claimant will continue to receive those benefits for some time. Evidently the claimant's monthly income has been reduced to much less than even half of his initial income, and I find that the claimant should receive a wage loss rating to compensate him for the wages he has actually lost.

Furthermore, the claimant is extremely motivated to return to work. The claimant underwent disk surgery in 1995 and again in 1996. After both surgeries he returned to work. As a thirty year employee for respondents, the claimant was very motivated to return to work. After sustaining his work-related injury in 2001, the claimant underwent two more extensive surgeries to his back and one surgery to his knee. It was only after this injury that the claimant has not been able to return to work, even though his past

history of returning to work after surgery and his current search for employment all corroborate this claimant's motivation to return to work.

In sum, the claimant has proven that he is permanently and totally disabled by the fact that his physical impairment has substantially limited his job opportunities. Furthermore, he has sustained a substantial loss in income by not being able to return to work or find other employment, despite having exhausted his potential job market. In addition, the claimant had proven that he has a remarkable work ethic as he returned to work after his previous back surgeries. However after his 2001 injury and having surgery, the claimant was in such extensive pain that he has not been able to return to work despite his efforts to find employment. As such, I find the claimant should be found to be permanently and totally disabled or entitled to benefits greatly in excess of those awarded. Therefore, I must respectfully dissent from the Majority's decision which awards wage loss benefits in the amount of 40%.

PHILIP A. HOOD, Commissioner