

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504949

OCEANUS DOMINGUEZ-CASTRO, EMPLOYEE	CLAIMANT
CORDOVA CONSTRUCTORS, INC., EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INSURANCE CO., CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED JUNE 27, 2008

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed, in part, and modified, in part.

OPINION AND ORDER

Respondent No. 1 appeals a decision of the Administrative Law Judge filed on May 21, 2007, finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back for which he is entitled to a permanent anatomical impairment in the amount of 17% to the body as a whole, and a finding that the

claimant is entitled to a 25% loss in wage earning capacity. Based upon our de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed, in part, and modified, in part. Specifically, we find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his back when he fell on March 5, 2005. However, we find that the claimant's permanent anatomical impairment rating is 10%, as opposed to the 17% that Dr. Summer's assessed on March 30, 2007. Further, we find that the claimant is entitled to a 5% loss in wage earning capacity.

The claimant was employed by the respondent employer as a welder. On March 5, 2005, the claimant was working on a Home Depot building in the Jacksonville-Little Rock area when he fell through the roof. The claimant was treated at Rebsamen Memorial Hospital in Jacksonville for fractures of the heels in both of his feet. The claimant needed to have an open reduction and internal fixation on the right foot but the treating physicians at that time felt like it needed to wait. The claimant ultimately returned to

North Carolina where he lived and was treated at the University of North Carolina at Chapel Hill Hospital. The claimant underwent the open reduction and internal fixation procedure on March 23, 2005. The claimant was given a 24% impairment to the left foot and a 53% impairment to the right foot. These converted to a lower extremity values of 37% to the right and 15% to the left. The respondents accepted these permanent anatomical impairment ratings and paid same.

We note at this time that the claimant is an illegal alien. Ark. Code Ann. §11-9-102(A) provides:

"Employee" means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

Regardless of the claimant's legal status, pursuant to the provisions of the Arkansas Workers' Compensation law, the claimant is entitled to benefits.

The respondents appeal the finding that the claimant sustained a compensable injury to his lumbar spine at the time of his fall. After reviewing the evidence in the record, we find that the claimant sustained a compensable injury to his lumbar spine. The claimant underwent a CT scan and some other diagnostic tests in Arkansas at the time of the injury. His treating physician in North Carolina has interpreted these tests as showing that the claimant had compression fractures at L1 and L2. In a letter dated October 25, 2005, Dr. Lawrence E. Dahners of the University of North Carolina School of Medical, Department of Orthopedics, opined:

I would attribute Mr. Dominguez-Castro's back pain to the fractures he had in his spine during this fall. I recognize that the radiologist did not note these fractures, however, they are definitely present. I have referred Mr. Dominguez-Castro to a spine surgeon for any further treatment of them.

Accordingly, we affirm the finding that the claimant sustained compression fractures to his lumbar spine when he fell on March 6, 2005.

We find that the claimant has a 10% permanent anatomical impairment to his lumbar spine for the compression fractures. We are at a loss to ascertain the 17% permanent anatomical impairment rating assessed by Dr. Summers. When we review Table 75, Figure 64 and Section 3.3b relied upon by Dr. Summers to assess the 17% rating, we are unable to reproduce this rating. However, Table 75, Section I(a) states that a compression fracture of vertebral body one level in the lumbar spine is 5%. The Table explains that if there is several vertebrae you then use the combined values chart in the back on Page 322. As the claimant sustained a compression fracture at L1 and L2, we find that the claimant is entitled to a 5% for each, for a total of 10%. Using the combined values on Page 322 of the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993), "the Guides" that converts to a 10% permanent impairment. Therefore, we find, based upon the Guides, the claimant is

entitled to a 10% permanent anatomical impairment for his lumbar spine compression fractures.

Dr. Summers summarily assigned a 16% rating utilizing the Guides without an explanation as to how he arrived at this number. The dissent has surmised that Dr. Summers assigned a 7% rating for the claimant's pre-existing pars defect. Mathematically, this is the only way to account for the difference between what the Guides actually assess for the claimant's compression fractures and the rating assigned by Dr. Summers. It is undisputed that the claimant's pars defect pre-existed his compensable injury. Moreover, there is no credible evidence that the claimant sustained any permanent impairment to this pre-existing degenerative condition. The claimant only testified that he only occasionally has lower back pain after working hard. It would required speculation and conjecture to associated this occasional pain to the pars defect and not the compression fracture or just simply tired overworked muscles. Accordingly, we cannot find that the claimant has established by a preponderance of the evidence an

entitlement to a 16% impairment rating resulting from his compensable injury.

The next issue that must be addressed is the amount of wage loss the claimant should receive. With respect to the wage loss, the respondents contend the claimant, because he sustained scheduled injuries to his right and left lower extremities, is not entitled to any wage loss disability benefits. Because we find that the claimant did have a 10% anatomical impairment to his spine, notwithstanding the 17% as assessed by Dr. Summers, we find that the claimant is entitled to wage loss disability benefits in the amount of 5%.

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 he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart

Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); 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 Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). 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); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. 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. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d

408 (1983). 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).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Supp. 2005) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly

impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

With respect to the amount of wage loss the claimant is entitled, we find that the 25% awarded by the Administrative Law Judge is excessive. The claimant argues that when you take his wages that he was making before he got hurt, which was \$15.00 an hour, times the amount of hours he worked and then you take the amount of wages the claimant is now making per hour, which is \$14.00 an hour and multiply that by the amount of hours that he now works, the total is a difference of 25%. Although the claimant is working now and testified that he is working fewer hours than he was for the respondent employer, there is no record whatsoever indicating that the claimant's working hours have been diminished by his work related injuries. Further, the claimant testified that he was working sixty to seventy hours per work for the respondent employer. However, the

wage records introduced by the respondent employer indicate that the claimant never worked more than sixty hours per week. The claimant is working full time in a job similar to what he was doing before he got hurt. He is making \$1 less per hour than he was making when he was injured. Therefore, when we take into consideration that the claimant is very young, only 27, has obtained employment making \$1 less per hour than he was before he got hurt, we cannot find that the claimant proved by a preponderance of the evidence that is entitled to 25% loss in wage earning capacity in addition to his permanent anatomical impairment rating. Therefore, the 25% loss in wage earning capacity awarded by the Administrative Law Judge is hereby modified to 5%.

Therefore, for all the reasons set forth herein, we affirm, in part, and affirm, as modified, in part, the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur, in part and dissent, in part from the majority's opinion. Specifically, I concur that the claimant has proved by a preponderance of the evidence that he sustained a compensable injuries to his lumbar spine on March 5, 2005. I also concur that regardless of the claimant's immigration status, he is entitled to workers' compensation benefits for his compensable injuries. However, as I find that a preponderance of the evidence clearly shows that the claimant is entitled to at least the 25% loss in wage earning capacity as assigned by the Administrative Law Judge, I must dissent from the majority on this issue. Furthermore, as I find that the preponderance of the evidence shows that the according to the AMA Guides to the Evaluation of Permanent Impairment, (4th ed. 1993), the combined value of the anatomical impairment ratings assigned to the claimant's compensable injuries, specifically including the compensable aggravation of the L5 pars defect, is 16%, I must dissent on this issue as well.

Anatomical Impairment

Here, the Administrative Law Judge correctly identified the claimant's compensable lumbar spine injuries as follows:

The evidence preponderates that the injuries to the claimant's lumbar spine, to include the compression fractures at L1 and L2 along with the aggravation of the previously asymptomatic L5 pars defects, are all the product of the compensable March 5, 2005 injury.

The Commission has adopted the AMA Guides to the Evaluation of Permanent Impairment, (4th ed. 1993) for use in assessing the extent of permanent anatomical impairment. Based on Table 75 of the Guides, the claimant is entitled to a sixteen percent (16%) anatomical impairment rating for his compensable lumbar injuries. According to the Combined Values chart, and as correctly stated by the majority, the 5% rating for the L1 compression fracture, combined with the 5% rating for the L2 compression fracture equates to a 10% whole body impairment. However, the majority has declined to award the claimant permanent partial disability benefits inclusive of the compensable aggravation of the L5 pars

defect. According to the Combined Values chart, the 5% for the L1 fracture, the 5% for the L2 fracture and the 7% for the L5 pars defect aggravation combine for a total 16% whole body impairment. The majority states:

It is undisputed that the claimant's pars defect pre-existed his compensable injury. Moreover, there is no credible evidence that the claimant sustained any permanent impairment to this pre-existing degenerative condition. The claimant only testified that he only occasionally has lower back pain after working hard.

However, I find that as the claimant has proved by a preponderance of the evidence the compensability of the aggravation injury, and, as the preponderance of the evidence of record shows that the L5 pars defect was asymptomatic before the specific incident which caused the claimant's compensable injuries at L1 and L2, the majority has erroneously denied the claimant the permanent partial disability benefits related to the compensable aggravation of the L5 pars defect.

The employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing

conditions are compensable regardless of whether major cause exists. Nashville Livestock Comm'n v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); St. Vincent Infirmary v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Public Employee Claims Div. v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992). To show compensability for a specific incident aggravation, one does not need to show major cause. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004). In claims for medical benefits and temporary total disability, a causal connection is established when the compensable injury is found to be "a factor" in the resulting inability to work and need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment. Williams v. L & W. Janitorial, Inc., supra. However, permanent disability "benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. §11-9-102 (4) (F) (ii) (a) (Supp. 2003). "Major cause" is defined as more than fifty percent of the

cause, and a finding of major cause shall be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102 (14) (Supp. 2003). The major cause requirement may be satisfied where the preponderance of the evidence shows that the asymptomatic pre-existing condition now, due to the work-related injury, is a symptomatic aggravation injury requiring treatment. See Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004; Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002).

Here, the medical records clearly show that the claimant has suffered a compensable aggravation of a pre-existing L-5 pars defect which required medical treatment. The medical records also clearly show that the claimant's L-5 pars defect was asymptomatic before the claimant sustained the compensable aggravation. Dr. Somers, although initially not using the AMA Guides to the Evaluation of Permanent Impairment, (4th ed. 1993), specifically included the L5 pars defect in calculating the extent of the

claimant's anatomical impairment. Dr. Somers' April 5, 2006 report states:

Regarding the L1 and L2 compression fractures...NCIC Guidelines indicate a ten percent (10%) permanent partial impairment for fracture of one vertebral body, fifty percent (50%) of that for the second, so there should be a fifteen (15%) permanent partial impairment of the back associated with the L1 and L2 compression fractures...

As far as the L5 pars defects, it is possible that they predated the injury. The Radiologist felt that they were old. The MRI scan in October 2005, however, indicates bone edema in the L5 pedicles. This edema certainly indicates evidences of stress and recent reaction in the area. Pars injuries can occur with the kind of fall that Mr. Dominguez-Castro sustained...If no further intervention is authorized, I would give him an additional ten percent (10%) permanent partial impairment of the back. Since these injuries occurred at the same time, they come out of the original one hundred percent (100%) and he would have a twenty-five percent (25%) permanent partial impairment of the back. This would include the two lumbar compression fractures and the injury to the posterior elements (pars defects) at L5.

Therefore, I find that the claimant has proved by a preponderance of the evidence that the major cause of the

disability or impairment the claimant has sustained is, in addition to the compensable L1 and L2 injuries, the compensable aggravation of the pre-existing L5 pars defect. But for the claimant falling through the roof of the Home Depot, injuring his L1 and L2 and aggravating a pre-existing L5 pars defect, the claimant's pre-existing, asymptomatic L5 pars defect would not entitle him to a rating. A symptomatic pars defect, which is what the claimant has now is entitled to a 7% rating under the Guides. As the compensable injury is entitled to a 7% rating and the claimant's pre-existing condition is not entitled to a rating, the majority cannot reasonably conclude that the major cause of the anatomical impairment associated with the claimant's compensable L5 pars defect injury is anything other than the claimant's compensable aggravation injury.

In conclusion, I find that the claimant is entitled to not only the 10% rating for the claimant's compensable L1 and L2 injuries, as awarded by the majority, but is also entitled to, according to Table 75 of the Guides, a 7% rating for the compensable aggravation of the

pre-existing L5 pars defect, for a total anatomical impairment rating of 16% to the body as a whole for the claimant's compensable lumbar spine injuries.

Wage Loss Disability

I find that the claimant has sustained wage-loss disability of twenty-five percent (25%), as assigned by the Administrative Law Judge. Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Johnson v. Latex Constr. Co., 94 Ark. Appl 431, ___ S.W.3d ___ (2006). The Commission is charged with the duty of determining disability based upon consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education and work experience. Id. Such other matters that may be considered include 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).

Ark. Code Ann. §11-9-522 (b) (1) states:

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 future earning capacity.

Here, the claimant was twenty-eight years old on the date of the hearing. The claimant worked for the respondent, starting on February 7, 2005, as an arc welder. The claimant testified that while in Mexico, before coming to the United States in 2000, he performed construction work, including welding and industrial painting. The claimant did not complete high school, however he is able to read and write in Spanish. During his employment with the respondent the claimant earned \$15.00 per hour, approximately 60 hours per week, for a stipulated average weekly wage of \$975.

On March 5, 2005, the claimant fell through a hole in the roof of a Home Depot where he was welding, landing on a concrete floor, injuring his lumbar spine, right ankle and left ankle. After a lengthy course of treatment in Arkansas and North Carolina, the claimant was given a limited duty restriction certificate on February 6, 2006, indicating no standing longer than 30 minutes without a seated break, no lifting more than 20 pounds; no lifting from the floor or squatting; no climbing ladders; and that the claimant would require a supportive chair for sitting tasks and should be allowed short breaks every 30 minutes to stretch and change positions.

The claimant underwent a functional capacity evaluation (FCE) on March 8, 2006, which stated:

Mr. Dominguez-Castro demonstrated consistently reliable efforts in his performance of the FCE. His body mechanics were true to the nature of his physical dysfunctions. Based on the results of this test, it would appear that Mr. Dominguez-Castro is not able to return to the job of welder because he was not able to perform today at a level that would be required of the job. He presently would do well to get a job that required less standing and physical

effort to his work including lifting and carrying anything greater than 20# with any frequency....

In addition to being assigned an impairment rating to the body as a whole for his compensable lumbar injuries, the claimant was assigned an anatomical impairment rating of 37% to the right lower extremity and 15% anatomical impairment to the left lower extremity.

The claimant testified that despite his physical limitations he has subsequently obtained employment earning \$14 per hour working approximately 48 hours per week, again working in construction. However, the claimant testified that he has missed several days of work due to his compensable injuries. The record also shows that the claimant has to limit his physical activities to working and then recovering overnight, so that he will be able to return to work the next day.

After consideration of the claimant's age, education, work experience, together with the medical evidence reflecting, as discussed above, an anatomical impairment rating of 16% to the body as a whole, and the

claimant's physical restrictions due to his compensable injuries, I find that the preponderance of the evidence shows that the claimant has sustained wage-loss disability greater than the 5% wage-loss disability assigned by the majority, and has in fact sustained 25% wage-loss disability as awarded by the Administrative Law Judge.

Here, before his compensable injuries, the claimant worked for the respondent at \$15 per hour for an approximate 60 hour week. After his compensable injuries, the claimant returned to work at \$14 per hour for an approximate 48 hour week. As a rationale for reducing the amount of wage-loss disability awarded by the Administrative Law Judge, the majority stated:

Although the claimant is working now and testified that he is working fewer hours than he was for the respondent employer, there is no record whatsoever indicating that the claimant's working hours have been diminished by his work related injuries.... The claimant is working full time in a job similar to what he was doing before he got hurt. He is making \$1 less per hour than he was making when he was injured. Therefore, when we take into consideration that the claimant is very young, only 27, has obtained employment making \$1 less per

hour than he was before he got hurt, we cannot find that the claimant proved by a preponderance of the evidence that he is entitled to 25% loss in wage earning capacity in addition to his permanent anatomical impairment rating.

The majority's statement that "there is no record whatsoever indicating that the claimant's working hours have been diminished by his work related injuries" disregards the preponderance of the evidence of record, including the claimant's testimony about the residual effects of his severe physical injuries, the supporting medical records documenting the claimant's severe physical injuries and the work restrictions arising therefrom.

The claimant's average weekly wage at the time of the injury was \$975. The claimant's average weekly wage now, at \$14 per hour, working 50 hours per week, inclusive of overtime, is \$770, a difference of \$205 per week. Simple math indicates a weekly wage differential between 20-25%, which I find, as did the Administrative Law Judge, to be indicative of the true extent of the claimant's wage-loss disability.

_____For the aforementioned reasons I must respectfully
concur in part and dissent in part.

PHILIP A. HOOD, Commissioner