

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603594

ROBERT MAULDING, EMPLOYEE	CLAIMANT
PRICES UTILITY CONTRACTORS, INC., EMPLOYER	RESPONDENT NO. 1
CINCINNATI INDEMNITY COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED OCTOBER 27, 2008

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

Claimant represented by the HONORABLE DIANA MAULDING, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals and Respondent No. 1 and Respondent No. 2 cross-appeal an opinion and order of the Administrative Law Judge filed December 12, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The employee-employer-insurance carrier relationship existed on April 3, 2006, when the claimant sustained a compensable back injury.
2. The claimant reached maximum medical improvement and the end of his healing period on July 21, 2006.
3. The Second Injury Fund has controverted any benefits for which the Second injury Fund would be found liable. (sic)
4. The claimant has failed to establish by a preponderance of the evidence that he was a full time employee. Specifically, the claimant has failed to establish that he actually worked forty hours per week or that he was expected by contract to work forty hours per week if the work was made available. The respondents therefore correctly calculated the claimant's average weekly wage by dividing the claimant's actual earnings for the fifty-two week period immediately preceding the week of injury by the number of weeks actually worked (fifty two).
5. The claimant's appropriate anatomical impairment for his compensable two level lumbar compression injury is 10% rated to the body as a whole.
6. The respondents are entitled to a credit against future liability for the additional 3% anatomical impairment overpaid to the claimant.
7. The claimant's claim for permanent disability benefits is ripe for determination.
8. The Second Injury Fund has no liability for the claimant's permanent disability.
9. The claimant has sustained a 25% permanent partial disability in excess of his 10% permanent anatomical impairment established by the medical evidence.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Claimant filed a request for a hearing on additional benefits after the notices of appeal was filed. The Full Commission denies this request.

Therefore we affirm and adopt the December 12, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I

concur in the majority's denial of the claimant's motion for a hearing on additional benefits. I also concur in the majority's finding that the claimant was not a full time employee, that the appropriate permanent anatomical impairment rating was 10% and that respondents are entitled to a credit against future liability for the additional 3% anatomical impairment overpaid to the claimant. However, I must respectfully dissent from the majority's award of a 25% loss in wage earning capacity in addition to the claimant's permanent anatomical impairment of 10%. In my opinion, the claimant has not proven by a preponderance of the evidence that he was entitled to a loss in wage earning capacity of up to 25%.

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/she 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, ___ S.W.3d ___ (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).

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to any loss in wage earning capacity. The claimant is 61 years old and has a college degree from LSU. The claimant is able to do housework and work on his street rod vehicles. The claimant's psychological assessment at the Arkansas Rehabilitation Service indicated that the claimant's intellectual ability was above average in most areas that he was tested in. In fact, the test results indicated that he would likely be successful in a traditional college format. He also appeared capable of learning on his own in independent studies/reading assignments. Moreover, he had the ability consistent with managerial and upper level clerical positions, and the ability to gather and analyze information to make decisions from a basic number of choices.

The claimant underwent a Functional Capacity Evaluation (FCE). The FCE indicated that the claimant was able to perform work in the medium category. On a constant basis, the claimant could reach to his left and right, and perform any type of handling with the left and right arms. The claimant could walk, sit and stand on a frequent basis.

It is clear that the claimant lacks motivation to return to work. The claimant testified that he went to a job fair looking for work as an airport screener. However, he did not bother to tell Heather Taylor, the vocational rehabilitation specialist, that he had gone. Ms. Taylor testified that she would have contacted the Little Rock Airport to obtain additional information and would have assisted the claimant in applying for the position.

Moreover, Ms. Taylor testified that she was not allowed to have direct communication with the claimant. He also made the statement that "he guessed he had to do this" and responded "whatever" to rehabilitation. There were instances where the claimant told Ms. Taylor that he would tell potential employers that he did not even feel he could work in a light category type job. He would "moan and groan" and make facial expressions when Ms. Taylor was talking to him about prospective employers. He reported to Ms. Taylor that he would complain of pain and exhibit pain behaviors during the interview. It is evident that the claimant's statements and behavior towards vocational rehabilitation is tantamount to a lack of cooperation.

He should not be rewarded with wage loss for his failure to cooperate.

Therefore, for all the reasons set forth herein, I find that the claimant is not entitled to any wage loss disability benefits in addition to his permanent anatomical impairment. Accordingly, I must dissent from the majority's award of 25% loss in wage earning capacity.

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

CONCURRING & DISSENTING OPINION

While I agree that the majority has correctly denied the claimant's request for a hearing on additional benefits during the appeal process, I must respectfully dissent, in part, from the majority's limited award of benefits to the claimant. Furthermore, I agree that the claimant is entitled to permanent benefits over and above his impairment rating, which the majority has awarded in the form of wage-loss disability benefits pursuant to Arkansas Code Annotated §11-9-522 (b) (1), an award with which I specifically concur. However, based upon a de novo review of the record I

find that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits under Arkansas Code Annotated §11-519 (e)(1), and therefore, I must respectfully dissent from the majority's failure to award permanent and total disability benefits.

The majority, by affirming and adopting the Administrative Law Judge, who limited his analysis to the claimant's claim for wage-loss disability, has failed to consider the claimant's claim for permanent and total disability benefits. While the analysis required in a claim for permanent and total disability is similar to that conducted to determine wage loss disability, it is not the same. See Rutherford v. Mid Delta Community Services, Inc. ___ Ark. App. ___, ___ S.W. 3d ___ (2008). Wage loss disability is defined as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). In determining wage-loss disability, in addition to the percentage of permanent physical impairment, the Commission may take into consideration such factors as the claimant'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). Such other matters 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). Permanent total disability is defined as inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519

(e) (1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2). The same factors considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Rutherford, Supra. However, the actual statutory analysis required of the fact finder is not the same. For wage loss disability, the relevant inquiry, based on Ark. Code Ann. §11-9-522, is: "To what extent has the claimant's compensable injury affected his or her ability to earn a livelihood?" For permanent total disability, the relevant inquiry, based on Ark. Code Ann. §11-9-519 is: "Has the claimant proved by a preponderance of the evidence the inability to earn any meaningful wage in the same or other employment?" As

stated above, the majority, by affirming and adopting the Administrative Law Judge, did not conduct the relevant inquiry into the claimant's entitlement to permanent and total disability benefits.

At the time of the hearing the claimant was 61-years-old. The claimant has at least a 10% permanent impairment rating due to his compensable back injury. Dr. Akin stated in deposition testimony taken on December 12, 2006:

(the claimant) had quite a physical job. And by observing him in clinic, and I felt like his behaviors were consistent, he seemed to be in a lot of pain and very limited in what he could really do. And I really just didn't see him realistically going back to doing a construction job. And when he gave the functional capacity evaluation that deemed him at light duty capacity, which is a very limiting thing, and kind of trying to see, you know, what is his training, and what would be realistic for a 60-year-old man to train at, you know, remedially, to do some kind of work, I thought this isn't a good situation. His prognosis for pain improvement is not good, now that he's been hurting for over six months. And based on all of these things, age, the nature of the injury, his failure to improve dramatically with surgery and other measures, I felt that it was reasonable to declare him disabled at this point....

As described on January 4, 2007 by the respondent vocational expert, Ms. Heather Naylor :

Mr. Maulding has a singular work history as a general construction worker/ laborer. He has been employed with the same employer, Price Utility Contractors, since 3/77. He was employed with Price Utility at the time of his injury and his last day to work was the day of his injury in 4/06.

Mr. Maulding reported that his basic job duties through the years have just been that of a general construction laborer. He said that he mainly worked on underground utilities which consisted of building manholes, rebuilding of vaults and building underground transformers. His other construction work consisted of general construction labor doing commercial construction and carpentry work. He was not a member of any union. At the time of his injury, he reported that he was building a barn on a residential property. He also reported that during all his years as a construction worker, he never operated any heavy equipment.

For the last several years or so (during his employment with Price Utility Contractors) he was also a Construction Supervisor. He reported that his job duties remained the same as far as the labor aspect was concerned, except that he was also responsible for supervising approximately 5 or 6 workers on any given day. Recently when working with Price Utility, he started to learn how to bid on jobs but did not really get to learn much about this before his injury occurred.

Mr. Price made approximately \$16.90 an hour and he would often work approximately 40 hours per week. He reported that Price Utility often let him take off work without pay whenever he wanted to, so that he would not have to use vacation days. Since his injury, Mr. Maulding indicated that he has been laid off and he reported that his employer has told him that there is no "light duty" work available to him that would be within the guidelines of his FCE.

The Functional Capacity Evaluation completed on July 17, 2006 indicated that the claimant gave a reliable effort. The claimant's functional limitations were listed as follows:

Mr. Maulding did not demonstrate the ability to lift and/or carry more than 30 lbs. He demonstrates this lifting ability in a limited plane of lifting from knee to shoulder level. In addition, Mr. Maulding demonstrates limited ability to performing stooping/bending which is consistent with his demonstrated AROM limitations of the lumbar spine. Mr. Maulding demonstrates decreased tolerances with general mobility tasks especially tasks that require him to work at or near floor level.

The claimant's entire work history is as a heavy-labor construction worker. Based on the above-outlined testimony of Dr. Akins, vocational expert Ms. Heather Naylor, and the results of the Functional

Capacity Evaluation, I find that the claimant has proved by a preponderance of the evidence inability to earn any meaningful wage in the same or other employment and is entitled to permanent and total disability benefits. The majority, by affirming and adopting the Administrative Law Judge, did not conduct the relevant inquiry for a permanent and total disability claim and should be reversed.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner