

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310822

LARRY ARNOLD, EMPLOYEE	CLAIMANT
PHILLIP MORRIS COMPANIES, EMPLOYER	RESPONDENT NO. 1
AMERICAN PROTECTION INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 21, 2009

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 1 represented by the HONORABLE ANDY CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 12, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 9, 2008, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$594.00 which would entitle him to compensation at the rate of \$396.00 for total disability benefits and \$297.00 for permanent partial disability benefits is also hereby accepted as fact.
3. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 36% to the body as a whole over and above his 12% permanent impairment rating.
4. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 36% to the body as a whole.

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 January 12, 2009, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

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 opinion. The respondents appeal and the claimant cross-appeals a decision by the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that the claimant was permanently and totally disabled and finding that the claimant was entitled to a 36% loss in wage earning capacity in addition to his permanent anatomical impairment rating of 12% to the body as a whole. Based upon my de novo review of the record, I would affirm the finding that the claimant is not permanently and totally disabled. However, I find that the claimant has failed to meet his burden of proof and cannot prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits. Therefore, I would reverse the award of 36% loss in wage earning capacity in addition to his permanent anatomical impairment rating.

The claimant sustained an admittedly compensable injury to his back on January 6, 2003. The claimant was cleaning out a milk tanker truck when he slipped and fell approximately eight feet. The claimant was taken to the hospital where he was diagnosed as suffering a compression fracture at the L2 level in his

lumbar spine. The claimant was hospitalized for four days. He was treated with a brace, medication and physical therapy. The claimant was released by Dr. Foster, the claimant's neurosurgeon, to return to work with no restrictions as of August 6, 2003. He assigned the claimant a 12% permanent anatomical impairment rating which was accepted and paid by the respondents.

After his release, the claimant returned to work for the respondent employer at his prior job as an in-take technician. The claimant testified that when he returned to work he continued to have some problems with his back but he worked through those problems. He admitted that during the calendar years 2004 and 2005 that his back was "pretty good". In early 2006 the claimant's back progressively began getting worse and he began having difficulty performing his job duties. The claimant was evaluated by Dr. Cyril Raben on June 26, 2006. Dr. Raben was Dr. Foster's partner. Dr. Foster had moved to Iowa and the claimant had been receiving annual evaluations from Dr. Raben. In that June 26, 2006, visit, Dr. Raben noted that the claimant had increased pain in his low back as well as other complaints that he had not previously reported. Dr. Raben ordered an MRI scan and placed restrictions on the claimant's physical activities. He indicated that the claimant should

frequently change positions, work only eight hours a day, not lift more than 10 pounds and engage in no prolong sitting or standing for more than 15 to 30 minutes.

In a report dated August 8, 2006, Dr. Raben indicated that the claimant's MRI scan revealed degenerative disk disease at the L2-3 level. He noted that the claimant's job required a lot of twisting and turning, carrying heavy things and climbing stairs which increased his pain. Dr. Raben recommended a disk space injection and indicated that the claimant could continue with the previous work restrictions with the addition of no stair climbing. The claimant returned to work for the respondent employer and was given light duty paperwork in quality control. The claimant performed this job for approximately two and a half months before he was let go by the respondent employer. The claimant has not worked for any other employer since that time.

Since 2006, the claimant has continued periodic evaluations from Dr. Raben who referred him to Dr. Piechal for pain management.

An initial determination must be made as to whether the claimant's current symptoms are causally related to his original compensable injury. The respondents contend that the claimant's current problems

are the result of a pre-existing degenerative change and/or idiopathic condition or an independent intervening cause. In support of this contention, the respondent notes that the claimant was released by Dr. Foster with no restrictions and no complaints of pain in August 2003. After his release the claimant returned to work for the respondent employer and worked the remainder of 2003, 2004, and 2005. The respondents further noted that Dr. Raben in a report dated October 4, 2005 indicated that the claimant had no pain, was "100% percent better," was working full duty and sleeping up to eight hours per night.

The claimant admitted that he was able to perform his job duties during 2004 and 2005. Although the claimant did not have any significant problems with his back, he did indicate that he had some minor problems with his back but that he continued to work through them. He testified that he was able to do his job by watching how he bent and using his legs more when lifting. He indicated that when he did have back pain he would come home at night and place a heating pad on his back. The claimant testified that he did not suffer any additional injury to his back and the medical records do not contain a history of a new injury to the claimant's back.

Dr. Raben testified at his deposition that the osteoarthritis present in the claimant's low back was causally related to his compensable injury. Dr. Raben also testified that the problems the claimant began having in 2006 are the type of problems he would expect from the claimant's type of injury. Dr. Raben also testified that he would state within a reasonable degree of medical certainty that the claimant's current problems and symptoms were the result of the 2003 injury given the fact that the claimant did not have back problems before the injury and the lack of any new injury since that time.

Based upon the opinion of Dr. Raben, I agree with the Administrative Law Judge that the claimant's current condition is causally related to the 2003 compensable injury. There can be no independent intervening cause unless a subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Construction Company, 11 Ark. App. 219, 669 S.W.2d 483 (1984). Here, there is no indication that the claimant engaged in any activity which would be considered unreasonable under the circumstances. Accordingly, I would affirm the decision of the Administrative Law Judge.

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).

After reviewing the evidence in this case and the relevant wage loss factors, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. In support of his contention that he is permanently totally disabled, the claimant relies upon the opinion of Dr. Piechal. In a report dated July 14, 2008, Dr. Piechal stated that he did not believe that the claimant "is industrially competitive in any fashion at this time." Dr. Piechal in that same report went on to note that the claimant was "sedentary at this time."

However, Dr. Raben was not of the opinion that the claimant was totally disabled from working. In fact, it was Dr. Raben's opinion that returning to work would be beneficial to the claimant. The following testimony is particularly instructive:

Q. In your opinion, is he at least still physically able to return to work with those light/sedentary restrictions?

A. Yes. I would highly recommend that. It would be good for his psyche.

I find that the opinion of Dr. Raben with regard to the claimant's ability to return to work is entitled to greater weight than that of Dr. Piechal. Dr. Raben is a neurosurgeon who has been the claimant's primary treating physician for several years. Prior to his treatment, the claimant was treated by Dr. Foster, Dr. Raben's partner. The claimant has only recently begun receiving treatment from Dr. Piechal and that treatment consists primarily of monitoring the claimant's pain medication. Accordingly, I find that the opinion of Dr. Raben is entitled to greater weight than that of Dr. Piechal.

Dr. Raben is of the opinion that the claimant can return to work within the restrictions previously imposed upon him. Those restrictions include frequent changes of positions, eight-hour work days, no lifting more than 10 pounds, no prolonged sitting or standing for more than 15 to 30 minutes, and no stair climbing. The claimant is 55 years old and is a high school graduate. He also attended one year of college. In addition to working for the respondent employer, the claimant's only other significant prior job was working

at Wal-Mart in a warehouse for six years filling purchase orders.

The claimant was evaluated by Tanya Owen, a vocational rehabilitation counselor. Ms. Owen authored a report and testified at the hearing. Ms. Owen testified that she interviewed the claimant, reviewed medical reports, and performed some testing. According to Ms. Owen, the claimant reads at an eighth-grade level, spells at a six-grade level and performs math at a fifth-grade level. She indicated that the claimant scored in the 26 percentile for his age on an IQ-type test which would indicate that the claimant should not be referred to a two or four-year degree program. However, based upon Dr. Raben's indication that the claimant could perform sedentary-type work, Ms. Owen did find jobs which she believed the claimant was capable of performing. Ms. Owen testified that these jobs were semi-skilled and that the claimant had transferrable skills from his prior jobs which would be beneficial. Ms. Owen identified jobs which included dispatching, work as a probation clerk, appointment clerk, or a telephone answering service.

Despite Ms. Owen's identification of these jobs and the opinion of Dr. Raben that the claimant is capable of working within his restrictions and that such

work would be beneficial, the claimant has made absolutely no effort to look for employment and has indicated that he has no intention of returning to work. A lack of interest or lack of motivation in returning to work impedes the Commission's accurate assessment of a claimant's loss in wage earning capacity. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Simply put, I find that the claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. The claimant's primary treating physician, Dr. Raben, has indicated that the claimant is physically able to return to work within restrictions and he highly recommended the claimant's return to work. As previously noted, the claimant has indicated that he has not looked for employment within his restrictions and at this time he does not have any intention to return to work. Significantly, the claimant had no interest in pursuing any of the jobs identified by Owen, the rehabilitation specialist. Accordingly, I find that the decision of the Administrative Law Judge should be affirmed.

The Administrative Law Judge awarded a 36% loss in wage earning capacity and I would reverse this finding. After I consider the fact the claimant is

relatively young, he has a high school education, he has worked for the same employer for a number of years and the fact that the claimant failed to look for any employment and has indicated that he has absolutely no intention of returning to work, I cannot find that the claimant is entitled to any wage loss disability benefits. Dr. Raben has stated that the claimant can work with restrictions and there are jobs available within the claimant's restrictions. The claimant lacks the requisite motivation to return to work. He is satisfied with sitting at home drawing disability benefits. The claimant is able to do laundry and household chores, as well as, mow the grass. Therefore, I would reverse the finding of the Administrative Law Judge that the claimant was entitled to a 36% loss in wage earning capacity in addition to his 12% permanent anatomical impairment.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner