

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603454

EDMOND BLOUIN, EMPLOYEE

CLAIMANT

BIO TECH PHARMACAL INDUSTRIES,
AN UNINSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 20, 2009

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

Claimant represented by HONORABLE CONRAD ODOM, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CHARLES STUTTE, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals from a decision of the Administrative Law Judge filed October 22, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The prior opinion of January 15, 2008 is final.
2. The parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$461.00 for total disability benefits and \$346.00 for permanent partial disability benefits is hereby accepted

as fact.

3. 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 10% to the body as a whole. This is based upon an impairment rating of 7% and a loss in wage earning capacity in an amount equal to 3% to the body as a whole.

4. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 10% to the body as a whole.

In affirming and adopting the opinion of the Administrative Law Judge, we note that the respondent employer has raised constitutional questions on appeal that were not brought up before the Administrative Law Judge. The respondent employer contends that the Commission does not have jurisdiction over this case when the respondent was found to be uninsured for workers' compensation purposes. As such, the respondent employer should be entitled to a jury trial and the prohibition of that trial is a violation of their Seventh Amendment right to a jury trial as afforded by the United States Constitution. We find that the argument has no merit.

Arkansas Code Ann. §11-9-103 provides:

(a) Every employer and every employee,

unless otherwise specifically provided in this chapter, shall be subject to the provisions of this chapter and shall be bound thereby. However, nothing in this chapter shall be construed to conflict with any valid act of Congress governing the liability of employers for injuries received by their employees.

Furthermore, Arkansas Code Ann. §11-9-401 states:

(a) (1) Every employer should secure compensation to its employees and pay or provide compensation for their disability or death from compensable injury arising out of and in the course of employment without regard to fault as a cause of the injury.

(2) There shall be no liability for compensation under this chapter where the injury or death was substantially occasioned by the willful intention of the injured employee to bring about such compensable injury or death.

(b) The primary obligation to pay compensation is upon the employer, and the procurement of a policy of insurance by an employer to cover the obligation in respect to this chapter shall not relieve the employer of the obligation.

It is clear from reading these two statutory provisions, that the respondent employer's argument is without merit. The respondent employer is not provided for in any other chapter in the Arkansas Code. Moreover, under the provisions of §11-9-401 the respondent employer is required to pay benefits if there is no policy for workers' compensation

insurance in effect at the time of the compensable injury.

The respondent employer additionally contends in its brief on appeal that the claimant did not sustain a compensable injury as defined by the Arkansas Workers' Compensation Act. The respondent employer contends that it did not stipulate that the claimant sustained a compensable injury. We note that the respondent employer stipulated that the claimant sustained a compensable injury and they were a party to the Pre-Hearing Order filed June 5, 2007, wherein that stipulation was contained. The respondent employer was a party to the hearing that was the subject of that pre-hearing order. A final order in that case is res judicata. Furthermore, the respondent employer has never withdrawn that stipulation. At the hearing in this matter on October 1, 2008, the attorney for the respondent employer made the following statement when questioned if there was any changes to the Pre-Hearing Order:

MR. STUTTE: You -- the only -- the only issue that's -- the Court has found in their prior orders they have using as the date of injury, I believe, a June 2004 date, which is our contention is inconsistent with the medical records, and I believe the testimony may -- may amend or change whatever that date is, so as opposed to us stipulating that -- I mean, since I wasn't in the record, I don't know how it ended up getting

stipulated initially, but I think just for clarification of the record that that date is not stipulated as to the date of injury.

Mr. Stutte's comments do not rise to the level of withdrawing the stipulation.

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.

Thus, we affirm and adopt the 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.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I agree with the majority that the respondent stipulated to a compensable injury. I also agree with the majority on the constitutional issue. However, based upon a de novo review of the record in its entirety, I find that the preponderance of the evidence of record clearly shows that the claimant has sustained wage-loss disability greater than 3%, therefore, while I concur in the majority's finding that the claimant is entitled to wage-loss disability, I must respectfully dissent from the majority's limited award.

Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a

compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, 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); 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).

At the time of the hearing the claimant was fifty-nine years old. It is undisputed that he has a 7% rating to the body as a whole for his compensable back injury. The claimant testified that he was making \$36,000 per year or \$692 per week working for the respondent employer at the time of his injury. Due to pain from his compensable back injury the claimant has been limited since his compensable injury to jobs working less hours for less pay. The highest paying job the claimant has been able to obtain since his injury is that of a substitute teacher which pays \$70 a day, or \$350 a week if the claimant is able to sustain a full

week of employment, which the claimant testified that due to his pain, he is unable to do.

Based solely on the evidence of record, it is apparent that the claimant, due to the pain from his compensable injury, has been unable to effectuate a successful return to the workforce, and clearly has not been able to obtain a job making the same or better wages than he was making for the respondent employer. Taking the best paying job, at a full time work week, which is optimistic, the claimant's average weekly salary range has dropped from almost \$700 to \$350, a 50% drop in wage earning capacity. As such, it is my opinion that the majority's award of only 3% wage loss disability benefits is not supported by the evidence of record. I find that the claimant has sustained wage loss disability in the amount of 50% and would award benefits accordingly.

For the aforementioned reasons I must respectfully concur, in part, and dissent, in part from the majority opinion.

PHILIP A. HOOD, Commissioner