

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E813422

BRUCE DEUTSCHER, EMPLOYEE	CLAIMANT
ALUMINUM COMPANY OF AMERICA, SELF-INSURED EMPLOYER	RESPONDENT
COMPENSATION MANAGERS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 1, 2009

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

Claimant represented by the HONORABLE TERENCE C. JENSEN,  
Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE J. PHILLIP  
CARROLL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

This matter is currently before the Full  
Commission on remand from the Arkansas Court of Appeals.  
In an opinion delivered March 4, 2009, the Arkansas  
Court of Appeals reversed and remanded for findings,  
consideration of medical evidence, and clarification of  
a legal issue. Pursuant to the Court's remand, and based  
on our de novo review of the entire record, the Full  
Commission finds that the claimant has proved by a  
preponderance of the evidence his entitlement to wage-  
loss disability benefits in the amount of 50% over and  
above his anatomical impairment rating.

## I. HISTORY

The claimant was a 34-year employee of the respondent. Except for some time in the military in the late 1960's (including two years in Viet Nam), the claimant's entire adult working career has been at the respondent's aluminum refining operation. The claimant sustained an admittedly compensable injury to his lower back on October 21, 1998. After receiving initial medical treatment, the claimant returned to work and remained employed performing duties within the restrictions imposed as a result of his back condition.

Over the years, the claimant continued to seek treatment for his condition, primarily from Dr. Jim Moore, a Little Rock neurosurgeon. Various diagnostic tests performed upon the claimant reflected that he had multiple protruding herniated discs, most prominently at L3-L4 and L4-L5. Dr. Moore, at various times, discussed the possibility of spinal surgery with the claimant to alleviate some of his symptoms, but the claimant wished to avoid surgery if possible. Instead, Dr. Moore provided conservative treatment to the claimant and he continued to work for a number of years.

Eventually, the claimant's condition worsened to the point that surgery became necessary. On January 6, 2003, Dr. Moore performed a decompressive

hemilaminectomy, facetectomy, and a diskectomy at L4-L5. Following this surgery, both Dr. Jim Moore and Dr. Mark Martindale indicated in their medical records that the claimant would be unable to re-enter the workforce. However, the claimant had stopped working some time before the surgery. The parties stipulated that he reached the end of his healing period for his back injury on June 24, 2003, but the claimant did not return to work after that date. In 2003, he formally retired from the respondent. In January 2004, the claimant began suffering from severe pain and immobility in his right hip. He underwent a hip replacement surgery performed by Dr. William Hefley, a Little Rock orthopedic surgeon in July 2004. At some point, the claimant began receiving Social Security disability benefits.

Vocational evidence was provided in the form of testimony by Robert White, a vocational consultant and specialist. Mr. White testified that he had evaluated the claimant's vocational ability based upon his back injury. Mr. White noted that the claimant had a serious injury to his back and it had been surgically treated. He also considered that the claimant was under certain medical restrictions because of residual back problems. According to Mr. White, the claimant had a

significant amount of impairment that limited him from performing many job-related activities. For example, Mr. White noted that the claimant had difficulty in standing for long periods of time or in vigorous movement or activities that required climbing, bending, or stooping.

Mr. White also considered the claimant's educational level which included a GED, but no college or vocational degrees. While the claimant did have some college hours, they were in the form of an English class and some other classes in lifesaving techniques which the claimant had undertaken in order to become a lifeguard. However, Mr. White was of the opinion that these limited college hours had no vocational application. He also noted that the claimant had no technical educational or training, and his entire job experience consisted of the thirty-four years he worked for the respondent. Mr. White did not believe that the claimant had any transferrable job skills as a result of that employment.

However, Mr. White did not believe that the claimant was permanently and totally disabled. He believed that the claimant did have enough functional ability to hold down at least a part-time job. Mr. White stated his belief that the claimant could perform

entry level functions in retail sales or similar occupations that would be considered light-duty employment and would allow him some freedom to move around or sit, as needed. However, Mr. White believed that, based upon his experience, these types of jobs would pay \$7.00 to \$8.00 per hour, or less, and certainly no more than \$10.00 per hour. Mr. White concluded that the claimant would have sustained a substantial loss of earning ability in that his stipulated income prior to his injury was just under \$1,000.00 per week.

The only other witness who provided testimony in this case was the claimant. The claimant testified that his back condition severely limited his activities. He stated that he was in severe pain which kept him from doing any significant physical exertion. He stated that he had difficulty even walking the few hundred yards to his mailbox and back to his house. The claimant testified that he often had to stop and rest before completing the trip because of the pain it generated. He further testified that he frequently had to rest by laying down and elevating his feet so as to take the pressure off his back. He stated that his daily activities consisted of little more than doing light housework, related household activities, and that he

would generally "just hang out." He also stated that on good days, he would take short trips on his motorcycle or go to visit friends. However, he stated that these activities could be no more than three to four hours or his pain level would have increased to the point where he had to return home and lay down. He also stated that he generally hired someone to do his yard work or carry out similar tasks.

## II. ADJUDICATION

As noted by the Court of Appeals, the Administrative Law Judge, affirmed and adopted by the majority, apparently misunderstood the difference between anatomical impairment and wage-loss disability. The 15% "rating" discussed by the Administrative Law Judge refers to the anatomical impairment assessed by the claimant's treating physician. It was not an attempt to evaluate the claimant's overall functional impairment which is the basis of wage-loss disability. The difference in these two factors was discussed by the Arkansas Supreme Court in Glass v. Eden, 233 Ark. 786, 346 S. W. 2d 685 (1961). That case concerned whether "disability" included only the functional loss of use based on a claimant's anatomical impairment, or, whether additional benefits could be awarded based upon a loss of earning ability. In reaching this decision, the

Supreme Court cited the relevant section from Larson on Workers' Compensation. The quoted section is as follows:

"The key to understanding this problem is recognition, at the outset, that the disability concept is a blend of two ingredients, whose recurrence in different proportions gives rise to most controversial disability questions: the first ingredient is disability in the medical or physical sense, as evidenced by obvious loss of members or by medical testimony that the claimant simply cannot make the necessary muscular movements and exertions; the second ingredient is de facto inability to earn wages, as evidenced by proof that the claimant has not in fact earned anything.

The two ingredients usually occur together; but each may be found without the other; a claimant may be, in a medical sense utterly shattered and ruined, but may by sheer determination and ingenuity to contrive to make a living for himself; conversely, a claimant may be able to work, in both his and the doctor's opinion, but awareness of his injury may lead employers to refuse him employment. These two illustrations will expose at once the error that results from preoccupation with either the medical or the wage-loss aspect of disability. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage-loss is as real and as directly traceable to the injury as in any other instance. At the other extreme, an insistence on wage-loss as the test would deprive

the claimant in the former illustration of an award, thus not only penalizing his laudable efforts to make the best of his misfortune, but also fostering the absurdity of pronouncing a man non-disabled in spite of the unanimous contrary evidence of medical experts and of common observation. The proper balancing of the medical and the wage loss factors is, then, the essence of the 'disability' problem in workmen's compensation."

In applying that standard in the case before it, the Supreme Court made it clear that in assessing a total disability rating, the Commission must consider not only the functional impairment based upon medical evidence, but must also consider other factors:

The maximum medical rating of disability in this case was 40%, which was allowed by the referee and affirmed by the Full Commission. Apparently, they also considered only medical evidence and this we consider error. Under the rule as set out in Larson, consideration should have been given, along with the medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss.

Therefore, for the error indicated, the cause is reversed and remanded to the Circuit Court with directions to remand to the Workers' Compensation Commission for further proceedings consistent with this opinion."

The essential holding of the Glass v. Eden case has been upheld by Arkansas Courts, and this Commission, on numerous occasions. Clearly, in assessing a claimant's permanent disability, the two factors which must be considered are the functional loss of use occasioned by an injury and how that functional loss, when combined with other factors such as a claimant's age, education, transferrable job skills, combine to limit his or her wage-earning capacity. In this case, it is obvious that the effects of the claimant's compensable injury, when combined with the above listed factors, severely limit the claimant's ability to earn a living. The claimant has a 15% anatomical impairment rating to the body as a whole. Following the claimant's 2003 back surgery, both Dr. Jim Moore and Dr. Mark Martindale indicated in their medical records that the claimant would be unable to re-enter the workforce. At the time of the hearing, the claimant was 55 years old. He has a 10<sup>th</sup> grade education with a GED and a college class in water safety. He has no transferrable job skills or any vocational or technical training which would assist him in earning a living.

Considering that the vocational expert, Mr. White's best estimate was that the claimant would earn no more than \$10.00 per hour, and even assuming the

claimant could perform such a job on a full-time basis (which appears unlikely), the claimant's earnings would still be less than half of what his pre-injury wages were. Based on the claimant's age, the significant limitations on the claimant's physical activities, his lack of education and lack of transferrable job skills, the Full Commission finds that the claimant has sustained wage-loss disability in the amount of 50% to his body as a whole, over and above the 15% anatomical impairment rating. This results in a total disability rating for the claimant of 65% to the body as a whole. The respondent would be entitled to a credit for any permanent partial disability benefits they have previously paid to the claimant, including those based upon the 15% anatomical impairment rating.

### III. CONCLUSION

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 proved by a preponderance of the evidence his entitlement to wage-loss disability benefits in the amount of 50% over and above his anatomical impairment rating.

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 fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissent, in part.

**CONCURRING AND DISSENTING OPINION**

I must respectfully dissent from the majority's award of 50% in wage loss disability benefits in addition to the claimant's permanent anatomical impairment. However, I concur in the majority's clarification of Ark. Code Ann. §11-9-522(b)(1).

After considering this matter on remand, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment rating. In my opinion, after considering the testimony of Robert White, the vocational rehabilitation counselor, Dr. Jim Moore and Dr. Mark Martindale as well as all the evidence in the record including the testimony of the claimant, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment. The claimant's testimony regarding his motivation to return to work is evidenced by the following exchange at the hearing upon questioning by the respondent's attorney:

Q. As far as going to work for somebody else, you haven't given it much thought?

Mr. Jensen: Let him finish his statement.

Mrs. Carroll: Excuse me.

The Witness: I was just going to say, if I had the opportunity to work for ALCOA for another ten years, that's what I've got in mind. I haven't even considered or even thought of going to work for anybody else, no, I haven't.

Q. And, in your mind, you'll just go on being retired if you can't work for ALCOA?

A. That's the way I feel. I haven't thought of working for anybody else. Don't know if anybody that could give me the opportunities like ALCOA.

It is clear that the claimant lacks motivation to return to work. It's either work for ALCOA or work for no one in his mind. The claimant has voluntarily elected to retire. He worked for the respondent employer for 33 years and his eligibility to take retirement vested after 30 years. The claimant receives approximately \$1,459 per month in retirement benefits from the respondent employer as well as fully paid health insurance coverage. The claimant also receives \$1,750 per month in social security benefits.

The claimant offered the testimony of Robert White, vocational counselor. Mr. White stated that he was not asked to provide a report and was only instructed to consider the claimant's back and not his hip problems when making any determinations. Mr. White testified as follows:

Q. Okay.

A. And I think, again, coupled with his age, approaching advanced age or closely approaching advanced age, that that would certainly keep him

from going back to his work at ALCOA.

Q. Okay. In regard to Mr. Deutscher's ability to enter the workforce in another capacity, in consideration of the four factors and your review of the medical reports and your interview of Mr. Deutscher, do you believe that he is capable of entering the workforce in another capacity.

A. Your Honor, I think he might be able to go back to work in a part-time capacity....

Dr. Jim Moore treated the claimant for his compensable back injury. In a letter dated August 9, 2005, Dr. Moore states:

INTERVAL HISTORY: I saw this patient last 7-27-04. He comes in today requesting medication. He was provided some Tylenol #3 in September of last year which apparently has done him satisfactorily until the present time. He continues to have periodic pain in the back especially on the left side. This is a great deal related to the degree of physical activities in which he engages. He attempts to do physical activities around his home including yard work which takes a very long period of time and his ability to flex, bend, squat are restricted and limited. The patient's last surgery was that of hip replacement on the right as accomplished by Dr. Hefley. He has applied for and has been approved for social security benefits.

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RECOMMENDATIONS: The patient is doing I think satisfactorily in view of the surgical procedures. He continues in a retired status and I do not believe that he is capable of carrying out any working activities. He was issued some Darvon 65 today to see if this will give him sufficient relief of his symptoms and as an alternative to Tylenol #3 which he was supplied with last.

DIAGNOSIS: Post-op status lumbar laminectomy.

At the time claimant was evaluated by Dr. Moore, the claimant had recently undergone a total hip replacement and had applied for and received social security disability benefits. Additional surgery was recommended for the claimant's remaining hip, which he had refused. Given the totality of the claimant's medical condition, and the lack of clarification in Dr. Moore's medical records, it would require speculation and conjecture to find that Dr. Moore's statement that the claimant is not capable of working is the result of the claimant's back condition and not his deteriorating hips. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Likewise, the report of Dr. Martindale dated January 25, 2007, indicates that the claimant is disabled but he does not indicate whether the major cause of this disability is the claimant's compensable back injury or his non-compensable deteriorating hips. There is no indication how much the claimant is disabled but Dr. Martindale has been treating the claimant since Dr. Moore retired. His report stated that the claimant's back "still with some stiffness and decreased range of motion." He stated also:

Bruce comes in today basically for a checkup regarding his workman's comp stuff. He had injured his back years ago. He had been seen actually by Dr. Moore for this. Basically, Dr. Moore retired and I have seen him as far as workman's comp since then. At any rate, he had an injury and has been disabled.

The evidence demonstrates that the claimant is able to ride his motorcycle and in fact participated in an ABATE Motorcycle Rally in September of 2003 that was a four or five hour trip from his home. In fact, in an October 6, 2004, note from Dr. Hefley, who treated the claimant's hip, Dr. Hefley stated:

He is 3 months out on the right. He is happy with his right hip. The left hip is not bothering him. He has been very active. He has been doing some high diving off a 20-foot height and active with other

activities.

Dr. Hefley discussed venting and grafting of the claimant's left femoral head and the claimant opted to forgo that procedure instead wanting to "take his chances." Dr. Hefley also noted that the claimant "does ride his motorcycle on extended trips".

Therefore, when I consider the opinions of Dr. Moore, Dr. Martindale, Dr. Hefley, and Mr. White and when I consider the fact that the claimant is clearly not motivated to return to work because he is receiving retirement benefits in the amount of \$1,600 per month, social security in the amount of \$1,750, the fact that he has fully paid health insurance, the fact the claimant has voluntarily elected to retire, he has not given any thought to working for another employer, is able to ride his motorcycle and enjoy other physical activities, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner