

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600881

HERMAN FISHER,
EMPLOYEE

CLAIMANT

CENTRAL FREIGHT LINES, INC.,
EMPLOYER

RESPONDENT

TRAVELERS INDEMNITY, COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 10, 2009

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

Claimant represented by the HONORABLE JOHN C. BARTTELT,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE PHILLIP
CUFFMAN, 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 December 22, 2008. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 16, 2006, the relationship of employee-employer-carrier existed among the parties, when the claimant sustained low back injury, and earned wages sufficient to entitle him to weekly compensation benefit rates of \$488.00/\$366.00, for temporary total/permanent partial disability.

3. The claimant's healing period ended on September 14, 2007, and resulted in a permanent physical impairment in the amount of 10% to the body as a whole.

4. When the claimant's age, education, work history, permanent restrictions and physical limitations are considered along with other matters reasonably expected to affect his future earning capacity are considered, the evidence preponderates that the claimant has sustained a loss of earning capacity in the amount of 40% in addition to his anatomical impairment as a result of the January 16, 2006, compensable injury.

5. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of January 16, 2006.

6. The respondents have controverted the claimant's entitlement to wage loss disability in excess of the claimant's 10 % permanent physical impairment.

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 December 22, 2008 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 must concur, in part, and dissent, in part, with the majority opinion. Specifically, I concur with the finding that the claimant sustained 10% permanent physical impairment to the body as a whole as a result of his compensable injury. However, I must dissent from the finding that in addition to this permanent physical impairment the claimant sustained a 40% loss of earning capacity.

The claimant contended at the hearing that he was entitled to an 18% permanent physical impairment rating as assigned by Dr. Terry L. Barnett, D.C. as opposed the 10% permanent physical impairment rating assigned by Dr. Stephen Cathey, a North Little Rock neurosurgeon which had been accepted by the respondents. After finding that the rating assigned by Dr. Barnett consisted of 9% for components of subjective elements of flexion and extension and was assigned when the claimant had yet to reach the end of his healing period, the Administrative Law Judge found that 10% anatomical impairment as assigned by Dr. Cathey was the appropriate rating. The claimant did not appeal this finding.

With regard to wage loss disability, I find that while the claimant may have sustained some degree

of loss to his earning capacity, the award of 40% in this case is excessive. The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are 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). A claimant's lack of interest in pursuing employment with his employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

The claimant in the present claim is relatively young, being only 39 years old at the time of the hearing. The claimant is a high school graduate and he possesses the ability and determination to return to

college and seek a degree in biblical studies. The claimant has worked as a truck driver, a welder, a meat cutter, on a car lot and for a farm. The claimant sustained an injury to his low back for which he underwent surgery and received a 10% anatomical impairment rating. The claimant was initially motivated to return to work for respondents, but may have returned too quickly as his back began to seriously bother him while driving. The claimant only attempted this return to work for one week, and has not worked since. Claimant's own subjective complaints of pain are presently keeping him from working. No physician has prohibited the claimant from driving, but only stated that since the claimant has tried it and failed, he probably should not resume such employment. The claimant underwent a Functional Capacity Evaluation in which he demonstrated an unreliable effort. The examiner wrote that because of this unreliable effort the claimant's "...true functional limitations remain unknown." Thus, without a reliable Functional Capacity Evaluation, this Commission is unable to truly assess the claimant's wage loss disability.

The claimant has admirably chosen to return to college and seek a degree in biblical studies. Pursuant

to the claimant's testimony, even if he is successful as a preacher he anticipates earning less money as a preacher than he did as a truck driver. The Administrative Law Judge, and now the majority relied upon this testimony in reaching its determination of wage loss disability. I view the claimant's ability to successfully return to school and carry 12 to 15 hours each semester to be clear evidence of the claimant's ability and desire to improve himself and return to work in a white collar, rather than a blue collar job. As such, he has demonstrated the ability to work, regardless of the degree and limited income associated with that degree. Accordingly, while I agree that the claimant has sustained a decrease in his earning capacity, I cannot agree that he sustained such a significant loss as awarded by the majority. Therefore, for all the reasons set forth herein, I must concur, in part, and dissent, in part, from the majority opinion.

KAREN H. MCKINNEY, Commissioner