

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606759

JAMES D. JONES, EMPLOYEE	CLAIMANT
CRAIGHEAD FARMERS CO-OP, SELF-INSURED EMPLOYER	RESPONDENT
AG-COMP SIF CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 14, 2009

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

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY, 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 July 16, 2009. 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 June 12, 2006, the employment relationship existed between the claimant and the self-insured employer when the claimant earned an average weekly wage of \$548.97, generating

weekly compensation benefit at the rates of \$366.00/\$275.00, for temporary total/permanent partial disability.

3. On June 12, 2006, the claimant sustained compensable injuries arising out of and in the course of his employment.
4. The claimant sustained a permanent physical impairment in the amount of 8% to the whole person as a result of his right shoulder and upper extremity injuries growing out of the June 12, 2006, compensable injury.
5. The respondent shall pay all reasonable hospital and medical expenses arising out of and in connection with the treatment of the claimant's June 12, 2006, injuries.
6. The claimant reached the end of his healing period with regard to the right (sic) and right shoulder injuries growing out of the June 12, 2006, compensable injury on June 5, 2007.
7. When the claimant's age, education, work history, permanent restrictions and limitations are considered, the evidence preponderates a loss of earning capacity/wage loss in the amount of 19% over and above the claimant's anatomical impairment has been sustained as a result of the June 12, 2006, work-related accident and resulting compensable injuries.
8. The respondent has controverted the claimant's entitlement to permanent partial disability/wage loss benefits in excess of the anatomical 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 July 16, 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 dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant is entitled to an 8% permanent anatomical impairment to the whole body for his injury to his right arm, as well as, a 19% loss in wage earning capacity. Based upon my de novo review of the record, 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. As such, the finding of the Administrative Law Judge should be reversed.

The claimant was employed by the respondent employer as a truck driver. The claimant took fuel to

farms. On June 12, 2006, he failed to negotiate a stop sign and ended up having an accident whereby his truck rolled three times. The claimant sustained an injury to his right arm as well as a broken nose, facial lacerations and an injury to his ankle. The claimant returned to work for the respondent employer in August of 2006, working restricted duty. In November of 2006, he was released to full duty employment. The claimant was laid off by the respondent employer in November of 2006 because they had no work for him. The claimant was considered a full-time employee when he went to work for the respondent employer in March of 2006. However, due to the fact that the claimant's accident rendered him unable to drive, the respondent employer had to replace the claimant's position. Therefore, the claimant became a seasonal employee at the end of August when he returned to work on restricted duty. The claimant maintained his wages of \$9.00 per hour.

The claimant has worked for several employers since he was laid off by the respondent employer. The claimant went to work for USA Truck in February of 2007, and worked there until June of 2007. The claimant earned between \$700 and \$1000 per week at that job. The claimant then went to work at First Choice Road Service in June of 2007 and worked there until November 2007.

In that position, the claimant earned \$650.00 to \$700.00 per week. From November of 2007 through February of 2008, the claimant made \$700 to \$1000.00 per week working at Whitt Transport. The claimant went to work for Nettleton and Hedger Brothers making \$9.00 an hour during the summer of 2008. The claimant quit working for Hedger Brothers on July 9, 2008 and he quit without any notice. After leaving Hedger Brothers, the claimant went to work for Swift Transport and worked there until three weeks before the May 1, 2009 hearing. The claimant is currently not employed.

The claimant testified that he left all the jobs he had after November 2007 due to physical problems performing the jobs because of his compensable injury. However, the employment application that the claimant filled out with Hedger Brothers showed that he left employment for other reasons. For instance, the claimant stated that he left Swift because he got custody of his son. The claimant left USA Truck because they cut his mileage. The claimant left the respondent employer because he and the supervisor did not see eye to eye. In short, it appears that the claimant is untruthful regarding his reasoning for leaving his other employment. The claimant finally admitted on cross-

examination that one of the reasons he had to come off the road was to care for his son.

Surveillance video was admitted into the record. The claimant was seen as he was working for Hedger Brothers, driving a concrete truck. In the video, the claimant is seen using a hose with his right arm to spray down the truck. He is shown driving. He is shown wiping his brow. He is also shown eating, using his right arm and, apparently, having no discomfort whatsoever. The claimant was also shown getting in and out of the cab of his truck.

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).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a

preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

In my opinion, the claimant is not entitled to any wage loss disability benefits. Clearly, the claimant has been able to get a job and keep a job making more than \$9.00 an hour, which is what he was making working for the respondent employer at the time of his compensable injury. The claimant was making anywhere from \$700.00 to \$1000.00 in many of the jobs that he was working. Further, when the claimant applied for unemployment benefits after leaving the respondent employer, he stated that he did not have any restrictions that would keep him from working. Also, when the claimant applied for his job at Hedger Brothers, he noted on the employment application that he did not have any restrictions that would keep him from performing his job duties.

Therefore, when I consider the fact that the claimant is only 33, the fact that the claimant has been

able to secure employment making substantially more per week than what he was making for the respondent employer, the fact that the claimant was seen being able to get in and out of his truck with ease and able to perform employment duties, 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. Accordingly, I would reverse the decision of the Administrative Law Judge.

KAREN H. MCKINNEY, COMMISSIONER