

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107011 & F304582

CLEVELAND OSBORN, EMPLOYEE	CLAIMANT
ANDERSON ENGINEERING CONSULTING, EMPLOYER	RESPONDENT NO. 1
ONE BEACON INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
TRANSPORTATION INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED JUNE 10, 2009

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

Claimant represented by the HONORABLE KRISTOFER E.
RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE FRANK B.
NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 3, Second Injury Fund, appeals an
administrative law judge's opinion filed September 17, 2008.

The administrative law judge found that the claimant had been rendered permanently and totally disabled. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant was permanently and totally disabled. We find that the claimant proved he was entitled to wage-loss disability in the amount of 50%.

I. HISTORY

Cleveland Osborn, age 61, testified that he was a high school graduate and had earned a technical-school degree in Foundation Engineering. Mr. Osborn served in the United States Army from approximately 1967 through 1984. The claimant testified that he received a disability rating from the Veterans Administration for his back and neck following discharge from the Army. The claimant began working for Anderson Engineering Consultants in September 1992. The claimant testified, "Most of what I did was steel inspections and concrete inspections, picking up concrete samples and soil samples, and making sure the asphalt concrete was done, inspecting steel, stuff like that."

The parties stipulated that an employment relationship existed on June 1, 2001. The claimant testified that

slipped and fell approximately nine feet into a hole. An emergency record dated June 1, 2001 indicated that the claimant was diagnosed with a contusion to the head and a contusion to the back. A physician diagnosed compression fracture of the claimant's lumbar spine on June 6, 2001. Another physician's diagnosis on June 15, 2001 included thoracic compression fracture at T12 and lumbar fracture at L1.

The parties stipulated that the claimant sustained a compensable injury to his back on March 10, 2003. The claimant testified that he felt an acute burning in his lower back after picking up a concrete cylinder. The claimant testified that he was not able to return to work after March 11, 2003.

Dr. Robert E. Abraham began treating the claimant in April 2003. Dr. Abraham stated on August 28, 2003, "I diagnosed him with having a herniated disk in the L4/5 region of his spine. Mr. Osborne underwent surgery (L4/5 microdiskectomy) for this on April 25, 2003. The patient has shown signs of improvement, yet will never be fully recovered. He is now having problems with his right hand....In light of all the patient's problems, I do not

suggest that he return to work doing the job that he is presently employed for. I actually suggest that the patient be retired." Dr. Abraham performed surgery on the claimant's right elbow, apparently a right ulnar nerve transposition, on September 24, 2003.

The claimant testified that he resigned his employment with the respondent-employer on or about October 1, 2003. The parties stipulated that the claimant reached the end of his healing period and maximum medical improvement on November 24, 2003.

Dr. Abraham wrote to Respondent No. 2's attorney on April 9, 2004:

This letter is in response to your March 22, 2004 correspondence regarding Cleveland Osborn. Mr. Osborn has reached MMI. He does have permanent impairment related to his lumbar spine problems and his rating is 17% based upon the A.M.A. Guides Fourth Edition. Mr. Osborn has a maximum lifting restriction of 45 pounds and the patient should avoid bending or twisting of his lumbar spine.

The claimant was deposed on August 21, 2007. The claimant testified that his disability rating from the Veterans Administration had been increased to 100% for his service-connected disabilities.

A pre-hearing order was filed on March 19, 2008. The claimant contended, among other things, that he was

permanently and totally disabled or in the alternative had sustained wage-loss exceeding his permanent anatomical impairment. Respondent No. 1 contended, among other things, that there was no wage loss. Respondent No. 2 contended, among other things, that if the claimant was found to be entitled to any wage-loss disability benefits, then the Second Injury Fund was liable for same. Respondent No. 3, Second Injury Fund, contended that it acknowledged responsibility for the claimant's wage-loss disability. Respondent No. 3 contended that it had not controverted wage-loss disability benefits.

The Commission's Special Funds Administrator informed the parties on March 20, 2008, "It appears settlement of this case is not likely. The Second Injury Fund will accept 30% wage loss liability. Please advise with the pay records reflecting benefits paid for the impairment rating so we can coordinate the transfer of liability."

A hearing was held on June 20, 2008. The claimant testified that his complaints were related to his back, legs, shoulder, and elbows. The claimant testified that he could drive a motor vehicle for short distances, operate a riding lawn mower, and perform small projects around his

house. The claimant testified that he wanted to return to work but was not sure what kind of work he could perform. The claimant testified that he received monthly benefits from Social Security, the Veterans Administration, and MetLife, and that these combined benefits averaged about \$5,000 per month.

An administrative law judge filed an opinion on September 17, 2008. The administrative law judge found, among other things, that the claimant sustained compensable injuries to his low back, elbows, and neck on June 1, 2001. The administrative law judge found that the claimant had sustained a 5% permanent impairment to the right upper extremity for which Respondent No. 1 was liable. The administrative law judge found that the claimant had sustained a 3% permanent physical impairment as a result of the March 10, 2003 compensable injury. None of the parties appeal these findings.

The administrative law judge found, "14. When the claimant's age, education, work history, permanent restriction and limitations are considered the evidence preponderates that he has been rendered permanently and

totally disabled." Respondent No. 3, Second Injury Fund, appeals to the Full Commission.

II. ADJUDICATION

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b)(1). "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e)(1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2).

In the present matter, the claimant is age 61 and has a high school education. The claimant has a degree in Foundation Engineering and his work history has been primarily in that field. The claimant began working for the respondent-employer in September 1992. The claimant's work

for the respondents involved steel and concrete inspections and required some manual labor. The claimant sustained compensable injuries to his low back, elbows, and neck on June 1, 2001. The claimant sustained a compensable injury to his back on March 10, 2003. The claimant has been assessed with a 5% impairment rating to his right upper extremity following compensable elbow surgery, and the administrative law judge found that the claimant had sustained a 3% whole-body impairment related to the compensable back injury of 2003.

Respondent No. 3, Second Injury Fund, has accepted responsibility for wage-loss disability in the amount of 30%. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 50%. We recognize that the claimant now has some physical limitations as a result of his compensable injuries. Nevertheless, the claimant is only age 61 and is articulate and intelligent. Dr. Abraham opined in April 2004 that the claimant "had a maximum lifting restriction of 45 pounds and the patient should avoid bending or twisting of his lumbar spine." Dr. Abraham, a primary treating physician, did not opine that the claimant was permanently and totally disabled. The

claimant testified that he was receiving a total of approximately \$5,000 monthly in Social Security disability, Veterans Administration disability, and an investment in MetLife. Although the claimant has been a credible witness throughout these proceedings, the Full Commission finds that the claimant is not motivated to return to gainful employment. A lack of motivation to return to work impedes an assessment of a claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant proved he was permanently and totally disabled. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 50%, and that Respondent No. 3, Second Injury Fund, is liable for wage-loss disability in the amount of 50%. Respondent No. 3 is not entitled to an offset, in accordance with Ark. Code Ann. §11-9-411, for the claimant's Veterans Administration benefits. The overriding purpose of Ark. Code Ann. §11-9-411 is to prevent a double recovery by a claimant for the same period of disability. *Henson v.*

General Electric, 99 Ark. App. 129, ___ S.W.3d ___ (2007). The claimant's VA benefits are not related to the period of disability covered by Respondent No. 3 and are not subject to the offset provided for in Ark. Code Ann. §11-9-411.

The Full Commission reiterates that Respondent No. 3 accepted and did not controvert wage-loss disability in the amount of 30%. We have awarded the claimant wage-loss disability in the amount of 50%. Pursuant to Ark. Code Ann. §11-9-715(a)(2)(A) (Repl. 2002), the claimant's attorney is entitled to fees for legal services on the 20% amount of compensation controverted and awarded from Respondent No. 3. See *Cleek v. Great S Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). The claimant's attorney in the instant matter is not entitled to a fee for prevailing on appeal in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002). See *Firestone Tube Co. v. Potts*, 100 Ark. App. 203, 266 S.W.3d 223 (2007).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence his entitlement to permanent and total disability benefits under Ark. Code Ann. §11-519 (e)(1), and therefore, I must respectfully dissent.

While the analysis required in a claim for permanent and total disability is similar to that conducted to determine wage loss disability, it is not the same. See Rutherford v. Mid Delta Community Services, Inc. ___ Ark. App. ___, ___ S.W. 3d ___ (2008). Wage loss disability is defined as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). In determining wage-loss disability, in addition to the percentage of permanent physical impairment, 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).

Permanent total disability is defined as inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-519 (e) (1). The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-519 (e) (2). The same factors considered when analyzing wage loss disability claims are usually considered when analyzing permanent and total disability claims. See Ark. Code Ann. §11-9-519 (c); Rutherford, Supra. However, the actual statutory analysis required of the fact finder is not the same. For wage loss disability, the relevant inquiry, based on Ark. Code Ann. §11-9-522, is: "To what extent has the claimant's compensable injury affected his or her ability to earn a livelihood?" For permanent total disability, the relevant inquiry, based on Ark. Code Ann. §11-9-519 is: "Has the claimant proved by a preponderance of the evidence the inability to earn any meaningful wage in the same or other employment?"

Here, the claimant is sixty-one years old with minimal post-secondary education. His work history is that of a manual laborer. He has had three surgical procedures on his neck, two surgical procedures on his back, and a right upper extremity surgery. He takes prescription medication for pain and muscle spasms. As noted by the majority, the claimant is physically restricted due to his compensable injury. Based on the above factors, I find that the claimant is unable to earn any meaningful wage as a manual laborer, or in any other employment. The claimant is permanently and totally disabled pursuant to Ark. Code Ann. §11-9-519.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner