

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510656

NEAL SMITH,
EMPLOYEE

CLAIMANT

J. B. HUNT TRANSPORT, INC.,
EMPLOYER

RESPONDENT

INSURANCE COMPANY OF STATE OF PA,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 13, 2009

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

Claimant represented by the HONORABLE J. MARK WHITE,
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE JOSEPH H.
PURVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross-appeals an
opinion and order of the Administrative Law Judge filed
February 25, 2009. In said order, the Administrative
Law Judge made the following findings of fact and
conclusions of law:

1. The stipulations agreed to by the parties at
the pre-hearing conference conducted on
September 3, 2008, and contained in a pre-
hearing order filed that same date, are hereby
accepted as fact.
2. Claimant has proven by a preponderance of the
evidence that he has suffered a loss in wage

earning capacity in an amount equal to 25% to the body as a whole.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 25% to the body as a whole.

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 February 25, 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

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant sustained a 25% wage loss disability. I do not find that the claimant's wage loss is as great at that found by the Administrative Law Judge. Therefore, I find that the decision of the Administrative Law Judge should be affirmed as modified. Alternatively, I find that the parties both indicated that this was a claim ripe for

exploration of vocational rehabilitation, as such the issue of wage loss disability is premature. Therefore, I find that the decision of the Administrative Law Judge should be vacated and this claim remanded to the ALJ with directions that the parties explore all aspects of vocational rehabilitation.

The Administrative Law Judge found that "there was perhaps a lack of communication between the respondent and the claimant with regard to what was being offered and what was expected" with regard to vocational rehabilitation. Respondents hired Tineta Wall to perform a vocational assessment of the claimant. In her initial vocational report, Ms. Walls concluded:

Mr. Smith appears to be a good candidate for vocational services. He expressed his desire to return to work and discussed his independent job search. He is also open to various training programs. At this time, I would recommend completion of labor market research focusing on work in an hour radius from injured workers' residence per his preferences. Once I have had a chance to conduct labor market survey, I will be in a better position to comment on client's employability. Also, I will conduct research regarding 2-year training programs. Injured worker expressed an interest in Electronics, Computers, and Paralegal training.

Claimant testified that it was his belief that the respondents were going to offer him retraining. Claimant even testified that he contacted his attorney with regard to this issue.

Arkansas Code Annotated § 11-9-505(b) (4) requires that the claimant file a request for vocational rehabilitation with the commission prior to a determination of permanent disability. Claimant was under the mistaken belief that the respondents would offer him vocational rehabilitation based upon his contacts with Ms. Wall. However, Ms. Wall was merely researching what options were available for vocational rehabilitation. The burden falls upon the claimant to inform the commission and thus the respondents what type of vocational rehabilitation plan he wants to undergo. It is not for the respondents to carve out a plan and force it upon the claimant.

Claimant clearly thought that vocational rehabilitation was being explored. However, he did not comply with A.C.A. § 11-9-505(b) (4). Nevertheless, both claimant and respondents indicated that this was clearly a claim that was ripe for a determination of vocational rehabilitation. Therefore, I find that any determination of wage loss disability is premature at

this time. The claimant is a highly motivated individual who has expressed a desire for retraining, and the respondents have agreed. Accordingly, I find that the decision of the Administrative Law Judge should be vacated and set aside and that this claim be remanded to the Administrative Law Judge for the parties to explore whether the claimant has a plan for vocational rehabilitation that is reasonable in relation to the disability sustained by the claimant.

Since vocational rehabilitation was not properly explored in this claim, I find that any award of wage loss disability is not only improper, but highly prejudiced.

The claimant is a young individual, being only 45 years old at the time of the hearing. He has a high school diploma and a bit of college education. The claimant has worked as a truck driver, a heavy equipment operator, a heating oil fire furnace repairman, and as a general laborer. The claimant has indicated an interest in retraining in order to start a new career. The claimant sustained an admittedly compensable injury to his low back for which he has undergone two surgical procedures. Presently, the claimant has a 25% permanent anatomical impairment resulting from his compensable

injury. A functional capacity evaluation indicated that the claimant was capable of returning to work in the medium category which would allow him to lift 42 pounds occasionally, 21 pounds frequently, and 8 pounds constantly. The claimant has been released to return to work within these restrictions by his treating physician. Prior to his injury the claimant earned \$74,600 annually as a truck driver for respondents. Since his injury the claimant has worked for a friend earning \$150 to \$200 per week, and he has helped his wife with her Karaoke business by repairing the machines and operating the equipment. The claimant testified that he has applied for work through the North Carolina Employment Commission and that he has talked to friends and inquired at some businesses on his own. However, he also testified that he mentioned that he had an open workers' compensation claim whenever he applied for a job.

Respondents hired Tineta Wall to perform a vocational assessment of the claimant. After interviewing and testing the claimant, Ms. Wall noted that the claimant was a good candidate for vocational services. Ms. Wall conducted a labor market survey and identified nine potential job opening within a one hour

radius of the claimant's residence that fell within his physical restrictions. The claimant failed to apply for any of these job openings.

Although the claimant has indicated that he is motivated to return to work, the claimant's lackadaisical approach to applying for employment belies this testimony. The claimant expressed an interest in retraining when he spoke with Ms. Wall yet he did not follow up with presenting a vocational rehabilitation plan to the commission. The claimant merely assumed that the respondents would create a plan for him. When a plan was not forthcoming from the respondents, the claimant's attitude toward returning to work appears to have soured. However, it is not for the respondents to create a plan for a claimant to pursue. As it is the claimant's future at stake, the burden rests upon the claimant to advise the commission and thus the respondents the type of vocational rehabilitation he desires to pursue. While the respondents may assist in the preparation phase, it is the claimant that must present the plan. Claimant failed to do so in this claim.

The job market survey conducted by Ms. Wall located jobs paying approximately \$10 to \$15 per hour.

Claimant argues in his brief that when his pre injury income is considered that mathematically the numbers reveal a greater than 50% loss in his wage earning capacity. First, I must dispute the claimant's numbers. Second, it has long been held that a pure mathematical formula for determining wage loss disability is not appropriate. With regard to the claimant's numbers, I note that the claimant "assumes" a 40 hour work week for the claimant as a truck driver. This assumption is inappropriate. Claimant earned \$74,600 per year driving a truck for respondents. Truck drivers are not limited to a 40 hour work week and the high wages reflect this fact. Even the DOT regulations acknowledge that truck drivers will drive as long and as much as they can, so time restrictions were put in place for driver and public safety. The DOT regulations set forth several methods for drive time restrictions - a driver may drive as much as 70 hours in an 8 day period with a required 34 hours off after that; a driver may drive 11 hours straight with the following 10 hours off duty; after coming off a 10 hour off duty, a driver may drive more than 14 hours if he shows at least 2 hours in the sleeper berth. Thus, it is inappropriate to make any assumptions with regard to the hourly wage claimant

earned as without any evidence establishing the claimant's pattern of driving time any calculation would be based upon mere conjecture and speculation. 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 Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). But at the very least it clear that the claimant did not work a 40 hour work week, thus rendering claimant's calculations meaningless. However, for the sake of argument, when claimant's annual salary of \$74,600, is considered with a more appropriate 70 hour work week, his wages amount to \$20 per hour.

There is not, and has never been, a mathematical formula for assessing wage loss disability. Eckhardt v. Willis Shaw Express, Full Commission Opinion Filed November 12, 1998 (E603970 & E414831). A determination of wage loss disability is not a mathematical formula to be determined by calculation, but an evaluation of several factors, including medical evidence, age, work experience, pre-injury and post-injury wages, education, interest in rehabilitation

and attitude. Curry v. JM & T Pulpwood, Full Commission Opinion Filed February 21, 1995 (E201535); Chism v. Jones, 9 Ark. App. 268, 658 S.W.2d 417 (1983); Nicholas v. Hempstead Co. Memorial Hospital, 9 Ark. App. 261, 658 S.W.2d 408; City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). If a mathematical formula were allowed, it would be in every claimant's best interest to neglect to return to work until after a hearing on wage loss disability so that he can compare his average weekly wage at the time of his injury to his complete lack of income. Such a formula would defeat the stated purpose of Act 796 of returning employees to work. Moreover, the amount of wages in and of itself is not a determining factor. Blann v. Harvill-Byrd Electric Co., 249 Ark. 456, 459 S.W.2d 567 (1970); Terrell v. Austin Bridge Co., 10 Ark. App. 1, 660 S.W.2d 941 (1983). Wage loss disability reflects a claimant's wage earning capacity, not the claimant's actual wages earned. This capacity assumes the capacity to earn at the entry level and the ability to advance with training and knowledge. Thus, consideration of entry level earnings, in and of themselves without consideration of the other wage loss factors, provides a skewed perception of one's actual capacity to earn wages.

Accordingly, after I consider the claimant's young age, his education and learning ability, his compensable injury and lifting restrictions, together with the claimant's motivation to seek retraining and improve his earning ability, his pre-injury income, and all other matters reasonably expected to affect his wage earning capacity, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a twenty-five percent (25%) wage loss disability. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER

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

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority opinion. I specifically concur that the claimant is entitled to 25% wage loss disability. However, after a de novo review of the record, I agree with the claimant that the evidence of record clearly does not support an award limited to only

25%. Based on the evidence of record, I find that the claimant is entitled to wage loss disability benefits in the amount of 58% and would award benefits accordingly.

The respondent's vocational expert, Tineta Wall, performed a labor market survey to identify a sampling of medium-level jobs. After contacting 49 employers in the Charlotte metropolitan area, Ms. Wall was able to identify only 9 jobs possibly suited for the claimant .

Prior to his injury, the claimant's wages from the respondent-employer were \$76,000 annually. Assuming a standard 40-hour workweek, this translates to an hourly wage of \$35.87 per hour. In contrast, the best-paying job identified in Ms. Wall's labor market survey was a customer service representative position paying \$15.00 per hour. This \$15.00 hourly wage is a 58% reduction from the claimant's pre-injury wage level. Yet, it is not clear that the claimant is capable of obtaining and performing this position. First, Ms. Wall noted that this particular employer preferred applicants with prior customer service experience, and the claimant has no such experience. Second, as this Commission is well aware, most customer service positions require extended sitting. The claimant, however, has difficulty

sitting for extended periods of time. The FCE report rates his "measured maximum tolerance" for sitting as 30 minutes. At the hearing, the claimant had to stand even before his direct examination was completed. This limited ability to sit for extended periods hampers the claimant's ability to adequately perform many desk jobs on a full-time basis.

The 9 jobs identified by Ms. Wall in the labor market survey paid an average hourly wage of \$11.03 per hour - a 69% reduction from the claimant's pre-injury wage level. Respondents claim that the claimant is somehow capable of earning wages comparable to his pre-injury wage level; yet their own hand-picked expert was unable to identify any suitable job that would pay the claimant even half of his pre-injury wages. If the labor market survey conducted by respondents' expert is accurate - and there is no evidence to suggest otherwise - the claimant is now limited to earning, at most, 42% of what he earned prior to his compensable injury, a loss of 58%. Give this expert opinion evidence, there is no substantial evidence by which the Commission can limit his wage-loss award to only 25%.

The evidence in the present claim is strikingly similar to that of Taggart v. Mid American

Packaging, ___ Ark. App. ___, ___ S.W.3d ___ (April 29, 2009). Like the claimant here, the claimant therein injured her back and ultimately lost her job due to her injury. Before her injury, she earned more than \$67,000 annually, but after the injury, she was earning only \$5.15 per hour for part-time work. As in the instant case, there was vocational evidence showing some possible jobs within the claimant's restrictions, and the best-paying job identified paid only \$35,000 annually, a reduction of 49% from her pre-injury wages. The Commission awarded that claimant wage-loss benefits of 20%, but the Court of Appeals reversed, holding that 20% was insufficient to adequately compensate the claimant for her loss of wage-earning capacity.

The claimant, in contrast, was working a job prior to his injury that would have paid him \$74,600 annually, and the evidence in the record identifies no job he can do that would pay more than \$15.00 per hour, or \$31,200 annually - a loss of 58%. If his loss is measured from the average pay of the 9 jobs identified by Ms. Wall, his loss of wage-earning capacity is actually 69%. If a 20% award in the Taggart case was insufficient to compensate for an earnings loss of only 49%, then, in this case, a 25% award is similarly

insufficient to compensate for the claimant's earnings loss of 58% or more.

Wage loss disability awards are left to the discretion of the Full Commission, however, they must be based on the evidence of record. Here, the only evidence of record presented shows that the claimant has sustained at least a 58% diminution in wage-earning capacity. There is no evidence of record indicating that the claimant has only sustained 25% wage loss disability.

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

PHILIP A. HOOD, Commissioner