

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210971

INTONG SIVIXAY, EMPLOYEE	CLAIMANT
DANAHER TOOL GROUP, EMPLOYER	RESPONDENT
FIDELITY & GUARANTY INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2009

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

Claimant represented by HONORABLE KEN OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reverse.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to 25% loss in wage earning capacity in addition to his 35% permanent anatomical impairment rating. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer in the forging department when he sustained a

traumatic injury on September 14, 2002. The claimant has undergone four surgical procedures as a result of that injury. He sustained injuries to his abdominal area when a piece of hot metal penetrated his abdomen. The medical reports indicate that it was not only a missile-type injury, but also a thermal injury as well. The claimant had a stomach resection, one-half of his liver resected, a significant length of his left transverse colon resected and a resection of multiple feet of his small intestine. In 2004, the claimant also had a procedure to reverse a colostomy.

In January of 2003, the claimant returned to work for the respondent employer in the assembly department. The claimant began working two hours per day and gradually increased his workload to a full eight-hour day. The claimant is currently working as a machine operator for the respondent employer making \$12.80 per hour. Before the claimant's injury he was earning a little more than \$17.00 per hour.

On November 14, 2004, the claimant saw Dr. Gary Moffitt for an independent medical evaluation. Dr. Moffitt

indicated that the claimant had reached maximum medical improvement but would require future medical treatment. The claimant was assigned a 35% permanent anatomical impairment rating which was accepted and has been paid by the respondents. At this time, the claimant contended that he was entitled to additional temporary total or temporary partial disability benefits from November 14, 2004, continuing through a date in the future and he also requested payment of permanent partial disability benefits for wage loss. The Administrative Law Judge found that the claimant was not entitled to any temporary total disability or temporary partial disability benefits. That issue was not appealed to the Full Commission. The only issue appealed was the 25% loss in wage earning capacity the Administrative Law Judge awarded to the claimant. After conducting a de novo review of the record, we 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.

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 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).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Supp. 2005) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code

Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

The evidence demonstrates that the claimant has not been told that he could not do his old job. In fact, the respondent employer offered the claimant to return to work at his old job and the claimant, instead, bid on a lower paying job. The claimant continues to work a full schedule for the respondent employer in his current position and he stated that he has been able to perform these duties without any difficulties. The evidence demonstrates and the claimant conceded that he had been offered his forging job by the respondent employer after he returned to full duty.

Rachelle Henson, a supervisor for the respondent employer, testified that the claimant had been offered his old job and he refused to do it. She testified that if the claimant had accepted this position he would have continued at his pre-injury rate up through the date of the hearing.

The evidence demonstrates that the claimant did not even try his old job nor did he even attempt to perform the job duties associated with the forging position after he returned to full employment. The claimant just flatly refused the position when it was offered to him. The claimant admitted that no physician has given him any work restrictions and the evidence in the record demonstrates that no physician has put any work restrictions on the claimant. The claimant refused to go back to the forging position on his own. Further, the claimant bid on lower paying jobs. Therefore, the claimant should not benefit from his own unilateral decision not to return to his old job.

Therefore, when we consider that the fact that the claimant was released to full duty and no physician has opined that he could not return to his old job in the forging department, the fact that there is absolutely no medical documentation of restrictions on the claimant's activities, the fact that the respondents made a bona fide and reasonable obtainable offer for the claimant to return to his old position at the old wage rate, the fact that the claimant made a unilateral decision not to return to his old

job, and the fact that the claimant voluntarily bid on and began working in a lower paying position for the respondent employer, we cannot find that the claimant is entitled any wage loss disability benefits in addition to his permanent anatomical impairment. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

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. Based on a de novo review of the record, I find that the claimant is entitled to wage-loss disability pursuant to Ark. Code Ann. §11-9-522(b)(1) and I agree with the Administrative Law Judge's award of 25%. I find that the claimant was not physically capable of returning to the job in the forge department; therefore, the majority's reliance

on Ark. Code Ann. §11-9-522(b) (2) as a bar to wage-loss disability benefits is in error.

Pursuant to Ark. Code Ann. §11-9-522(b) (1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, 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); 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), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

Here, the claimant was assigned a permanent physical impairment rating in an amount equal to 35% by Dr. Moffitt. Dr. Moffitt also indicated that claimant's physical activity would be limited due to weakness caused by his disorder.

According to the medical records, claimant was born on May 4, 1961, which would make him 47 years old. The claimant testified that he has difficulty eating because of the injury. This is confirmed in the medical reports. The claimant also testified that he can no longer perform many activities around the house, such as lifting and yard work. Instead, claimant must rely upon his wife to perform those activities. Also, the claimant's weight has fluctuated significantly since his injury as a result of his eating problems. The claimant's loss of weight was cited by Dr. Moffitt as a factor in assessing his permanent impairment.

After consideration of the relevant wage-loss factors presented in this case, including claimant's testimony and Dr. Moffitt's opinion that claimant has an impairment of 35% to the body as a whole and suffers from

weakness which limits his ability to perform physical activity, I find, as did the Administrative Law Judge, that the claimant has met his burden of proving 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.

To deny benefits, the majority has relied on Ark. Code Ann. §11-9-522(b)(2) which indicates that an employee who has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than the average weekly wage at the time of the accident is not entitled to benefits for wage loss. The employer has the burden of proving an employee's employment, or the receipt of a bona fide offer to be employed at the same wages. A.C.A. §11-9-522(c)(1).

Here, the claimant returned to work for the respondent performing lighter-duty work beginning in January 2003. After the claimant was released by Dr. Moffitt with his impairment rating, the respondent offered claimant the opportunity to return to his job in the forge department earning the same wages he had earned at the time of the

injury. The claimant acknowledged at the hearing that this job was offered to him by the respondent and that he was informed that he would make the same wages he was earning at the time of the injury. However, it is the claimant's contention that he is unable to physically perform the job in the forge department. I find that the preponderance of the evidence shows that the claimant was not physically capable of returning to the job in the forge department; therefore, a bona fide and reasonably obtainable offer to be employed was not offered to claimant and he is not barred from receiving benefits for wage loss.

The majority emphasizes the fact that Dr. Moffitt did not place any specific restrictions on the claimant, such as a weight-lifting restriction. However, a review of Dr. Moffitt's report of November 11, 2004 indicates that the claimant does have some fairly significant limitations. First, Dr. Moffitt indicated that claimant had "suffered a significant amount of permanent impairment" and he assigned a rating equal to 35% to the body as a whole. This impairment was the result of the injury to claimant's abdomen and his digestive system. Dr. Moffitt noted that

claimant had signs and symptoms of organic digestive tract disease and that there was a loss or alteration in his dietary restrictions which were not controlled by medication, and that claimant had a 10 to 20% loss of weight below his desirable weight. Indeed, a review of the medical records indicates that claimant's weight has fluctuated between 89 and 109 pounds since the time of his injury. The claimant testified that he weighs somewhere between 90 and 110 pounds. Furthermore, although Dr. Moffitt did not assign specific work restrictions, Dr. Moffitt did state the following:

His physical activity is limited somewhat due to his weakness in association with his disorder.

I find that it is clear from a review of Dr. Moffitt's medical report that the claimant suffered from weakness as a result of his injury and this weakness would limit his ability to perform physical activity. Dr. Moffitt's opinion is significant when one considers that the forging department job was physically demanding.

The claimant testified that the job in the forging department was physically demanding, as he was required to move six to seven hundred 15-pound pieces of metal each day from one machine into a second machine, and finally into a third machine. Based upon his experience in performing that job for five or six years prior to his compensable injury, it was the claimant's contention that he was physically unable to perform the job because lifting caused weakness, pain, and dizziness.

The physical nature of the forging job was confirmed by Rochelle Kay Henson, a supervisor for the respondent. Henson testified that a job in the forge department pays more because of the skill involved and because it is a physical job. Significantly, Henson testified as follows:

Q. Why is a forging position a higher pay rate?

A. The skill. The skill level and it's a rough job.

Q. Okay. Real hot?

A. It's hot, it's hard, it's very physical.

(Emphasis added.)

Dr. Moffitt indicated that claimant had suffered a significant permanent impairment as a result of his compensable injury. While not assigning specific work restrictions or lifting restrictions, he did indicate that claimant's physical activity would be limited due to weakness caused by his disorder. According to claimant's testimony, the job in the forge department was physically demanding. Claimant's testimony regarding the physical demands of the job was confirmed by Ms. Henson, who described the job as "rough", "hot", "hard", and "very physical". Based upon this evidence, I find that the claimant was not capable of returning to the job in the forge department after his compensable injury. Therefore, a bona fide offer was not made to claimant and he is not barred from receiving benefits for wage loss pursuant to A.C.A. §11-9-522(b)(2), and the majority has erred in reversing the Administrative Law Judge's 25% wage-loss disability award.

For the aforementioned reasons I must respectfully dissent.

Sivixay - F210971

-18-

PHILIP A. HOOD, Commissioner