

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E616625

MIKEL HOLLOWAY,  
EMPLOYEE

CLAIMANT

MOUNTAIN VALLEY OIL CO., INC.,  
EMPLOYER

RESPONDENT

FEDERATED MUTUAL INS. CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 11, 2010

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

Claimant represented by the HONORABLE EDDIE W. WALKER,  
JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE CONSTANCE G.  
CLARK, Attorney at Law, Fayetteville, 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 21, 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 July  
22, 2009, and contained in a pre-hearing order  
filed July 24, 2009, are hereby accepted as  
fact.
2. The claimant has proven by a preponderance of  
the evidence that he suffered a wage loss that  
would be equal to 33 percent impairment to the  
body as a whole.

3. The claimant's attorney is entitled to an attorney's fee in This matter is presently before the Full Commission on set out by the Arkansas Workers' Compensation Act.

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 21, 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 prior to July 1, 2001, the claimant's attorney's fee is governed by

the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion finding that the claimant sustained a 33% wage loss disability. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a decrease in his wage earning capacity equal to 33% to the body as a whole.

The claimant was employed as a truck driver for respondent employer when he sustained a compensable injury to his left shoulder on December 11, 1996. At the time of his injury, the claimant earned approximately \$500.00 per week which entitled him to a temporary total disability of rate of \$337.00. The claimant underwent a total shoulder replacement surgery in 1997. After his healing period ended, the claimant returned to work for the respondent employer in a light duty capacity earning more money than he was earning at the of his injury. Specifically, the claimant was paid a salary of \$625.00 per week, approximately \$125.00 more per week than he was earning at the time of his injury. In 2005, the claimant was terminated from respondent employer for reason totally unrelated to his compensable injury. The claimant secured employment with Penske Logistics which fell within his permanent restrictions of no lifting greater than 20 pounds and no overhead lifting. Initially claimant was hired at \$11.00 per hour, but by the time he last worked for Penske, the claimant was earning just over \$14.00 per hour. In 2007, the claimant underwent another surgery on his shoulder. Following this surgery, the claimant was no longer able to return to work for Penske as he was no

longer able to use his left arm for any lifting at all. Nevertheless, the claimant soon secured employment with the Transportation Security Administration screening luggage and freight at the Fort Smith Airport. The claimant currently earns \$13.50 per hour, working 25 hours per week.

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/she 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/she 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 has failed to prove by a preponderance of the evidence that he is entitled to a 33% wage loss disability. While the claimant may have sustained some degree of wage loss, I ardently disagree with this excessive award. The claimant is a high school graduate and he possesses many transferable skills which he has utilized over the years to demonstrate his ability to adapt and earn meaningful wages since his compensable injury. The claimant was working as a fuel truck driver at the time of his injury. Following his compensable injury, the claimant translated his skills as a fuel truck driver into his light duty position performing collection and other customer service related duties. Claimant later secured employment once again driving a truck in a position where he did not have to lift or touch the freight. Now the claimant is working as a luggage and freight

screeener for the TSA. The Administrative Law Judge, and now the majority have mistakenly focused on the claimant's wages at the time he last worked for respondent employer rather than the claimant's wages at the time of his compensable injury to determine that the claimant has sustained a 33% wage loss disability. This is significant in that at the time of his injury the claimant earned approximately \$500.00 per week as noted by the stipulated temporary total disability rate, which is \$125.00 less per week than he was earning when the claimant last worked for respondent employer. A.C.A. § 11-9-522 which permits wage loss disability clearly states that if the employee has obtained other employment at wages equal to or greater than his "average weekly wage at the time of the accident..." Thus, it was error for the Administrative Law Judge and now the majority to even consider the claimant's wages more than ten years after his compensable injury when determining wage loss disability. The only wages we are to compare are those the claimant was earning at the time of his injury.

Claimant earned approximately \$500.00 per hour at the time of his injury. While this is less than the claimant's testimony of between \$500 and \$600 per week,

the \$500.00 figure actually computes with the stipulated temporary total and permanent partial disability rates of \$337.00 and \$235.00. Following his most recent surgery, the claimant secured employment with TSA earning \$13.30 per hour; however, TSA only allows him to work 25 per week. This time limitation is not a medical restriction. In fact, the claimant testified that if TSA permitted it, he was capable of working 40 hours per week in his luggage screening job. Claimant works from 5a.m. to 10a.m. five days a week. This schedule allows time for additional part time work should the claimant be so inclined to increase his earnings. However, the claimant has not seen fit to even submit an application for any such supplemental work.

Given that the claimant is capable of earning \$13.50 per hour together with the fact that he only works 25 hours per week, but is physically capable of working much longer hours, I find that the 33% wage loss disability awarded by the majority is clearly in error. The claimant was only 45 years old at the time of his injury. He has been capable of returning to work earning greatly in excess of his average weekly wage at the time of his accident. The claimant is intelligent and possesses transferable skills as demonstrated by his

ability to find and maintain work after his compensable injury. Moreover, the claimant is capable of working in the trucking industry doing dispatch should he ever look for such employment. Accordingly, when I consider the claimant's age, education, compensable injury, work experience, and earnings, I cannot find that the claimant sustained a significant decrease in his wage earning capacity to warrant a 33% wage loss disability award. Therefore, I must respectfully dissent.

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KAREN H. MCKINNEY, COMMISSIONER