

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F512067

STEVEN STROMIRE, EMPLOYEE	CLAIMANT
SILENT SECURITY SERVICES, INC., EMPLOYER	RESPONDENT # 1
CONTINENTAL WESTERN INS. CO., CARRIER	RESPONDENT # 1
SECOND INJURY FUND	RESPONDENT # 2

AMENDED AND SUBSTITUTED OPINION FILED APRIL 27, 2010

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

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

Respondents #1 represented by the HONORABLE WILLIAM C. FRYE,
Attorney at Law, North Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

This claim is presently before the Commission on Respondent No. 1's Motion to Correct the Full Commission Opinion. Respondent No. 2 filed an electronic response advising that it did not have any objections. Claimant did not file a response. In the review of the Motion, it was determined also that Commissioner Hood's concurring and dissenting opinion was inadvertently omitted. After

consideration of Respondent No. 2's Motion, and all other matters properly before the Commission, we find that Respondent No. 2's Motion is well taken and is, hereby, granted. The Full Commission, on its own motion, finds that an error exists in the Opinion and Order filed on March 31, 2010. The Full Commission finds that the Opinion and Order from March 31, 2010 failed to include a concurring and dissenting opinion from Commissioner Hood.

The Full Commission is authorized to correct clerical errors and this is a proper case for exercise of that authority. Ark. Code Ann. § 11-9-713(d) (Repl. 1996).

The following amended and Substituted Opinion is hereby issued.

Respondent No. 1 appeals and claimant cross appeals from a decision of the Administrative Law Judge filed July 23, 2009.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 24, 2005, the employment relationship existed between the claimant and respondent No. 1, when the claim sustained a

compensable injury resulting in a permanent physical impairment of 11% to the body as a whole, which was accepted and paid.

3. On October 24, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$328.00/\$246.00, for temporary total/permanent partial disability.
4. The claimant sustained a permanent physical impairment in the amount of 11% to the body as a whole as a result of the October 24, 2005, cervical injury and subsequent surgery.
5. When the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity are considered, the evidence preponderates that the claimant has sustained a loss of earning capacity, or wage loss disability, in the amount of 14% over and above and in addition to his anatomical impairment.
6. Respondent No. 2 does not have liability in this claim, in that the evidence fails to preponderate that the claimant's disability is the product of a combination of any prior disability or impairment with the most recent compensable injury.
7. Respondents No. 1 shall pay all reasonable hospital and medical expenses arising out of the injury of October 24, 2005.
8. Respondents No. 1 have controverted the claimant's entitlement to permanent partial disability benefits in excess of the claimant's 11% whole body 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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the granting of the Respondent No. 1's Motion and the Full Commission's Motion. However, I must dissent from the majority's finding that the claimant proved by a

preponderance of the evidence that he sustained a 14% wage loss in wage earning capacity in addition to his permanent anatomical impairment rating. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as an alarm technician. The claimant installed burglar alarms, cameras, and different kinds of surveillance equipment. The claimant sustained an admittedly compensable injury on October 24, 2005 when he fell from a ladder. The claim eventually came under the care of Dr. Cooper who performed an anterior cervical decompression and fusion, at C3-4, C4-5, and C5-6 with left anterior iliac crest bone autograft and anterior cervical plate internal fixation.

The claimant was assessed with a permanent anatomical impairment rating of 11% by Dr. Brent Sprinkle on March 7, 2007. Dr. Sprinkle gave the claimant restrictions of no pushing/pulling over ten pounds, no standing over one hour, no lifting over ten pounds, and no overhead work. The claimant was ordered to undergo a Functional Capacity Evaluation (FCE), which he did on May 30, 2007. The FCE showed that the claimant gave reliable effort and concluded

that the claimant demonstrated the ability to perform work in the medium classification.

The claimant did not return to work for the respondent employer. The claimant has worked for a friend who owns a construction company and the friend is aware of the claimant's physical condition and accommodates his restrictions. The claimant is paid \$13 per hour and he testified that his hours would vary. Sometimes the claimant works a 40-hour week, and sometimes it is 15-20 hours per week.

The claimant also receives Social Security Disability Benefits. The claimant underwent a vocational rehabilitation evaluation with Ms. Heather Taylor. Ms. Taylor's initial report dated March 29, 2009, concluded that the claimant acquired skills as a businessman in the local community in excess of 30 years, as well as through his electrical experience. These would allow the claimant to utilize transferable skills to pursue other jobs within the guidelines of the FCE. Ms. Taylor identified a number of employment positions within a 40-mile radius of the claimant's residence. In a vocational progress report dated April 27, 2009, Ms. Taylor reported that the claimant

relayed that he wanted to continue working for his friend, Stracener Construction, making \$13 per hour and he declined her offer of further job search assistance.

The claimant admitted that he has driven a forklift since his compensable injury. He owns a business that his wife runs, but he does not do any work there according to him. He stated that she called him because a pallet of feed had come in and she was not able to unload it. The claimant went down there, borrowed a forklift from a neighboring business and unloaded the pallet. The claimant stated that was the only time he had ever been on the forklift and that the respondents just happened to be doing surveillance on him that day.

The claimant testified that his receipt of Social Security disability benefits has not prevented him from looking for work. He testified that he received a nine-month trial period where he could make any amount of money and it did not affect his disability. However, after the trial period, he thought he could make six, eight or nine hundred dollars. The claimant was unsure.

Since the claimant has quit working for the respondent employer, he has had at least two jobs. The

first job was working for Tomorrow's Child Learning Center, and he was making \$13 an hour driving a bus. As previously noted, the claimant has worked for Stracener Construction Company.

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).

In my opinion, 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 claimant is a high school graduate and has two years of vocational training, one year of architectural drafting and one year of air-conditioning and refrigeration. He also trained as a journeyman electrician and attended electrical school for four years. The claimant also owns his own business which his wife runs.

The claimant has done construction work and owned a family heavy equipment and tool rental business for 25 years before he started selling truck accessories and installing them. The claimant is committee chairman of the local Ducks Unlimited Chapter since November of 2008. He now works for a friend's construction company where his restrictions are accommodated and he can work as many or as few hours as he wishes. The claimant declined Ms. Taylor's offer for job search assistance stating that he didn't need it.

It is clear, the claimant is not motivated to return to work full time for full wages as it will negatively affect his Social Security disability benefits. The claimant has made \$13 per hour at the last two jobs he has had since his injury, which is more than what he was making at the time he was injured. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment.

Therefore, for those reasons set forth above, I respectfully dissent from the majority opinion.

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. Specifically, I concur with the majority's determination that the claimant is entitled to 14% wage-loss disability. I concur with the finding that Respondent No. 2 does not have liability. I concur in the granting of Respondent No. 1's Motion and the Full Commission's Motion. However, as I would award the claimant an additional 35% wage-loss disability, I must dissent from the majority's failure to award additional benefits.

Prior to the stipulated compensable injury, the claimant was working at least 40 hours per week at a wage rate of \$12.65 per hour, which translates into gross weekly earnings of \$506.00. In addition to his work for the

respondent, claimant was also driving a bus for the school system and earning wages for that work. At the present time, the claimant earns \$13.00 per hour, some 35 cents per hour more than what claimant previously earned. However, claimant can work only 15 to 20 hours per week, which equals weekly earnings of \$195.00 to \$260.00 per week. Therefore, his actual wage loss is between 61.5% and 49%.

As the evidence of record clearly shows that the claimant is only capable of earning, at the high end, \$260.00 per week, the majority's award of 14%, with which I specifically concur, is, under Taggart v. Mid-American Packaging, ___ Ark. App. ___, ___ S.W.3d ___ (April 29, 2009), insufficient. The evidence of record calls for a wage loss award in the amount of at least 49%. Therefore, in addition to the 14% wage-loss disability awarded by the majority, I would award an additional 35% wage-loss disability.

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

PHILIP A. HOOD, Commissioner