

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F511219 & F008615

DANIEL BALL, EMPLOYEE	CLAIMANT
CITY OF NORTH LITTLE ROCK POLICE DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
MUNICIPAL LEAGUE WORKERS COMP TRUST, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED AUGUST 11, 2011

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 1, 2010. In

said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of these claims.
2. On September 29, 2005, the employment relationship existed between the claimant and respondent #1, when the claimant sustained a compensable injury to his low back arising out of and in the course of his employment, during which time the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00/\$350.00, for total/permanent partial disability benefits.
3. The claimant reached the end of his healing period on June 30, 2010, with a residual anatomical impairment of 25% to the body as a whole, as a result of the September 29, 2005, compensable injury and subsequent surgeries.
4. Respondent #2, the Second Injury Fund, does not have any liability in this claim, in that the claimant's present disability is the product of the most recent September 29, 2005, injury alone.
5. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he has been rendered permanently totally disabled as a result of the September 29, 2005, compensable injury.
6. 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 he has suffered a loss of earning capacity in the amount of 60% over and above his anatomical impairment.

7. Respondent #1 shall pay all reasonable hospital and medical expenses arising out of the claimant's injuries of August 1, 2000, and September 29, 2005.
8. Respondent #1 has controvert (sic) the claimant's entitlement to permanent disability benefits in excess of that corresponding to a 10% whole body anatomical impairment, as well as the claimant's entitlement to wage loss benefits.

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 April 1, 2010, 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to a

60% loss in wage-earning capacity in addition to his 25% permanent anatomical impairment rating. After conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 60% loss in wage earning capacity.

The claimant was employed by the respondent employer as a police officer. The claimant sustained two injuries, one in 2000 and another one in 2005. The claimant had returned to work as a patrolman after the first accident without any problems. The second injury on September 29, 2005, required the claimant to have two spinal surgeries, one in March of 2007 and another on July 13, 2009. The claimant was found by Dr. Chakales, his treating physician, to be a maximum medical improvement on June 30, 2010. Dr. Chakales gave the claimant a 25% permanent anatomical impairment rating. At this time, the claimant was awarded 60% loss in wage-earning capacity, although he contended he was permanently and totally disabled at the hearing.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Henson v. General Elec., 99 Ark. App. 129, 257 S.W.3d 908 (2007). 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. Eckhardt v. Willis Shaw Exp., Inc., 62, Ark. App 224, 970 S.W.2d 316 (1998). Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Henson, Supra. 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, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982). I find the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 60% loss in wage earning capacity.

The respondents presented the testimony of Ms. Heather Taylor, a vocational rehabilitation consultant with Systemic Corporation. Ms. Taylor met with the claimant on July 19, 2010, and made a report on July 30, 2010. During that meeting, the claimant told Ms. Taylor that his main interest was to become a charter private pilot. During the hearing, the claimant testified that he had reviewed the information provided by Ms. Taylor and he realized that he would not be able to pursue that career. At the time of the meeting, Ms. Taylor gave the claimant a Career Assessment Form, which the claimant

took several weeks to complete and return to Ms. Taylor.

Ms. Taylor talked to the claimant on September 21, 2010, and they set up a meeting for September 27, 2010. The claimant failed to show up for that meeting and failed to contact Ms. Taylor regarding instructions where they were going to meet. Ms. Taylor closed her file at the end of October. Ms. Taylor wrote to the claimant and to the respondent, and claimant's legal counsel on October 20, 2010, stating that she would withdraw from the case in 30 days if she did not hear from the claimant. She never heard from the claimant, and she wrote on November 19, 2010 advising that she was closing her file. Approximately a month later on December 13, 2010, the claimant's attorney wrote Ms. Taylor saying that the claimant had called Ms. Taylor's company, but had not received a return call.

The claimant did not cooperate with the vocational rehabilitation process. The claimant did not follow-up with Ms. Taylor after their September 21st telephone conversation regarding the September 27th meeting. The claimant contended that he left many messages with Ms. Taylor, and she did not return his phone calls. The claimant testified that he contacted Ms. Taylor's office and talked to the receptionist. The claimant did not leave a voice mail. Ms. Taylor was

clear that she had voice mail and returned her voice mail messages within a day or two if she was out of the office.

The claimant has not applied for any jobs with another police department, dispatch center, 911 call center or anything remotely connected with government or policing. The claimant has not applied for any security-type work or even as a greeter at Wal-Mart. He also has not even tried to volunteer on the North Little Rock Cold Case Squad.

Therefore, after I consider the fact that the claimant has not made a good faith effort whatsoever to even return to work, the claimant's Functional Capacity Evaluation indicated that he could work in the light category and the fact that the claimant did not cooperate with the vocational rehabilitation process, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in addition to his permanent anatomical impairment. It appears the claimant is not motivated to return to employment. Therefore, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner