

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F810176

ANDREW COLLINS, EMPLOYEE	CLAIMANT
HALLIBURTON ENERGY SERVICES, EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 14, 2011

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

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

Respondents represented by the HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed February 25, 2011.

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 September 11, 2008, the relationship of employee-employer-carrier existed between the parties.
3. On September 11, 2008, the claimant earned wages

sufficient to entitle him to weekly compensation benefits of \$522.00 for total disability and \$392.00 for permanent partial disability.

4. On September 11, 2008, the claimant sustained a compensable injury to his low back.
5. There is no dispute over medical services for this compensable injury, at the present time.
6. There appears to be no dispute over the claimant's entitlement to temporary total disability benefits, which accrued through November 30, 2009.
7. The claimant is entitled to additional temporary total disability benefits for the period of December 1, 2009 through June 22, 2010. Specifically, the claimant has proven by the greater weight of the credible evidence that during this interval, he continued within his healing period from the effects of his compensable lumbar injury and continued to be rendered totally disabled from regular gainful employment by this compensable injury.
8. The claimant's healing period from the effects of his compensable lumbar injury ended on June 22, 2010.
9. The claimant has sustained a permanent physical impairment, solely as a result of his compensable lumbar injury of September 11, 2008, in the amount of 7 percent to the body as a whole. The greater weight of the credible evidence establishes that the claimant's compensable injury of September 11, 2008, was the "major cause" of this degree of permanent physical impairment, that this degree of permanent physical impairment is supported by objective and measurable physical findings, that this degree of permanent physical impairment was calculated in a manner that conforms to the Commission's Official Rating Guide, and that this degree of permanent physical impairment gives no consideration to pain, straight leg raising tests, range of motion, or any other subjective matters.
10. The claimant's compensable lumbar injury of September 11, 2008, was the major cause of

permanent functional disability for loss of wage-earning capacity in the amount of 10 percent to the body as a whole.

11. The claimant has proven by the greater weight of the credible evidence that he is entitled to an overall permanent partial disability of 17 percent to the body as a whole.
12. Ark. Code Ann. §11-9-411 is applicable to the present claim, and the respondents are entitled to a reduction of the additional temporary total disability benefits and permanent partial disability benefits herein awarded, equal to the amounts received by the claimant under a group long term disability policy for the same periods of disability. The respondents are also required to place into escrow, for a period not to exceed 5 years, an amount equal to this reduction or off set.
13. The respondents have controverted the claimant's entitlement to any additional temporary total disability benefits and his entitlement to any permanent partial disability benefits in excess of 3 percent to the body as a whole.
14. The appropriate fee for the claimant's attorney is the statutory attorney's fee on the controverted temporary total disability benefits and permanent partial disability benefits herein awarded, in excess of 3 percent 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 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

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

_____I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the evidence shows the claimant has sustained wage-loss disability in the amount of 50%. I also find that, under strict construction, the respondents are not allowed to take an offset under Ark. Code Ann. §11-9-411.

Wage-Loss Disability

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).

The claimant is 34 years of age and has completed high school. However, he has no special training or skills that would allow him to re-enter the labor market earning anything close to the amount of money that he was earning at the time of his injury. The claimant has a 7% permanent impairment rating as a result of his compensable injury.

The claimant testified that he underwent surgery on December 5, 2008 for a focal lumbar disc protrusion at the L5 level. The claimant testified that the December 5, 2008 surgery improved his condition for a while, but the symptoms all came back and he was having pain down his left leg and pain in his

lower back, with numbness and loss of feeling in his leg. The claimant continued under the care of Dr. Standefer and ultimately underwent another surgery on October 14, 2009. That surgery involved recurrent L5 disc protrusion with lateralization to the left.

The claimant testified that, after the October 14, 2009 surgery, he got some relief; however, again, he only received temporary relief. When asked to describe his current symptoms, the claimant testified as follows:

I still have the severe pain down my left leg, with pain in my lower back that constricts on the way I can bend and move. I can't stand for long periods. I can't walk for long periods; anything over 10 or 15 minutes is excruciating. Sitting, 30 to 45 minutes, and then I need to move around.

Dr. Hoyt, the claimant's family physician, restricted the claimant from lifting in excess of 20 pounds, pushing and pulling in excess of 100 pounds, any bending or stooping, and prolonged sitting, standing, or lifting. Dr. Standefer, the treating neurosurgeon, opined that the claimant should not engage in lifting in excess of 35 to 40 pounds, repetitive bending, or prolonged sitting, standing, and walking. Dr. Standefer expressed the opinion that, as a result of the claimant's compensable injury, the claimant should not engage in "manual labor".

The claimant's job at the respondent involved lifting

more than 100 pounds, and his jobs prior to the respondent required him to lift more than 50 pounds.

The claimant testified that, although some of his jobs involved some clerical work, he was not a typist or a secretary. Further, he indicated that the sales job that he had involved loading things in a big truck, and that he could not do that type of work in his current condition.

The claimant testified that, as of the date of his injury, September 11, 2008, he had already earned \$30,350.00 that year. It was stipulated that his temporary total disability rate should be \$522.00; therefore, by stipulation, his average weekly wage was at least \$783.00 per week, since the temporary total disability rate is based on two-thirds of the average weekly wage.

Although the claimant worked considerable overtime in order to earn the \$783.00 per week, a fair analysis of the impact that this accident has had on his earning capacity cannot be assessed without converting the average weekly wage to an hourly amount based on 40 hours per week, because most regular full-time jobs are 40 hours a week. \$783.00 per week for a 40-hour week is equivalent to \$19.58 per hour.

The distinction in the hourly rates is important, because an analysis of the Administrative Law Judge's opinion, affirmed and adopted by the majority, reveals that he apparently

did not take into consideration that, in spite of the fact that the claimant only regularly earned \$12.50 per hour, his average weekly wage was at least \$783.00 per week, yielding an hourly wage of \$19.58.

The only reasonable explanation for the Administrative Law Judge's award of 10% wage loss disability, affirmed and adopted by the majority, is that the possible availability of the jobs set forth in a vocational rehabilitation report anticipated pay in the range of approximately \$10.00 per hour. Under the incorrect calculation, the claimant was only earning \$12.50 per hour. This leads to the misleading appearance of minimal wage loss. However, as the mathematical calculations in this case reveal, the claimant was actually earning the equivalent of \$19.58 per hour, which is a 50% wage loss, if the claimant is now only capable of obtaining jobs in the \$10 per hour range. As such, I would award the claimant 50% wage loss disability.

Ark. Code Ann. §11-9-411

Prior to the 2009 amendment, Ark. Code Ann. §11-9-411(a) provided that:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same...period of disability [from]...a group disability policy... .

The 2009 amendment added the following section to Ark.

Code Ann. §11-9-411(a) (1):

The reduction specified in subsection (a) (1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

Ark. Code Ann. §11-9-704(c) (Repl. 2002) requires strict construction of workers' compensation statutes. Strict construction requires that nothing be taken as intended that is not clearly expressed, and its doctrine is to use the plain meaning of the language employed. American Standard Travelers Indemnity Co. v. Post, 78 Ark. App. 79, 77 S.W.3d 554 (2002). Here, there is no dispute that the claimant paid for part of the disability policy. Under strict construction, the respondent is not entitled to any offset. There is nothing in the statute allowing the respondent to take credit for half-paid policies. Any amount paid by the claimant means the claimant has "paid for the policy" according to Ark. Code Ann. §11-9-411(a) (2). I would not allow the respondent to take the offset.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner