

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F703657

KEITH DANIELS, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., SELF-INSURED EMPLOYER	RESPONDENT
TYNET CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 3, 2011

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

Claimant represented by the HONORABLE ADRIENNE MURPHY, Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed August 25, 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 this claim.
2. On all relevant dates, including February 27, 2007, the relationship of employee-self insured employer-third

party administrator existed between the parties.

3. On all relevant dates, including February 27, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$387.00 for total disability and \$290.00 for permanent partial disability.
4. During this period, the claimant sustained a compensable injury or illness, in the form of salmonella aortitis.
5. There is no dispute, at present, over the claimant's entitlement to reasonably necessary medical services for this compensable injury or illness, at the respondent's expense.
6. There is no dispute, at present, over the claimant's entitlement to temporary disability benefits for this compensable injury or illness.
7. The claimant's healing period from the effects of this compensable injury or illness ended on or before October 24, 2008.
8. The claimant has sustained a permanent partial disability of 20 percent to the body as a whole, as a result of his compensable injury or illness. This includes permanent partial disability for permanent physical impairment of 9 percent to the body as a whole and permanent partial disability for permanent functional disability or loss of wage-earning capacity of 11 percent to the body as a whole.
9. The respondent has controverted the claimant's entitlement to any permanent partial disability benefits in excess of 9 percent to the body as a whole.

10. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the additional controverted permanent partial disability benefits herein awarded (i.e., 11 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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the August 25, 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 he was entitled to wage loss disability benefits in amount of 11% to the body as

a whole in addition to his permanent anatomical impairment rating of 9%. Based upon my de novo review, I find that the claimant has failed to meet his burden of proof.

The claimant worked for the respondent employer as a truck driver delivering live chickens. He was diagnosed and hospitalized in February of 2007 with Salmonella aortitis. The claimant required operative repair of his aorta. Dr. Hennigan was the claimant's treating physician, and he opined that the claimant's condition was directly related to his work exposure to live chickens. The respondents accepted the claimant's claim as compensable and paid benefits accordingly, including a 9% anatomical impairment rating.

In April of 2008, the claimant was admitted to the hospital for chest pains. He had a myocardial infarction and underwent cardio catheterization and had a five vessel coronary artery bypass surgery. Subsequent to this, the claimant had two strokes and had to go into rehab.

The claimant continues to take Bactrim for his salmonella aortitis and will likely be on this medication for the rest of his life. At this time, the claimant is requesting wage loss disability benefits in addition to his permanent anatomical impairment.

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).

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.

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. When reviewing the records of Dr. Hennigan, it is clear that the claimant did not have any physical restrictions from salmonella aortitis which prevented him from returning to work. Dr. Hennigan makes it clear that for a number of months, he continued to keep the claimant off of work only because the claimant had requested it. The claimant was saying that he was weak. There is no medical opinion stating that the subjective weakness reported was the result of the salmonella infection. In fact, Dr. Hennigan noted significant concern that the claimant's subjective complaints and refusal to return to work were psychological rather than based on any physical ailment. When the claimant was hospitalized for his heart attack, Dr. Weiss, who had initially treated him during his

hospitalization for salmonella aortitis and performed the aortic graft, noted the claimant's history:

The patient is a 48-year-old white male well known to from previous endograft placement because of salmonella aortitis, which was probably work related. He has not worked since that time for some reason.

In assessing any wage loss claim, the claimant's refusal to return to work must be justified due to the claimant's compensable injury. In this case, the only restrictions placed upon the claimant by any physician in relation to the salmonella aortitis was the recommendation that he not work with live poultry and limit his exposure to the sun.

This case is similar to Williams v. St. Vincent Infirmary, 59 Ark. App. 148, 954 S.W.2d 302 (1997). In both cases the claimant's complaints were subjective and not necessarily related to the compensable injury. His treating physician wanted the claimant to return to work, but the claimant refused to do so based upon his subjective complaints, not physical restrictions imposed by any physician.

The claimant also appears to lack motivation to return to work. Although the claimant's physician, Dr. Hennigan kept him off work at his request through

April 1, 2008, Dr. Henningan made clear that as of April 1, 2008, he believed the claimant could, in fact, he used the word "must" return to employment. The claimant admitted that Dr. Hennigan thought he could return to work at that time. The only person who did not think the claimant could return to work was the claimant himself. It is well established that the testimony of the claimant is never considered uncontroverted because the claimant is an interested party. Lambert v Berber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985).

The complicating factor in this case is that the claimant suffered an intervening non-work related medical condition on April 24, 2008, in the form of a myocardial infarction, which resulted in a five vessel coronary artery bypass surgery. The claimant's disability and inability to return to work after that time is clearly related to conditions other than than the work-related infection. Further, the claimant suffered several strokes after the myocardial infarction which resulted in paralysis, the need for rehabilitation, cognitive changes and memory loss. The claimant also suffers from substance abuse issues and depression which impacts his ability to return to work. These issues were most likely factors in the claimant's inability to return to work. Dr. Hennigan suspected in

2008 that psychological components were the cause of the claimant's refusal to return to work rather than any physical limitations as a result of the salmonella infection.

There is little question that the claimant has suffered permanent disability and cannot return to gainful employment due to his heart attack and strokes. However, the claimant must prove that he suffered wage loss as a result of the salmonella infection and the restriction he has from working around live chickens. The claimant has failed to establish such wage loss by a preponderance of the evidence. In my opinion, it is clear that the claimant's heart attack, strokes, depression, and substance abuse are responsible for any wage loss disability in this case.

The claimant was not suffering from any physical condition as a result of salmonella aortitis which required him to remain off work on or after April 1, 2008. His physician made quite clear in the weeks prior to the claimant's heart attack that he needed to return to work and there was absolutely no physical reason for him not to do so. Dr. Hennigan only restricted him from working with live chickens. The claimant was not restricted from working as a truck driver, only from working around live chickens. That

certainly does not significantly restrict his continued employment as a truck driver, and does not justify an award of wage loss disability.

It requires speculation and conjecture to reach the conclusion that the claimant suffered any wage loss disability related to the salmonella aortitis. It is well established that conjecture and speculation cannot be permitted to supply the place of proof. Dena Construction Co. v Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). The claimant's treating physician opined that he was physically able to return to work and that he had psychological components which were causing his refusal to return to employment. On April 1, 2008, Dr. Hennigan expressed that the claimant must return to work. The evidence is clear that the claimant did not return to work because of his subsequent heart attack and strokes, not because of his compensable injury. Any decrease in the claimant's wage earning capacity is not due to the restriction that he cannot work with live chickens.

Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner