

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F811566

KEN GUNTER, EMPLOYEE	CLAIMANT
ARKANSAS HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 13, 2011

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

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

Respondents represented by the HONORABLE WILLIAM L. WHARTON, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed March 1, 2011.

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

1. The stipulations agreed to by the parties at the prehearing conference conducted on October 6, 2010, and contained in a pre-hearing order filed October 7, 2010, are hereby accepted as fact.
2. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss in an

amount that would be equal to a 15 percent whole body impairment.

3. The claimant has proven by a preponderance of the evidence that he is entitled to an attorney's fee in this matter that is commiserate with 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 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 would award wage-loss disability in the amount of 30%.

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).

Here, the claimant is 56 years old. He has a high school education. He has a 10% whole body permanent impairment rating. His employer will not allow him to return to work within

the medical restrictions that have been placed upon him; and, in spite of diligent effort and the help of a vocational rehabilitation expert, the claimant has not been able to find employment. The claimant was earning almost \$15.00 per hour when he got hurt.

The claimant's treating neurosurgeon opined that the claimant can sit for about 35 minutes at a time, and that he can stand for about 20 minutes at a time. When these limitations are considered together with a 20-pound lifting restriction, it should be apparent that the claimant has sustained more than a 15% wage-loss disability. However, if it is not apparent from review of the medical records and consideration of the claimant's testimony, there should be no doubt that the wage-loss disability is in excess of 15% when one considers the testimony of the respondents' own vocational rehabilitation expert, who opined that the claimant's access to at least 20% of the labor market is eliminated because he can no longer perform very heavy work; at least 20% is eliminated because he can no longer perform heavy work; and at least 30% is eliminated because he can no longer perform medium work. These facts, taken in conjunction with the claimant's age, education, and work experience lead me to a finding that the claimant has sustained wage-loss disability of at least 30%.

For the aforementioned reasons I must respectfully
dissent.

PHILIP A. HOOD, Commissioner