

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G305023

JOHN BOGGS, Employee	CLAIMANT
ARKANSAS DEPT. OF TRANSPORTATION, Employer	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, Carrier	RESPONDENT

OPINION FILED JULY 16, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 17, 2024, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 17, 2024, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The claimant was earning an average weekly wage of \$803.74 which would entitle him to compensation at the weekly rates of \$536.00 for total disability benefits and \$402.00 for permanent partial disability benefits.
3. Claimant reached maximum medical improvement on March 4, 2024.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Extent of claimant's impairment rating.
2. Claimant's entitlement to benefits for wage loss resulting from his compensable Injury.
3. Attorney's fee.

At the time of the hearing claimant indicated that the extent of his impairment rating is no longer an issue. Instead, the parties have agreed to stipulate that claimant's permanent impairment rating equals 13% to the body as a whole.

The claimant contends that he is entitled to benefits for wage loss resulting from his compensable injury. Claimant also contends that he is entitled to a controverted attorney fee on any unpaid indemnity benefits.

The respondents contend that this claim has been accepted as compensable and that the claimant has been provided all benefits to which he is entitled. After Dr. Frank Tomecek recommended fusion surgery from L3 to S1, which respondent had authorized but the claimant did not want, the claimant used his Change of Physician to see Dr. Blankenship. Dr. Blankenship performed surgery on April 18, 2023, which respondent provided the claimant. Dr. Blankenship released the claimant at MMI and on March 4, 2024, wrote that the claimant had a 13% permanent impairment rating. Dr. Blankenship also wrote that the claimant could return to gainful employment with work restrictions. Respondent has accepted the claimant's 13% impairment rating and is paying appropriate permanent partial disability benefits to the claimant. The claimant performed unreliably at an FCE on March 27, 2024 in the sedentary classification with 24 of 46 consistency measures. The claimant is still an employee of the respondent employer.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on April 17, 2024, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that claimant's permanent impairment rating equals 13% to the body as a whole is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 35% to the body as a whole.

4. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

Claimant is a 53-year-old man who began working for respondent approximately fifteen years ago. He suffered an admittedly compensable injury to his lumbar spine while fixing a flat tire on a backhoe on December 19, 2021. Following his injury, claimant came under the care of Dr. Arthur Johnson, neurosurgeon, who recommended surgery at the L4-5 and L5-S1 levels. Claimant requested a second opinion and was seen by Dr. Barry

Katz, neurosurgeon, who also recommended surgery. Claimant chose not to undergo the recommended surgery, but instead returned to work for respondent in a job that allowed more supervisory work. During this time, claimant continued to receive treatment in the form of pain management which primarily consisted of pain medication.

When his back condition progressively worsened, claimant attempted to return to see Dr. Katz, but Dr. Katz had relocated so claimant was evaluated by Dr. Tomecek, neurosurgeon. Dr. Tomecek ordered an updated MRI scan and when he saw claimant on June 14, 2021, he recommended a bilateral discectomy and fusion from L3 to the sacrum. He also discussed other options; including, stem cell injections.

Based on claimant's response to epidural steroid injections, Dr. Tomecek indicated in a report dated August 4, 2021 that he believed that claimant was still a candidate for stem cell injections. Following a peer review, respondent authorized surgery but denied approval for the stem cell injections.

Claimant subsequently requested a hearing on his entitlement to the stem cell injections recommended by Dr. Tomecek. A hearing on that issue was held on November 22, 2021, and an opinion was filed December 17, 2021 finding that the stem cell injections were reasonable and necessary. That opinion was appealed by the respondent to the Full Commission.

While the case was on appeal, respondent filed two motions to submit newly-discovered evidence; specifically, medical reports from Dr. Tomecek dated March 3, 2022 and April 13, 2022. In the March 3, 2022 report, Dr. Tomecek indicated that he no longer believed that the stem cell injections would benefit claimant's condition and in the report of April 13, 2022 indicated that the injections would benefit his condition. Based on the

inconsistency of Dr. Tomecek's opinion, the Full Commission in an order filed May 13, 2022 granted the respondent's motion to introduce newly-discovered evidence and remanded the claim for additional proceedings. On remand, claimant filed a motion to dismiss withdrawing his request for stem cell injections based on Dr. Tomecek's opinion. This motion was granted by order filed July 11, 2022.

Since that time claimant has filed for and received a change of physician request to Dr. Blankenship. Claimant began treating with Dr. Blankenship on February 20, 2023, and Dr. Blankenship agreed that claimant was in need of surgery but not the one previously recommended by Dr. Tomecek. In his report of February 20, 2023, Dr. Blankenship stated:

Dr. Tomacek had offered him a multilevel arthrodesis from a posterior approach with pedicular fixation. I told him that is how I did the surgery 20 years ago. We have newer and better ways of accomplishing what needs to be done. I have offered him an anterior lumbar interbody arthrodesis and L5-S1 with lateral interbody arthrodeses at L3-L4 and L4-L5. He would then undergone [sic] posterior stabilization with unilateral cortical screw placement on the right with an extreme lateral decompression at L5-S1 on the right.

Dr. Blankenship performed the surgery on April 18, 2023. Since this surgery, claimant has continued to treat with Dr. Blankenship for continued low back pain. He has also undergone epidural steroid injections by Dr. Cannon which failed to provide any relief and he also underwent physical therapy.

Although claimant continued to have low back complaints, Dr. Blankenship in a report dated March 4, 2024, stated that claimant had reached maximum medical

improvement and that he had a 13% impairment rating to the body as a whole as a result of his compensable low back injury.

Claimant has filed this claim contending that he is entitled to temporary total disability benefits for loss in wage earning capacity in excess of his 13% impairment rating.

ADJUDICATION

Claimant contends that he is entitled to benefits for wage loss resulting from his compensable injury. Wage loss is the extent to which a compensable injury has affected a claimant's ability to earn a livelihood. The Commission is charged with the duty of determining the amount of disability. *Cross v. Crawford County Memorial Hosp.*, 54 Ark. App. 130, 923 S.W. 2d 886 (1996). In determining wage loss disability, the Commission may take into consideration various factors. These factors include the claimant's age, education, work experience, medical evidence, and any other matters which may be reasonably be expected to affect claimant's future earning power. Other matters include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A.C.A. §11-9-522; *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); and *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W. 2d 130 (1990).

Claimant is 53 years old and according to the functional capacities evaluation he obtained his GED. Claimant testified that he began working for respondent approximately fifteen years ago. At the time of his injury in 2011 he was a finish grade operator. Claimant testified that while finish grade operator was his title, he actually ran a crew of

about ten people. Per the parties stipulation, claimant earned an average weekly wage of \$803.74 at that job.

At some point after his injury, claimant was returned to work for respondent but due to his physical limitations was unable to return to his prior job. Instead, claimant was placed in a supervisory job where he was earning \$31.58 per hour, working 40 hours per week.

After claimant's surgery by Dr. Blankenship, respondent determined that based on limitations placed on claimant by Dr. Blankenship that claimant could not return to his supervisory job. Instead, claimant has been placed in a clerical/data entry position that allows him to sit at a desk, using a computer. Claimant works at this job five hours a day, five days a week, and is paid \$22.30 an hour.

Claimant did not testify about any of his work experience prior to beginning work for the respondent.

Claimant testified that his medications include Oxycodone, Acetaminophen, Etodolac, and Cycobenzapar. He testified that some of the medications cause constipation; make him tired and groggy; and cause difficulty concentrating. He also notes that his pain causes him difficulty while trying to sleep. It is claimant's testimony that he has missed some work in his clerical position due to pain caused by his injury.

I also note that claimant has undergone surgery on his cervical spine by Dr. Johnson; however, his neck condition is not a part of his workers' compensation claim.

Following his surgery claimant was referred for a functional capacities evaluation which was performed on March 27, 2024. Claimant testified that he gave his best effort during the evaluation but states that on the day of the evaluation he was having "bad pain,

severe pain.” Claimant also attempted to discredit the FCE report by contending that the evaluator was distracted during the evaluation due to a personal situation. I do not find any credible evidence that the FCE is invalid or unworthy of belief due to any alleged distractions on the part of the evaluator. The evaluation report contains findings based on claimant’s effort during the testing.

The FCE report indicates that the evaluation was unreliable due to inconsistent effort on behalf of the claimant. The report indicates that there were only 24 of 46 consistency measures within expected limits. One such example of inconsistent effort testing involves Bi-Manual Lifting - Floor to Knuckle:

Mr. Boggs demonstrated that he was unable to lift the empty box off of the floor using both arms. He was then offered a different weight. He proceeded to complete all lifts of the second weight while using only his RUE. The second weight weighed the same as the empty box. This is not indicative of reliable effort.

The evaluation determined that claimant demonstrated the ability to work in at least the sedentary classification of work over the course of a normal eight-hour work day. It also noted that due to the unreliable effort, claimant’s abilities could be higher. The report indicated that claimant demonstrated the ability to occasionally lift/carry up to 15 pounds and occasionally lift up to 5 pounds with his right upper extremity and left upper extremity when lifting from knuckle to shoulder level.

Following the functional capacities evaluation, Dr. Blankenship completed a form setting out his own restrictions for the claimant. In some respects, his limitations were less restrictive than the FCE. While the FCE had lifting restrictions of 5-15 pounds, Dr. Blankenship indicated that claimant could lift 15-20 pounds (Floor to Waist, Waist to

Shoulder, and Shoulder to Overhead) and that he could carry 25-30 pounds. He also indicated that claimant could frequently sit/walk; sit; data entry/typing; simple grasping; squat; kneel; climb; reach; operate foot controls; operate hand controls; and drive. He indicated that claimant could occasionally bend, twist, and operate heavy equipment. Claimant could not push and pull or weed eat. Dr. Blankenship indicated that claimant should not lift more than 15 or 20 pounds; that he should not engage in prolonged bending or stooping; and that he should not constantly carry more than 25-30 pounds. Dr. Blankenship did not indicate that claimant was capable of performing any activity constantly.

The form completed for respondent by Dr. Blankenship indicates that for purposes of assigning restrictions that Occasional is defined as up to 2.6 hours of the day; Frequent is up to 5.3 hours of the day; and Constant as 5.3 hours or more. Based on the fact that Dr. Blankenship did not indicate that claimant could do anything “constantly”, but a number of things “frequently”, respondent determined that claimant was only capable of working five hours per day and has assigned him to a computer data entry job for five hours per day, five days a week. Claimant has acknowledged that he was informed that he could alternate between sitting and standing in the performance of this data entry job.

In summary, claimant has experienced some loss in wage earning capacity. At some point he returned to work for respondent and was placed in a supervisory position working eight hours a day, five days per week, and earning \$31.58 per hour. Currently, claimant is working for respondent performing a data entry job working five hours a day, five days a week, at a rate of \$22.30 per hour. While claimant testified that he does not feel like he can do any job at the present, his testimony is not supported by the restrictions

placed on him by Dr. Blankenship. According to the limitations assigned by Dr. Blankenship, claimant is not limited to a sedentary-type job. However, he is limited in the number of hours he is capable of performing work within his limitations. Finally, I note that according to the FCE report, claimant gave an unreliable effort during the evaluation.

Based upon the foregoing wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 35% to the body as a whole.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 35% to the body as a whole. Respondent has controverted claimant's entitlement to payment of permanent partial disability benefits in an amount equal to 35% based upon this loss in wage earning capacity.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$637.45.

All sums herein accrued are payable in a lump sum and without discount.

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IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE