NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G307065

RUSSELL A. PAYNE, EMPLOYEE

CLAIMANT

ARKANSAS DEPT. OF TRANSPORTATION, EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 7, 2024

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

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

Respondents represented by the CHARLES H. McLEMORE, Attorney, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondent appeals and Claimant cross-appeals an amended opinion and order of the Administrative Law Judge filed December 22, 2023. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on October 4,

2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanently totally disabled as a result of his compensable injury. 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 50% to the body as a whole.

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

4. Pursuant to A.C.A. §11-9-411 respondent is entitled to an offset in an amount equal to $189.06 per week.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's December 22, 2023 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.

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. 2012).

For prevailing on this appeal before the Full Commission, Claimant's attorney is entitled to fees for legal services in accordance with Ark. Code

Ann. §11-9-715 (Repl. 2012). For prevailing on appeal to the Full Commission, the Claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Mayton concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur, in part, and dissent, in part, from the majority's opinion. Specifically, I concur with the finding that the claimant has not proven by a preponderance of the credible evidence that he is permanently and totally disabled as a result of his compensable injury. However, in my *de novo* review of the file, I dissent from the finding that the claimant has met his burden of proving by a preponderance of the credible evidence that he has suffered a loss in wage earning capacity in an amount equal to 50% of the whole body.

This claim results from an admittedly compensable injury the claimant sustained on May 17, 2013, after the hood of a truck fell on his head and neck area. In 2017, the claimant received an impairment rating of fourteen percent (14%) and later received an additional rating of twelve percent (12%) to the body as a whole. The respondents have accepted these ratings.

The claimant is currently receiving disability retirement benefits from the respondent employer and now contends that he is entitled to wage-loss disability benefits. An administrative law judge issued an opinion awarding the claimant fifty percent (50%) wage-loss disability over and above his impairment ratings but ruled that the claimant is not permanently and totally disabled. Both parties filed appeals.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Wal-Mart Stores, Inc*. *v*. *Connell*, 340 Ark. 475, 10 S.W.3d 727 (2000). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he/she sustained permanent physical impairment as a result of a compensable injury. *Id*.

The Commission must determine disability after consideration of medical evidence and other factors affecting wage-loss such as the

claimant's age, education, and work experience. *Tempworks Mgmt*. *Servs*. *v*. *Jaynes*, 2020 Ark. App. 70, 593 S.W.3d 519 (2020). Motivation, postinjury income, credibility, demeanor, and a multitude of other factors are matters to be considered in claims for these wage-loss disability benefits in excess of permanent physical impairment. *Id*. These factors are considered in *Beal v*. *Fairfield Bay Community Club*, *Inc*., 2011 Ark. App. 136 (2011) where the Court of Appeals stated:

> Beal further testified that he had worked all of his life but that he has not returned to work because "they are not going to let him back out there, as no doctor is going to pass him on a physical and drug test and stuff." Beal is blind in his left eye, but admitted to having glaucoma before his injury. According to Beal he does not feel that there are any jobs he can perform and is now retired. The Commission disagreed and concluded that "the evidence shows that [Beal] is clearly not motivated to return to any form of gainful employment" and noted that Beal's lack of motivation is a valid consideration in its denial of Beal's wage-loss disability claim.

City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

In a 2010 case considering wage-loss, the Court of Appeals affirmed the Commission's decision to deny wage-loss to a claimant who was 25 years-old and had not looked for any work outside of her previous job as a cake decorator or work within her restrictions. *Morrison v. Confectionately Yours, Inc*., 2010 Ark. App. 687 (2010). This claimant

received a seven percent (7%) disability rating, but the Court noted that this claimant had not attempted to look for work within her restrictions and had low motivation to return to any work other than her previous job. *Id*. The Commission found that the claimant developed skills as a cake decorator that would serve her well in other lines of work. *Id*.

Further, our rules are clear that:

> The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

Ark. Code Ann. § 11-9-505(b)(3).

An employer relying on this defense must show that the claimant refused to participate in a program of vocational rehabilitation, job-placement assistance, or through some other affirmative action indicated an unwillingness to cooperate in those endeavors, and such refusal to cooperate was without any reasonable cause. *Tillery v. Alma Sch. Dist.*, 2022 Ark. App. 425 (2022).

The claimant attended his initial intake with Systemedic on August 22, 2023. (Resp. Ex. 2, Pp. 4-12). Ms. Hampton determined that "[b]ased

on Mr. Payne's transferable skills, functional ability, records reviewed of his injury and the past work history, he is capable of working in the Medium category of physical work demands." (Resp. Ex. 2, P. 11). However, Ms. Hampton's notes reflect that the claimant "stated he is not interested in returning to work and/or receiving vocational rehabilitation services. He reported he experiences too much pain and believes he is not capable of performing duties of a job. He stated he would like to stay off work to take care of himself." *Id*.

On October 9, 2023, Systemedic sent a letter to the claimant in an attempt to follow-up on his intake appointment providing him with a list of ten available jobs within a thirty-to-sixty-mile radius of his home for which he was qualified and were selected in consideration of the claimant's education, skills, work history, and within the results of his FCE. (Resp. Ex. 2, P. 13).

Although the claimant would later contact Ms. Hampton stating that he is interested in her services, his actions prove otherwise. (Resp. Ex. 2, Pp. 15-16). At the December 2023 hearing, the claimant had the following exchange with the respondents' attorney regarding the claimant's work with Ms. Hampton:

> Q: (by Mr. McLemore) You thought you were saying you didn't think you were physically able to do a job.

Mr. Walker: Excuse me. He didn't say he thought that. He said that is what he said.

A: Yes. That is how I understood it. She didn't say to me about doing the capacity or whatever. Her words was not about doing – what is it called – the –

Q: (by Mr. McLemore) The functional capacity evaluation?

A: No. Her wanting to get me back into the job workforce.

Q: Okay.

A: She did not say that. She said about me working a job. And I said no, I didn't think I could.

Q: Okay, so you don't think you could?

A: No.

Q: Well, I want to ask you what you mean by that? You don't think you can do the crew leader job or you don't think you can do any job?

A: I don't – I do not believe that I can hold down a 40-hour a week job with the medication I take and the shape that I am in and stuff. I don't.

(Hrng. Tr., P. 45).

When asked if he had considered a part-time job, the claimant testified:

Q: All right. Did you tell Ms. Hampton that you thought you could work a part-time job?

A: Maybe. I hadn't tried a part-time job.

Q: Have you thought about a part-time job?

A: I have thought about it. Like I said with the medication and the way I am, I don't know that I could.

Q: Okay. What job have you applied for?

A: I haven't.

Q: Have you looked for a job somewhere?

A: No.

Q: Okay. So you are not actively looking for a job?

A: I have not put in for a job anywhere.

(Hrng. Tr., P. 46).

Upon receiving the list of prospective jobs from Ms. Hampton, the claimant did nothing. (Hrng. Tr., P. 48). When asked if he applied for any of the ten jobs selected by Ms. Hampton or whether he contacted any of the prospective employers, the claimant testified that he had not, he simply "didn't take it that for me to contact them or put in for them or nothing." (Hrng. Tr., P. 48).

When questioned directly whether he told Ms. Hampton that he is uninterested in vocational rehabilitation, the claimant stated that, "[w]hat I understood from her question was could I work a full-time job and my response was, no, I didn't think I could." (Hrng. Tr., Pp. 60,61).

The claimant has an extensive work history and numerous transferrable skills, which Ms. Hampton identified as: paving; structural

fabrication, installation, and repair; casting; crushing and grinding; mixing; and protecting. (Resp. Ex. 2, P. 11). He was employed with the respondent employer for twenty-five (25) years, where his role included office and computer work as well as physical labor. (Hrng. Tr., Pp. 35-38). In fact, during his time with the respondent employer, the claimant was a crew leader and supervisor which allowed him to develop supervisory and organizational skills. (Hrng. Tr., Pp. 34, 36). There is no doubt that the claimant is a skilled and capable employee with a wide range of transferrable skills.

The claimant's testimony reflects that his behavior is entirely self-limiting and, it appears, he is content to collect disability-retirement benefits rather than return to the job market. The results of the claimant's FCE, which were noted to be reliable with 51 of 53 consistency measures within expected limits, showed that the claimant demonstrated the ability to perform work in the medium classification. (*See* Cl. Ex. 1, Pp.39-57).

There is no evidence in the record that any physician has advised the claimant that he is unable to work a forty-hour week job at medium duty. Further, the only source claiming that the claimant is limited to two to three days a week due to his medication is the claimant himself.

The claimant worked for the respondent employer for years taking the same medication. He simply does not wish to return to work and has made it clear that he will resist any opportunities for assistance in doing so. For

these reasons, it is clear the claimant has refused to participate in vocational rehabilitation or return to the job market without cause and is, therefore, not entitled to wage-loss disability.

The claimant has been released to return to work at medium duty and no physician or other provider has limited him to less than forty (40) hours a week at medium duty. The only person who has said the claimant cannot work forty (40) hours a week at medium duty or cannot work because of the medication he is taking is the claimant himself.

The claimant should not be rewarded for his self-limiting behavior and his refusal to even look for a job or try to return to work. To rule otherwise and award the claimant wage-loss is in direct conflict with Ark. Code Ann. § 11-9-505(b)(3).

Accordingly, for the reasons set forth above, I concur, in part, and dissent, in part.

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MICHAEL R. MAYTON, Commissioner