

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G804572

JEFFREY ANDREWS,
EMPLOYEE

CLAIMANT

ACE FENCE COMPANY, INC.,
EMPLOYER

RESPONDENT

ARKANSAS P & C GUARANTY FUND,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 5, 2021

Upon review before the FULL COMMISSION in 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 KEVIN M. O'DWYER,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed October 13, 2020. The administrative law judge found that the claimant failed to prove he was entitled to wage-loss benefits. After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 10%.

I. HISTORY

Jeff Andrews, now age 51, testified that he had attended college and had obtained a Bachelor's degree in History. The claimant testified that he had previously been employed at Whirlpool before being laid off. The

claimant testified that he had also been employed as a substitute teacher and as a bank agent. The claimant's testimony indicated that he became employed with the respondents in about 2013. The claimant testified that he worked as an "estimator" for the respondents. The claimant testified that he would drive to prospective customers and place four to 10 bids daily.

The parties stipulated that the employment relationship existed on July 25, 2017. The claimant testified that he was involved in a work-related motor vehicle accident that day. The parties stipulated that the claimant "sustained a compensable injury to his spine" on July 25, 2017. According to the record, the claimant treated at Mercy Hospital Fort Smith on July 25, 2017: "Patient was restrained driver traveling around 30mph in a truck, when a mailtruck struck passenger side of truck....Patient c/o neck and left trapezius pain."

The claimant testified that he continued to work for the respondents following the compensable injury. The claimant began treating with Dr. Kyle Mangels on March 7, 2018. Dr. Mangels reported in part, "He was injured on the job on 07/25/17....He describes neck pain but more importantly, he has left shoulder pain and left arm pain and numbness....He was going to an appointment in his company truck and basically was involved in a car wreck on the job....He is working regular duty. I think he needs to try some physical therapy at this point. He is going to need an anterior cervical

fusion and discectomy from C5 to C7, if physical therapy does not help him significantly....We are going to have him do physical therapy and he will keep working at this point.”

The claimant followed up with Dr. Mangels on April 18, 2018: “He just finished physical therapy and Monday was his last visit. This was two days ago....He is working now. The physical therapy actually caused a little increased pain, especially with traction....I think he needs to have more physical therapy at the same facility with 12 more visits. He can work regular duty effective today.”

Dr. Mangels reported on June 20, 2018:

Mr. Andrews returns to see me today again in my Sallisaw office with his wife and nurse case manager today. He feels like he is good basically 98% of the time. Physical therapy has been done again. He had a second course of physical therapy and this went well. He is not having much in the way of symptoms at this point.... He is working. I feel that he can work regular duty and these restrictions are permanent. He has no restrictions actually. I want to see him back as needed....He is released to full regular duty and released from care at the point of maximum medical improvement. I am going to see him back as needed at this point....

The claimant testified, however, that his physical condition began worsening in about September 2018. The record indicates that the claimant underwent an anterior discectomy and fusion at C5-6 and C6-7 in December 2018. The claimant testified that he had been unable to return to work for the respondents after surgery.

The claimant followed up with Dr. Mangels on July 1, 2019:

Chief Complaint: Status post cervical fusion anteriorly from C5 to C7 using Stryker Tritanium cages and plating done from C5 to C7 anteriorly at Tulsa Spine and Specialty Hospital about seven months ago now....

He is not working. He is struggling with regards to pain especially on drives. He can lift 25 pounds with no driving commercially or working overhead still. He should alternate sitting and standing as required by the patient. He does not have to wear a collar. These restrictions are temporary still and unchanged from last time. He is not at the point of maximum medical improvement yet.

I think he needs to consider a discogram....If he does not want to do a discogram, then I would do a functional capacity evaluation and release him after the functional capacity evaluation....

The claimant participated in a Functional Capacity Evaluation on August 6, 2019: “The results of this evaluation indicate that a reliable effort was put forth, with 52 of 53 consistency measures within expected limits....Mr. Andrews completed functional testing on this date with **reliable** results. Overall, Mr. Andrews demonstrated the ability to perform work in the **MEDIUM** classification of work as defined by the US Dept. of Labor’s guidelines over the course of a normal workday with limitations as noted above.”

Dr. Mangels reported on October 4, 2019:

Chief Complaint: Status post cervical fusion anteriorly from C5 to C7 using Stryker Tritanium cages and plating done from C5 to C7 anteriorly at Tulsa Spine and Specialty Hospital with the surgery being done in December, 2018.

Mr. Andrews returns to see me today in my Tulsa office again this time with his son. He feels like his pain is “super bad” and

has increased recently. I am not really sure why his pain is getting worse. I don't think he needs to see a pain management doctor formally. He does have a primary care physician at the VA Clinic who could probably manage his pain....He has been using a TENS unit and he is on Norco.... I do think he is at the point of maximum medical improvement at this point. I gave him a copy of his work restrictions. These are permanent now. He can lift 50 pounds on a permanent basis. I am going to see him back as needed. He is released from my care at this point. He had an FCE done on August 6th and this was reviewed today. The physical therapist thought that this was a reliable test and the physical therapist felt he is able to work in a medium classification work. I reviewed some of the testing in more detail and the physical therapist felt that he could occasionally lift up to 50 pounds. I think his work restriction is a 50-pound lifting restriction at this point therefore. These restrictions are permanent. I am going to release him today from my care and I did a rating on him with the fourth edition....Using table 75 in the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, I feel he receives a ten percent (10%) impairment of the whole person with regards to his cervical fusion at a single level but he had a second level operated on. In summary, he receives an eleven percent (11%) impairment rating with regards to his cervical spine....My opinion is within a reasonable degree of medical certainty.

The claimant testified that he had applied for several jobs since being released by Dr. Mangels but had not been hired.

A pre-hearing order was filed on February 4, 2020. The claimant contended, "The claimant contends that he has sustained wage-loss disability greatly in excess of his impairment and that the extent of that permanent disability should be determined by the Commission. The claimant contends that any disability benefits awarded should be paid in a

lump sum as such a payment would be in his best interest. The claimant contends that any permanent disability in excess of his 11% permanent impairment to the body as a whole has been controverted and that his attorney is entitled to an appropriate attorney's fee. The claimant reserves all other issues."

The respondents contended, "The claimant is not entitled to wage-loss disability, the claimant should not be paid in a lump sum payment, the claimant is not entitled to any permanent disability in excess of his 11% permanent impairment to the body as a whole, and no attorney's fees should be paid to the claimant. The claimant has been paid his compensation rate from the date of the impairment rating. All other issues are reserved and the respondents reserve the right to amend this pre-hearing questionnaire."

The parties agreed to litigate the following issues:

1. Whether the claimant is entitled to wage-loss disability.
2. Whether the claimant is entitled to a lump sum payment.
3. Fees for legal services.

The claimant treated with a pain manager, Dr. Joseph Miller, on February 25, 2020. The claimant testified that Dr. Miller had issued him a "Medical Marijuana Card." The claimant testified regarding the prescription for marijuana, "The first couple times I took it, it seemed to help pretty good. Now it helps as far as it will like knock me out, but then I wake up and I'm

still having pain, so it doesn't really." The claimant testified that he continued to suffer from pain and physical restrictions as a result of the compensable injury and surgery.

An administrative law judge filed an opinion on October 13, 2020. The administrative law judge found that the claimant failed to prove he was entitled to wage-loss disability benefits. The claimant appeals to the Full Commission.

II. ADJUDICATION

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b)(1)(Repl. 2012).

An administrative law judge found in the present matter, "3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss benefits in this matter." The Full Commission reverses this finding. The claimant is a 51-year-old college graduate. The claimant's

employment history includes working at Whirlpool, substitute teaching, and working in a bank's foreclosure department. The claimant became employed with the respondents, Ace Fence Company, in about 2013. The claimant testified that he drove to prospective customers' homes and placed bids on fencing projects. The parties stipulated that the claimant sustained a compensable injury to his cervical spine on July 25, 2017. The claimant's vehicle was "T-boned" by a mail delivery truck. The claimant initially continued to work following the compensable injury. The claimant received conservative treatment for several months before undergoing a cervical discectomy in December 2018. The claimant testified that the respondents terminated his employment shortly afterward.

The claimant gave a reliable effort during a Functional Capacity Evaluation carried out on August 6, 2019. The claimant was released to "Medium" work. Dr. Mangels subsequently noted that the claimant had a 50-pound lifting restriction. Dr. Mangels assigned the claimant an 11% permanent anatomical impairment rating which the respondents have apparently accepted. However, the respondents have not allowed the claimant to return to work. The claimant's testimony indicated that he is motivated to return to gainful employment. The claimant testified that he has filed applications with a several prospective employers. The Commission notes the claimant's testimony that he is unable to properly

turn his neck as a result of the compensable injury and surgery, which restriction limits the claimant's driving abilities. A primary part of the claimant's work requirement for the respondents was driving a vehicle. The claimant has now been prescribed "Medical Marijuana" which the claimant said makes him sleepy with no substantive pain relief. We reiterate that the respondents terminated the claimant's employment after surgery following the compensable injury. The claimant now has an 11% permanent anatomical impairment and suffers with chronic pain which is causally related to the compensable injury. Although the claimant is relatively young at age 51 and has earned an undergraduate degree, he now has permanent physical restrictions as a result of the compensable injury in addition to an 11% permanent anatomical impairment rating.

After reviewing the entire record *de novo*, therefore, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 10% in excess of the 11% permanent anatomical impairment assessed by Dr. Mangels. The claimant proved that the July 25, 2017 compensable injury was the major cause of his 11% permanent anatomical impairment and 10% wage-loss disability. The claimant on appeal does not contend that he is entitled to wage-loss disability in a lump sum. The Full Commission therefore reserves the issue of lump-sum payment of wage-loss disability. The claimant's attorney is entitled to fees

for legal services in accordance with Ark. Code Ann. §11-9-715(a)(1)(Repl. 2012). For prevailing on appeal, 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.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

The majority finds that Claimant proved he is entitled to wage-loss benefits of 10%. For the reasons set out below, I respectfully dissent from the majority on this issue.

Other than Claimant’s self-serving testimony, there is nothing in the record to indicate that Claimant’s ability to earn wages is less now than before the compensable injury. Claimant testified that he has trouble turning his neck, which makes it difficult for him to drive; however, the only objective evidence on Claimant’s restrictions is that he is unable to lift over 50 pounds. Even assuming that Claimant has been unable to find another

job, there is nothing in the record to indicate that such inability is caused by his injury or impairments. Accordingly, I would find that Claimant failed to prove he is entitled to wage-loss benefits.

CHRISTOPHER L. PALMER, Commissioner