

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H202795

JESSIE L. KIRK, Employee	CLAIMANT
VAN BUREN WATER & SEWER DEPT., Employer	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, Carrier	RESPONDENT

OPINION FILED OCTOBER 16, 2023

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 MARY K. EDWARDS, Attorney, No. Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 18, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 21, 2023 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 sustained a compensable injury to his back, head, and right shoulder on March 30, 2022.
3. The claimant was earning an average weekly wage of \$965.04 which would entitle him to compensation at the weekly rates of \$643.00 for total disability benefits and

\$482.00 for permanent partial disability benefits.

4. The respondent accepted and paid permanent partial disability benefits based on a 2% rating to the body as a whole.

5. Respondent previously paid claimant permanent partial disability benefits for a 10% impairment rating in a previous claim.

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

1. Claimant's entitlement to benefits pursuant to A.C.A. §11-9-505(a)(1).
2. Wage loss disability.
3. Attorney's fee.

The claimant contends that since the respondents were able to provide employment for the claimant after the surgery for which they are claiming a 10% to the whole person reduction in his current impairment rating, they should be able to allow him to return to work following his most recent surgery. Unless they can present good cause for not allowing the claimant to return to work, payments pursuant to A.C.A. §11-9-505(a)(1) are appropriate. Claimant contends that if the respondent/employer is not allowing him to return to work at wages equal to or greater than the wages that he was earning at the time of his injury, he is entitled to wage loss disability. Claimant contends his attorney is entitled to an appropriate attorney's fee in regard to any benefits awarded pursuant to A.C.A. §11-9-505(a)(1) and as a result of an award of wage loss disability.

The respondents contend claimant cannot prove that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1). Suitable work was not available with the employer. Regarding wage loss, respondents pursued vocational rehabilitation and recently received the report. Respondents are in the process of determining its position regarding

wage loss.

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 witnesses and to observe their 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 June 21, 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 benefits pursuant to A.C.A. §11-9-505(a)(1).

3. Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 35% to the body as a whole as a result of his compensable injury for loss in wage earning capacity.

4. Respondents have controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

Claimant is a 48-year-old high school graduate who worked for respondent as a Wastewater Plant Operator Class III. He has a prior history of injuries to his low back. Claimant was involved in a motor vehicle accident in 2000 which resulted in surgery at the L5-S1 level. Thereafter, while employed by respondent, claimant suffered a second injury to his low back in 2009 when he and another employee were digging a sewer line

and the ditch collapsed. As a result of that injury, claimant underwent surgery on August 12, 2010, which was performed by Dr. Arthur Johnson. Following that surgery, Dr. Johnson assigned claimant an impairment rating in an amount equal to 10% to the body as a whole.

After the surgery in 2010, claimant returned to work for respondent and continued to perform his regular job duties until March 30, 2022. On March 30, 2022, claimant suffered an admittedly compensable injury to his back, head, and right shoulder when he was struck from behind by another employee driving a vehicle.

Claimant was treated for his back injury by Dr. Frank Tomecek, neurosurgeon, who performed an L5-S1 decompression and fusion procedure on August 24, 2022. Medical records from Dr. Tomecek reflect that although claimant's condition improved after the surgery, he still continued to have some complaints of low back pain with post-surgical treatment including physical therapy and two S1 joint injections.

Dr. Tomecek ordered a functional capacities evaluation which was performed on April 19, 2023, and determined that claimant demonstrated the ability to perform work in the Medium classification of work with the ability to occasionally lift up to 50 pounds. Following the functional capacities evaluation, claimant returned to Dr. Tomecek who agreed with the evaluation restrictions with additions of no pushing or pulling over 70 pounds; no crawling; no repetitive squatting or bending; and limited climbing of stairs or ladders to a few minutes per day. Dr. Tomecek indicated that claimant had reached maximum medical improvement and he also assigned claimant an additional 2% impairment rating to the body as a whole. This rating has been accepted and paid by respondent.

Following claimant's release by Dr. Tomecek, he was not permitted to return to his prior position by respondent; instead, his employment was terminated. On July 3, 2023, claimant became employed by the City of Fort Smith as a Wastewater Plant Operator earning \$15.54 per hour or \$32,323.20 per year.

Claimant has filed this claim contending that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1) due to respondent's failure to return him to his prior job. He also requests benefits for wage loss disability resulting from his compensable injury.

ADJUDICATION

Claimant contends that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1) for respondent's refusal to return him to his prior job. In order to receive benefits pursuant to A.C.A. §11-9-505(a)(1), claimant has the burden of proving by a preponderance of the evidence that (1) he sustained a compensable injury; (2) there is suitable employment within his physical and mental limitations available with the employer; (3) the employer refused to return him to work; and (4) the employer's refusal to return him to work was without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 230, 934 S.W. 2d 237, 239 (1996); *Nat'l. Cmty. Coll. v. Castaneda*, 2018 Ark. App. 458, 588 S.W. 3d 911.

I find that claimant has failed to meet his burden of proof. Specifically, I find that claimant has failed to satisfy elements (2) and (4). The job description of a Water and Wastewater Operator III requires the ability to lift manhole covers weighing up to 50 pounds. Claimant contends that after his 2009 injury he was given a lifting restriction of 40 pounds and that he continued to perform his job duties until the time of his March 30,

2022 injury. Therefore, since his restriction is now 50 pounds, he should be permitted to return to work for respondent at his prior job.

Even though claimant worked at his job performing lifting which may have exceeded his limitations after the 2009 injury, that is not determinative of this issue given the remaining evidence presented. Although claimant's contention that he could return to work and lift up to 50 pounds is the primary basis for his claim, the evidence does not support this contention. The medical records contain numerous statements from claimant to his treating physicians that he did not believe he could return to his prior employment.

March 2, 2023 – Dr. Tomecek

His employer is Van Buren water and sewer. He does not feel he can return to that job because it is too much manual labor. He cannot work on his flower beds he tries walking and it is difficult he cannot rake or do other yard work. It is hard for him to drive more than short distances.

April 6, 2023 – Dr. Tomecek

His job involves sometimes lifting up to 200 and more pounds at a time. He has to lift 50 pound bags of Lyme all day he has to mow and weed eat throughout the day. He does not feel he can return to this type of work.

He states that with the requirements of his job for the state that he does not believe he can return to a job with this degree of manual labor.

April 19, 2023 – Functional Capacity Evaluation

He reports that he had to climb stairs daily and ladders only occasionally. He had to regularly lift 50 lb bags of lime and 5 gallon buckets of water samples. Mr. Kirk reports that he is not sure if he is able to perform those

job duties at this time due to his back condition.

May 4, 2023 – Dr. Tomecek

At that job he had to lift 50 pound bags of Lyme several times a day. He also had to do other maintenance mowing and weed eating and many other activities. In addition, there were times he had to lift up to 200 pounds at this job.

(Emphasis added.)

Notably, as late as the functional capacity evaluation on April 19, 2023, claimant informed the individuals at the evaluation that he did not think he could perform the job duties due to his back condition. I also note that the functional capacity evaluation indicated that claimant could occasionally lift up to 50 pounds. According to the FCE, he had to regularly lift 50-pound bags of lime and according to Dr. Tomecek claimant lifted those 50-pound bags several times per day. In addition, despite the job description which indicates lifting up to 50 pounds, claimant informed Dr. Tomecek in his reports of April 6, 2023 and May 4, 2023 that he had to lift up to 200 pounds at his job.

Furthermore, although claimant contends that he is capable of performing his prior job which would require lifting of at least 50 pounds, he has not tried to lift that much because he is afraid to try.

Q Now, your medical records indicate that the doctor has placed a 50-pound restriction on you. Do you believe that is about right or not?

A I haven't tried it. I have not tried lifting anything that heavy yet. I am afraid to.

Given claimant's testimony that he has not lifted anything weighing 50 pounds

because he is afraid to would be an indication that respondent's refusal to return claimant to a job requiring lifting 50 pounds was not unreasonable. To the contrary, one could argue that it would be irresponsible for respondent to place claimant in a position of lifting more weight than he feels comfortable lifting.

I also note that in addition to the weight limitation, Dr. Tomesek indicated that claimant is limited to climbing stairs and ladders to only a few minutes per day and that he was restricting from pushing/pulling more than 70 pounds.

Testifying at the hearing on behalf of respondent was Steve Dufresne, Director of Utilities for respondent since September 1, 2012. Prior to serving as director, Dufresne performed various other jobs for respondent since 1992, including the job performed by claimant. Dufresne testified that because respondent is a small utility, individuals in one division have to help perform duties in other divisions. This would include helping repair water and sewer leaks and maintenance of water meters. These duties may include using shovels to dig up water lines; maintaining and repair of meters weighing 300-400 pounds; and climbing out of pits and vaults that may be four to twelve foot deep. Dufresne testified:

Q So what specifically of the job duties when you made that decision was giving you pause or you felt like maybe he could not do?

A Specifically, all of them. Opening and closing valves is a pushing and pulling. Climbing in and out of pits, climbing on ladders, climbing on water tanks. Pulling pumps. Working on pulling manholes. Just all of the general - - everything we do requires the bending, squatting, crawling so on a continual basis.

Finally, I note that when he was not allowed to return to respondent, claimant obtained employment at the City of Fort Smith as a Class III Wastewater Operator.

Although this title is the same as the claimant held with respondent, the fact that claimant has the same job title with Fort Smith does not serve as proof that he could have continued performing the job with respondent. For instance, it is unknown whether the job with the City of Fort Smith requires lifting up to 50 pounds. If it does, claimant apparently has not performed that duty because he testified that he had not lifted 50 pounds because he was afraid to do so. In addition, according to statements he made to Dr. Tomecek he had to lift up to 200 pounds with respondent. There is no evidence claimant is lifting that much weight with the City of Fort Smith. Accordingly, I do not find that the evidence establishes that claimant is performing the same job with Fort Smith with the same job duties such as would serve as evidence that he could perform his prior job with respondent.

In summary, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that there was suitable employment within his physical restrictions and that respondent's refusal to return him to work was without reasonable cause. Claimant was assigned a lifting restriction of 50 pounds occasionally, but indicated to Dr. Tomecek that he had to lift up to 200 pounds at his job. He also indicated that he had to regularly lift 50-pound bags of lime each day. Claimant indicated to both Dr. Tomecek and at the functional capacities evaluation that he did not believe he could perform his job duties with respondent. Finally, according to claimant's own testimony, he has not even attempted to lift 50 pounds because he is afraid to try. Under these circumstances, it was not unreasonable for respondent not to return claimant to a job that required lifting up to 50 pounds. Accordingly, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to benefits

pursuant to A.C.A. §11-9-505(a)(1).

Claimant also contends that he is entitled to permanent partial disability benefits for a loss in wage earning capacity resulting from his compensable injury. Pursuant to A.C.A. §11-9-522(b)(1), in considering claims for permanent disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of permanent physical impairment as well as the claimant's age, education, work experience, and other matters reasonably expected to affect his future earning capacity.

After consideration of the relevant wage loss factors in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 35% to the body as a whole.

The claimant is 48 years old and he is a high school graduate. Claimant admitted that he struggles with the use of computers. Claimant testified that he has several licenses. These include Water Distribution License Grade III; Wasterwater Treatment Grade III; Backflow Tester and Repair; Masters in Solid Waste; Plumbing Inspector's License; and a Class A CDL.

Claimant's prior jobs have included work for a water and sewer contractor; working for Stilwell Industries, and working as a wildland firefighter for the U.S. Forestry Service. According to claimant's testimony, none of his prior jobs were any less physically demanding than the job he performed with respondent.

As previously noted, claimant has a total impairment rating in an amount equal to 12% to the body as a whole (10% from 2010 and 2% from 2023). He has been given restrictions from a functional capacities evaluation which allows him to occasionally lift up

to 50 pounds and carry up to 20 pounds on a frequent basis. Claimant was also limited to occasional stooping, crouching and kneeling. The evaluation determined that claimant was capable of performing work in the Medium classification of work. Following that evaluation claimant returned to Dr. Tomecek who indicated that in addition to the restrictions placed upon claimant at the functional capacities evaluation, claimant should not push or pull over 70 pounds and he should not crawl or repetitively squat or repetitively bend. In addition, he should limit climbing of stairs and ladders to only a few minutes each day.

For reasons previously discussed, claimant was not capable of returning to work for the respondent. Claimant underwent a vocational evaluation with the highest paying job identified as a Watershed Tender at an average salary of \$30,020.00. Fortunately, claimant was able to obtain employment at the City of Fort Smith as a Class III Wastewater Operator. Documentary evidence indicates that claimant earns \$15.54 per hour for a total of \$32,323.20 per year for this City of Fort Smith. Based on the parties' stipulations, the claimant earned an average weekly wage of \$965.04 while working for respondent which would total \$50,182.08 per year. Thus, claimant has clearly suffered a loss in his ability to earn wages.

Based on the foregoing evidence, I find that 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. While claimant is capable of performing work in the Medium classification of work according to the functional capacity evaluation, his ability to lift has been severely limited by his most recent compensable injury. In fact, that inability led to claimant no longer being able to perform his job with the

respondent. Claimant underwent a vocational evaluation in which the highest paying job was identified as Watershed Tender at an average salary of \$30,020.00. Fortunately, claimant was able to obtain employment with the City of Fort Smith as a Wastewater Operator Class III at a salary of \$32,323.20. Thus, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 35% to the body as a whole as a result of his compensable injury.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is entitled to benefits pursuant to A.C.A. §11-9-505(a)(1). Claimant has proven 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. Accordingly, claimant is entitled to payment of permanent partial disability benefits in an amount equal to 35% to the body as a whole. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

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.

Respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$608.45.

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