BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G506221

ROGER GRUBBS, Employee	CLAIMANT
SOUTHERN PERSONNEL MANAGEMENT, INC., d/b/a CABINET SHOP, Employer	RESPONDENT #1
AMTRUST NORTH AMERICA, Carrier/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JUNE 10, 2021

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.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney, Little Rock, Arkansas; although not present at hearing.

STATEMENT OF THE CASE

On May 3, 2021, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 17, 2021 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 prior opinions are final.

3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of $325.00 for total disability benefits and $244.00 for permanent partial disability benefits.

4. Respondent #1 has accepted and is paying the 12% permanent impairment rating to the body as a whole.

5. The claimant reached maximum medical improvement on October 22, 2020.

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

1. Extent of claimant's wage loss disability.

2. Attorney's fee.

The claimant contends that he has sustained permanent loss of earning capacity greatly in excess of 12%.

Respondent #1 contends that claimant sustained a lumbar injury when he was initially injured on March 4, 2013. He underwent a FCE which found that he could no longer work full time and was restricted to no more than 4-hour work days. Claimant was working part-time when he was injured on August 7, 2015. Due to the March 2013 back injury, claimant was assigned a 5% rating to the body as a whole and a 15% wage loss disability. On August 7, 2015, claimant sustained a compensable injury to his cervical, thoracic and lumbar spine. He was awarded temporary total disability and medical treatment. Claimant ultimately had a lumbar fusion and was assigned a 12% rating, which respondent #1 accepted and is currently paying. A new FCE was done that indicated claimant could return to work in the light category. Respondent #1 has provided vocational rehabilitation with Heather Taylor which is ongoing at this time. Respondent #1 contends the claimant has sustained no additional wage loss disability above the prior

15% he was awarded.

Respondent #2 defers to the outcome of litigation in regard to the wage loss issue and waives its right to attend the hearing.

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 March 17, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 30% to the body as a whole as a result of his August 7, 2015 compensable injury.

3. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant has worked for the owners of the Cabinet Shop since 1975. Claimant performed cabinetry work and his job duties required him to lift more than 100 pounds, bend, stoop, and twist. In addition to working in the shop, claimant also performed installation work.

Claimant has suffered two compensable injuries as a result of motor vehicle

accidents. The first MVA occurred on March 4, 2013 (G301840) at which time the employer was known as Cabinet Shop and the carrier was the Arkansas P & C Guaranty Fund. The employer name subsequently changed to Southern Personnel Management d/b/a Cabinet Shop and the carrier is AmTrust North America. Claimant's second MVA occurred after the name and carrier change. The second MVA was on August 7, 2015 (G506221) and it is the subject of this particular claim.

With regard to the first MVA on March 4, 2013, the claimant suffered compensable injuries to his cervical, thoracic, and lumbar spine. Claimant's treatment included medication, physical therapy, work restrictions, and injections. Claimant also underwent a functional capacities evaluation in which he demonstrated the ability to perform work in the medium classification of work. Claimant was also assigned a 5% impairment rating and released as having reached maximum medical improvement by Dr. Holder on October 23, 2013.

After his release by Dr. Holder, claimant was treated by Dr. Covington at the Oklahoma Spine and Brain Institute. Dr. Covington was of the opinion that claimant had a non-surgical spine problem and he recommended treatment with injections, medication, and physical therapy. On June 9, 2015, Dr. Covington indicated that claimant had reached maximum medical improvement from a neurosurgical standpoint, but stated that claimant needed continued pain management to control his symptoms.

Thereafter, claimant sought medical treatment from Dr. Schilling, a chiropractic physician, beginning on July 23, 2015. Shortly after he began receiving treatment from Dr. Schilling, claimant was involved in the second MVA on August 7, 2015, which according to his previous testimony made his condition worse. The employer and carrier

at the time of the second MVA initially accepted as compensable an injury to claimant's cervical, thoracic, and lumbar spine. Claimant continued to receive treatment from Dr. Schilling until he was released on November 30, 2015.

Based on an opinion from Dr. Cathey, respondent subsequently denied compensability of the injury on August 7, 2015, and claimant came under the care of Dr. Blankenship. Based upon an MRI scan, Dr. Blankenship diagnosed claimant with a disc protrusion at L5-S1 and recommended conservative treatment to include an evaluation with Dr. Cannon for a possible lumbar epidural steroid injection as well as aggressive physical therapy.

Due to the denial of the claim by respondent, a hearing was conducted on January 29, 2018 and an opinion was filed February 28, 2018 by this administrative law judge finding that claimant had proven a compensable injury to his cervical, thoracic, and lumbar spine on August 7, 2015. Claimant was awarded additional medical treatment recommended by Dr. Blankenship and temporary total disability benefits. That decision was appealed to the Full Commission, which in an opinion filed October 1, 2018 affirmed the finding of compensability and award of medical treatment by Dr. Blankenship. The award of temporary total disability benefits was reserved.

Since the prior hearing in this case on January 29, 2018, claimant also requested a hearing on his entitlement to wage loss benefits attributable to his 2013 compensable injury. A hearing was conducted on that claim by ALJ Grimes on February 5, 2019, and in an opinion filed February 13, 2019, she awarded claimant 15% to the body as a whole for wage loss resulting from the 2013 MVA. That decision was not appealed and is now final.

With regard to the 2015 injury, claimant continued to treat with Dr. Blankenship. Initially, this was conservative treatment, but when claimant's condition did not improve Dr. Blankenship recommended surgery on the lumbar spine which he performed on April 9, 2020. In a report dated October 22, 2020, Dr. Blankenship stated that claimant had reached maximum medical improvement and he assigned claimant an impairment rating in an amount equal to 12% to the body as a whole. This rating has been accepted and paid by the respondent.

Claimant has filed the current claim contending that he is entitled to permanent benefits for wage loss resulting from the 2015 MVA.

ADJUDICATION

Claimant contends that he is entitled to permanent disability benefits for loss in wage earning capacity as a result of his August 7, 2015 compensable injury. Claimant testified that he did not believe he was capable of performing full time work in his current physical condition. Essentially, claimant testified that he believes he is permanently totally disabled. Pursuant to A.C.A. §11-9-519(e):

> (1) 'Permanent total disability' means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.
> (2) The burden of proof shall be upon the employee to prove inability to earn any meaningful wage in the same or other employment.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, and after consideration of the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 30% to

the body as a whole as a result of his August 7, 2015 injury.

According to A.C.A. §11-9-522(b)(1), when considering claims for permanent disability benefits in excess of the permanent physical impairment rating, 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 all other matters reasonably expected to affect his future earning capacity.

Here, the claimant was previously assigned a 5% impairment rating and awarded 13% for wage loss as the result of a MVA on March 4, 2013 in an opinion by ALJ Grimes on February 13, 2019. At that hearing claimant testified that he was able to return to work for respondent only because respondent provided him accommodations on the job. Even then, he testified that there were only a few days that he worked eight hours per day. When questioned by ALJ Grimes, claimant testified that the balance of his work after 2013 was parttime or half a day work.

With that background, claimant suffered a second compensable injury as a result of a MVA on August 7, 2015. Claimant has undergone surgery on his lumbar spine as a result of that compensable injury and has been assigned an additional impairment rating in an amount equal to 12% to the body as a whole.

The claimant is 67 years old and he is a high school graduate. In addition, the claimant studied carpentry and construction at a vo-tech school for two years. For the last 45 years claimant has performed carpentry work for the owners of the respondent.

Following claimant's surgery, Dr. Blankenship eventually ordered a functional capacities evaluation which was performed on November 11, 2020, with 52 of 52 consistency measures within expected limits. The evaluation determined that claimant

could occasionally lift/carry up to 20 pounds, and frequently lift/carry up to 10 pounds. The evaluation determined that claimant was capable of performing work in the light classification of work.

Given the results of the functional capacities evaluation, respondent #1 had claimant evaluated by Heather Taylor, a vocational rehabilitation specialist. Taylor testified at the hearing that she met with the claimant to perform a vocational rehabilitation assessment and to determine whether he was interested in her providing job search services. Taylor testified that she asked claimant if he wanted to look for a different job based upon the results of the functional capacities evaluation and claimant indicated that he did not believe he was physically capable of performing work, but would be interested to see what type of jobs might be available. Taylor sent claimant a letter with several job openings and asked him if he needed any assistance with any of those applications. According to Taylor's testimony, she never heard back from the claimant and never provided any additional services. Claimant testified at the hearing that he contacted the employers provided to him by Taylor but was not offered employment.

Taylor testified that all of the jobs she provided claimant paid at least minimum wage which is currently $11.00 an hour. Taylor also testified that claimant did not have any transferrable skills.

In determining the extent of claimant's wage loss, it is important to note that Dr. Blankenship has opined that claimant should retire. I do not find Dr. Blankenship's opinion to be entitled to significant weight for several reasons. While doctors may be experts on functional or anatomical loss, they are not experts on wage loss disability or loss of earning capacity unless such qualifications are shown. *Oller v. Champion Parts*

Rebuilders, 5 Ark. App. 307, 635 S.W. 2d 276 (1982). Here, it appears that Dr. Blankenship's opinion is not based upon claimant's physical limitations, but based upon the claimant's age and his own personal belief with regard to whether jobs are available. In his report of July 16, 2020, Dr. Blankenship stated:

> I told him that I think it is doubtful that he is going to be able to return to work at his pre-injury job and honestly at his age I doubt that there is anything parttime or limited activities that he can do. He has been off work for five years. He is doing great. With such a long delay in surgical intervention for his problem, I have told him that we will reevaluate in three, but I think likely in three months he will be at MMI and my advice to him would be that he should not return to work given his age. (Emphasis added.)

Dr. Blankenship again reiterated that claimant should retire in his report of October 22, 2020.

In addition to the fact that Dr. Blankenship's opinion seems to be based upon claimant's age as opposed to his physical limitations, I also note that his opinion is contrary to his prior opinion regarding claimant's ability to return to work. At one point, there was a question as to whether or not the respondent was going to accept liability for surgery recommended by Dr. Blankenship. In determining whether to accept liability, respondent's case manager sent questions to Dr. Blankenship and he responded in his report of March 2, 2020. In that report, with respect to a question regarding claimant's ability to return to work, Dr. Blankenship indicated that it was very likely claimant could return to work.

> At present restrictions, etc., are not significantly germane to this discussion. If the gentleman is going to have surgical intervention, we need to get him

> fixed. We need to get him recovered from it and then we need to get him into a work-conditioning program. It is very likely he can return to this work after a rehabilitation period which probably work-conditioning would be a minimum of three months. (Emphasis added.)

Claimant subsequently underwent the surgery and according to Dr. Blankenship's medical reports claimant had a good result from the surgery.

> April 23, 2020
>
> He is now two weeks out. He is doing great.
>
> July 16, 2020
>
> He had some increased activity about a week ago that aggravated his pain and he rated that pain at that time about 70% toward the worst pain imaginable. Now his pain is back down to 10% toward the worst pain imaginable. (Emphasis added.)
>
> October 22, 2020
>
> He is doing great with complete resolution of his pre-operative pain. He still has some low back pain mostly midline. He rates this only about 20% toward the worst pain imaginable. *** He is doing well and states that he has a marked reduction in his preoperative pain. (Emphasis added)

Thus, in his report of March 2, 2020, Dr. Blankenship indicated that it was very likely that claimant could return to work. Claimant then underwent surgery and per Dr. Blankenship's own medical reports, the claimant was doing "great" and had a complete resolution of his preoperative pain. Again, this would indicate that Dr. Blankenship's opinion that claimant should retire is based upon his age, not his physical limitations and ability to perform work.

Finally, with respect to Dr. Blankenship's opinion that claimant should retire, I note that Dr. Blankenship most recently expressed that opinion in his report of October 22, 2020. Dr. Blankenship also subsequently ordered a functional capacities evaluation which was performed on November 11, 2020. That evaluation was determined was determined to be valid based upon the claimant's effort and it determined that claimant was capable of performing work in the light classification of work. Notably, Dr. Blankenship has not addressed the claimant's ability to return to work subsequent to the functional capacity evaluation results.

I find it significant that the functional capacities evaluation which was determined to be valid indicated that claimant was capable of performing work within the light classification of work and that Taylor was able to provide claimant with job openings for work within those restrictions paying at least minimum wage of $11.00 an hour. The fact that claimant contacted those employers and was unable to obtain employment does not indicate that claimant does not have the ability to perform those jobs.

With respect to this issue, I also note that claimant testified that he disagreed with the evaluation's determination that he can frequently sit or stand. In fact, the evaluation report indicates that claimant can frequently walk and stand and that he is capable of constant sitting. While claimant may disagree with those evaluation results, given the fact that the evaluation was determined to be valid I find no reason to discount the findings with regard to claimant's ability to walk, stand, or sit while accepting the validity of other findings from that evaluation.

Finally, I believe it is important to note that claimant testified that since his 2015 MVA he has worked only three hours for the respondent and that was essentially in a

supervisory role. I also note that claimant is currently drawing social security retirement benefits and that claimant has a cabin at the week and goes fishing once or twice per week.

In summary, claimant has the burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable 2015 MVA. I do not find under the facts presented that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. While Dr. Blankenship indicated that claimant should retire, I find for reasons previously discussed that Dr. Blankenship's opinion with regard to claimant's retirement is entitled to little weight. Furthermore, and more importantly, the functional capacities evaluation determined that claimant was capable of performing work in the light classification of work. According to Heather Taylor, a vocational rehabilitation specialist, there are jobs within the claimant's work capacity which are available to him which would pay at least minimum wage of $11.00 per hour. Based upon the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 30% to the body as a whole as a result of his August 7, 2015 injury.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable August 7, 2015 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 30% to the body as a whole. Respondent #1 has controverted claimant's entitlement to 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.

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

Respondent #1 is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of $644.75.

IT IS SO ORDERED.

_____

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE