

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO.:H105339

DARRELL HAMILTON, EMPLOYEE

CLAIMANT

**COOPER TIRE & RUBBER COMPANY,
EMPLOYER**

RESPONDENT

**CENTRAL ADJUSTMENT COMPANY, INC.,
INSURANCE CARRIER/THIRD PARTY ADMINISTRATOR
(TPA)**

RESPONDENT

OPINION FILED FEBRUARY 6, 2023

Hearing held before Administrative Law Judge Chandra L. Black, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Paul Miller, Attorney at Law, Texarkana, Texas.

Respondents represented by Ms. Karen H. McKinney, Attorney at Law, Little Rock, Arkansas.

Statement of the Case

On November 8, 2022, the above-captioned claim came on for a hearing in Texarkana, Arkansas. Previously, a prehearing telephone conference was conducted in this matter on August 16, 2022. Following said telephone conference, a Prehearing Order was entered that same day. I have marked the order, and the respective prehearing filings of the parties as Commission's Exhibit 1 without any objection from either of the parties.

Stipulations

During the prehearing telephone conference and/or at the hearing, the parties agreed to certain stipulations. I hereby accept the following proposed stipulations as fact:

1. That the employee-employer/self-insured employer relationship existed at all relevant times, including on or about February 27, 2021¹, when the Claimant sustained an admittedly compensable injury to his mid-back.
2. On October 14, 2021 the Claimant underwent a Functional Capacity Evaluation (FCE) and was found to be capable of performing work in the *MEDIUM* classification of work as defined by the US Dept. of Labor's guidelines over the course of a normal 8-hour workday with certain physical limitations.
3. The Claimant's average weekly wage (AWW) on the day of his work-related accidental injury was \$1,179.00. His weekly indemnity rate is \$736.00 for temporary total disability (TTD) compensation, and \$552.00 is his weekly indemnity rate for permanent partial disability (PPD).
4. On May 18, 2022, Dr. Reza Shahim assessed the Claimant a 3% permanent impairment rating for his back injury. The Respondents have accepted said rating and are paying it or paid it in full.
5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues

The parties agreed to litigate the following issues:

1. Whether the Claimant is entitled to wage loss disability for his admittedly compensable back injury of February 27, 2021.
2. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

Contentions

The respective contentions of the parties are as follows:

Claimant:

Mr. Hamilton incurred an on-the-job injury to his back while working as a mixer operator. As a result of his injury, Hamilton now works in Sort and Palletize

¹ In the hearing transcript, the date of injury is incorrectly stated on page 5. The correct date of injury is February 27, 2021, and not February 21, 2021.

and has sustained a wage loss. Mr. Hamilton is entitled to wage loss benefits due to the drop in his hourly wage average from \$28.00 per hour to \$17.50 per hour.

Respondents:

Respondents contend that the Claimant has been released to return to work in a Medium Duty capacity and he has returned to work for Respondents. Respondents further contend that the Claimant is capable of working and earning the same or greater wages that he earned at the time of his injury and therefore has not sustained any wage loss disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including the medical reports, the documents, and all other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witnesses, and observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and have been accepted as fact.
3. The evidence preponderates that the Claimant sustained a 7% wage loss disability over and above his 3% permanent anatomical impairment, which resulted due to his compensable mid-back injury of February 27, 2021.
4. The Respondents have controverted this claim for additional benefits. Therefore, the Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.
5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Summary of Evidence

The Claimant, Mr. Darrell Hamilton, testified in his own behalf during the hearing. Mr. Toney Thompson also testified on behalf of the Claimant.

The record consists of the hearing transcript of November 8, 2022, and the exhibits contained therein. Specifically, the evidentiary record includes Commission's Exhibit 1; the Claimant's Medical Exhibits consisting of 28 numbered pages was marked Claimant's Exhibit 1; Claimant's Non-medical Exhibits comprising of 19 numbered pages was marked Claimant's Exhibit 2; Respondents introduced into evidence 18 pages of Medical Records, have been marked Respondents' Exhibit 1; and their Non-medical Records entailing 53 numbered pages were labeled Respondents' Exhibit 2.

Hearing Testimony

Darrell Hamilton

The Claimant, age 37, is a high school graduate. Afterward in 2009, the Claimant attended a local community college, and obtained a technical certificate in auto mechanics. The Claimant began working for Cooper Tire and Rubber Company around 2015 or 2016. He initially worked performing employment duties for the respondent-employer in the mixing department. The highest position that the Claimant held within that department was, mixer operator. His primary employment duties as a mixer operator included mixing rubber and compound. The Claimant worked in that position for over five years.

He confirmed that on February 27, 2021 the day of his work-related injury, he sustained a compensable injury to the left side of his back while performing employment duties for the Respondents. Per the medical records, the Claimant sustained an injury to

the mid-back of the thoracic area. The Claimant confirmed that the source of his problems to date continues to be in that particular area of his spine. He agreed that the Respondents/Cooper Tire accepted his injury as compensable and paid benefits to and on his behalf, including a 3% permanent impairment rating for his mid-back. According to the Claimant, he decided against back surgery because he believed he was better off without any type of surgical intervention.

The Claimant confirmed that he underwent a Functional Capacity Evaluation (FCE) and was found to have physical restrictions and limitations. He was released from medical care for his back injury on May 18, 2022. At that time, the Claimant's treating physician instructed him to continue with his current FCE restrictions. Per his FCE restrictions, the Claimant's lifting limitation is 40 pounds. He can occasionally carry 35 pounds, and frequently lift 20 pounds. Additionally, the Claimant has the ability to only occasionally push and pull. He confirmed that his employer has provided him a job within his restrictions. Specifically, the Claimant testified that pushing, pulling, repetitively bending and twisting cause his mid-back to "hurt really bad." The Claimant confirmed that the above-mentioned restrictions have been permanently placed on him.

Under further questioning, the Claimant specifically confirmed that as a mixer operator, he made "good money." However, now the Claimant is prevented from returning to work in that position because of his physical restrictions of being able to occasionally lift up to 40 pounds. According to the Claimant, while working as a mixer operator, he had to lift and load numerous bags of compound that weighed from 40 to 60 pounds during his entire shift. The Claimant stated that he is also precluded from working as mixer operator due to his restrictions relating to bending, twisting, pushing, and pulling.

The Claimant verified that he worked with his union representative and Cooper Tire to find a job within the plant that was suitable for his restrictions. Ultimately, they transferred the Claimant to work as a sort and palletize operator. In that particular area, the Claimant is responsible for sorting the tires and putting the proper labels on them. He has performed that job for nearly a year. The Claimant admitted that his current job is suitable work for his restrictions. However, the Claimant denied that his current job pays as much as the mixer operator work.

He acknowledged that his employer introduced into evidence records showing some other jobs such as a salesperson for Frito-Lay, and a worker for an insurance company. However, the Claimant confirmed that he does not know if he can do those jobs given his limitations. The Claimant essentially testified that he has the functional ability to do some limited bending and twisting. According to the Claimant, he can perform the sort and palletize job and stay within his restrictions. He admitted that he has not looked for jobs outside of Cooper Tire and tried to figure out whether they were within his physical restrictions. The Claimant essentially confirmed that he develops certain seniority at Cooper Tire, and that is a helpful thing in acquiring promotions.

Next, the Claimant was asked to turn his focus to the difference in the pay that he made as a mixer operator as opposed to working in the sort and palletize position. The Claimant was shown a copy of Claimant's Exhibit 2, which is the first page of his 2019 federal income tax return. He confirmed that his income is the only income reflected on that document. He agreed that this document shows that in 2019, he worked as a mixer operator at Cooper Tire and his total gross pay was \$55,290.00. The Claimant further agreed that the next page of the exhibit shows his 2020 federal tax return. He confirmed

that this document shows that he earned \$46,859.00 in 2020, working as a mixer operator. However, the Claimant confirmed that although he got hurt in February 2021, he was still classified as a mixer operator. The Claimant's union contract guaranteed him 85% of his average income.

Subsequently, in November 2021, the Claimant moved to his current position in sort and palletize. The Claimant confirmed that given the change of jobs and the 85% guarantee, his total income reflected at page 3 for tax year 2021 was \$42,679.00. Additionally, the Claimant further confirmed that he has spent the entire year of 2022 working in sort and palletize. The Claimant testified that as of November 4, 2022 he has made \$32,604.00. For the entire year of 2022, the Claimant estimated his annual income for the year to be \$38,632.00. He confirmed that this is substantially less than what he made as a mixer operator. The Claimant agreed that the pay rates and averages at Cooper Tire are confusing to work through. Therefore, the Claimant relied on his union representative to help him calculate and understand things such as the averages and different segments of pay.

Claimant's attorney introduced into evidence some of the Claimant's actual payroll records including a stub that breaks out his pay. Specifically, Claimant's Exhibit 2, pages four through 11 show seven consecutive pay periods, and each one has an average. Per this document, on September 18, 2020 the Claimant's actual pay average was \$26.90. However, the Claimant agreed that this paystub has some overtime and holiday pay listed on it. For the week of September 25, 2020 the Claimant's average pay was \$29.03. He confirmed that the pay records introduced into evidence accurately reflect his pay averages.

The Claimant confirmed that his other paystubs show that in July 2022, he worked in the sort and palletize job. His initial regular pay average was \$20.14. Yet another document of record demonstrates the Claimant's average hourly rate of pay while working in sort and palletize was \$18.94. Given the Claimant's current averages of pay, he confirmed that he is asking for an award of wage loss disability benefits based upon the difference in pay of what he earned as a mixer operator prior to his injury as compared to what he now earns from working as a sort and palletize operator.

On cross-examination, the Claimant confirmed that he graduated from high school in 2005. He admitted that he is able to read and write, and do math. The Claimant confirmed that he has effective communication skills. He verified that prior to going to work for Cooper Tire in 2016, he worked for SERVPRO, which is a water restoration company. According to the Claimant, his employment duties there entailed fire and water cleanups. His hourly rate of pay was \$15.00. After the Claimant received his certification in auto mechanics, he began working as an auto mechanic. The Claimant confirmed that he removed motors, transmissions, and starters from vehicles, along with other similar activities associated with auto repair and upkeep.

Regarding his work at Cooper Tire, the Claimant initially performed employment duties as a mixer operator utility worker. Subsequently, the Claimant was promoted to the position of mixer operator. The Claimant admitted that he is trainable and that he can move up in the job he is doing now. He denied that as a mixer operator, a lift assist was made available to him to help with the lifting of the hundred-pound bags. The Claimant further denied that he could ask for help with the lifting. According to the Claimant, he complained to the union reps about the lack of lift assists.

With respect to the Claimant's February 2021 compensable back injury, he confirmed that he was injured while removing rubber from a ram flapper door when his injury happened. The Claimant confirmed that when he reported his injury to management, Cooper Tire accepted it and sent him for medical treatment. He initially sought medical treatment for his injury from Healthcare Express. The Claimant was evaluated by Dr. Calhoun, a neurosurgeon in, North Little Rock. He confirmed that Dr. Calhoun talked to him about what was going on with his back and released him back to full duty work. The Claimant essentially testified that management instructed him to continue doing light duty work until he underwent his FCE. According to the Claimant, management did not allow him to work as a mixer operator. The Claimant testified that Cooper Tire changed his classification in July 2021, after Dr. Calhoun returned him to full duty work.

However, the Claimant was shown documents of record proving that when he first went to work for Cooper Tire in April 2016, he was a mixing room utility. He confirmed that other documents show that he worked as a mixer operator, beginning May 2017 continuing until April 25, 2020. He admitted that another document of record shows the next change of employment duties for him occurred on November 19, 2021, and he went to work as a sort and palletize operator, which was after his October 2021 FCE. The Claimant finally admitted that these documents are correct. However, the Claimant went on to explain that he was sent to work in another department, but they did not change his classification until after his FCE. He maintained that after his FCE, Cooper Tire took it upon themselves to change his classification to another position, but not the sort and

palletize operator position. However, the Claimant admitted that he does not have any payroll stubs or job change information to verify his testimony in this regard.

The Claimant confirmed that he obtained a change of physician to treat with Dr. Shahim after his release to full duty by Dr. Calhoun. The Claimant verified that Dr. Shahim performed some injections, and it was determined that the shots were not providing him with any long-term relief. He agreed that in May 2022, Dr. Shahim stopped those and placed him at maximum medical improvement. At that time, Dr. Shahim assessed the Claimant with a 3% impairment rating for his back injury. The Claimant admitted that Cooper Tire paid him for the 3% rating.

Following the Claimant's release to permanent work status by Dr. Shahim in May 2022, he admitted that he has not had any future medical treatment for his back since that time. He confirmed that no doctor has removed or excused him from work because of his back since May of 2022.

The Claimant was shown some of his payroll stubs. He agreed that some of these paystubs show that after he reached maximum medical improvement by Dr. Shahim, he worked as a sort and palletize operator and averaged at times, up to \$20.00 an hour, particularly for the week ending May 27, 2022. The Claimant admitted that Respondents' Exhibit No. 2, at page one shows that he averaged \$19.54 for the week of October 21, 2022. He agreed that he does not have a set average weekly wage that shows up on his pay stubs. The Claimant further agreed that his pay is going to vary each week because of other factors that go into how much he earns. Hence, the Claimant essentially agreed that while working as a sort and palletize operator, he does not have the exact same weekly wage due to other factors that go into what he earns for that particular week. The

attorney for Respondents showed the Claimant his pay stub of record for week beginning May 21, 2022 and ending May 27, 2022. The Claimant agreed that this pay stub shows he earned \$1,257.76 for that week. For week June 4, 2022 through June 10, 2022 the Claimant's gross paycheck of \$719.19. The Claimant admitted that he had other paychecks showing rates of \$20.16 and \$19.98.

Under further questioning, the Claimant admitted that he has taken paid time off, which included holiday pay, paid vacation leave, and FMLA. However, the Claimant maintained that since May 2022, he has taken FMLA due to his back injury. Yet, the Claimant admitted that he did not present any documentation to Cooper Tire showing that the FMLA he has taken was due to his back injury. The Claimant maintained that he told management that he has blood pressure problems due to his back injury. In this regard, the Claimant admitted that he did not present any evidence stating that he was unable to work because of back pain and that he was missing hours at work because of his back injury.

Next, the Claimant was shown pages one through three of his functional capacity evaluation. The Claimant confirmed that page two of that document lists the activities he can do. He agreed that he can frequently walk at work. The Claimant further confirmed that throughout this evaluation, he was assessed to have normal balance. Per this evaluation, the Claimant can occasionally stoop, and frequently crouch, kneel and climb stairs. He also showed the ability to occasionally push and pull a cart. The Claimant agreed that he can constantly reach with his hands according to this document. Also, per this evaluation, the Claimant demonstrated the ability to frequently reach overhead, and could do constant finger handling of things. He admitted that he can constantly stand and

sit. The Claimant confirmed he was released to work in the medium duty capacity with the limitation of being able to occasionally lift up to 40 pounds.

He confirmed he has not ever looked for work outside of Cooper Tire. The Claimant agreed that in today's economy, there are job openings about everywhere you look. However, the Claimant admitted that he does not know if he could make more if he left his employment with Cooper Tire because he has not looked for any work outside of the company.

Counsel for the Respondents referred the Claimant to a list of jobs for the Texarkana area that she found on her search of internet. Specifically, Respondents' attorney showed the Claimant documents representing potential employment with Frito Lay that pays \$58,200.00 a year. The Claimant essentially stated that he does not know if he could perform the job based on the qualifications or physical requirements of that job. He confirmed that he has not inquired of anyone about the job. One of the physical requirements of the job is that you be able to drive. The Claimant admitted he is able to drive, but he stated that he has problems with blurry vision due to his blood pressure problems. However, he admitted that he does not have any medical documentation excusing him from driving. The Claimant maintained that he does not know if he could perform the Frito Lay job if he had to lift 40 pounds frequently with or without a reasonable accommodation. However, the Claimant admitted that he holds a valid unrestricted driver's license.

Other jobs found on the internet include that of a power locator, which pays up to an annual salary of \$52,900.00. The Claimant confirmed that the pay for this position is what he was making as a mixer operator. He confirmed that he is able to enter energized

areas, which is one of the requirements for the power locator job. The Claimant admitted that everything at Cooper Tire is energized equipment. One of the other jobs was a plastic injection molding technician, which pays up to \$25.00 an hour. The Claimant confirmed that he could perform the 25-pound lifting requirement for this job. He agreed that he is able to work in a dirty, dusty and noisy environment. The other job listed of record, included that of customer relations representative for an insurance company that showed no physical exertions for that position, except standing and walking. The Claimant agreed that he can operate a computer and engage in communication with people over the phone and in person. However, the Claimant testified that he does not have any type of training for that position although he did graduate from high school.

The Claimant agreed that he has gone to school and graduated. He also agreed that he got his certification in auto mechanics. He confirmed that he underwent training to become a mixer operator, and to work as a sort and palletize operator. The Claimant denied that he could not work as a sort and palletize lead because it would go against his current restrictions. According to the Claimant, in the lead position, he would not be able to pick the tires out and get into the machinery, nor would he be able to move the pallets.

Next, the Claimant was shown a copy of the job description for his current job as a sort and palletize operator introduced into evidence per Respondents' Exhibit No. 2, at page 11. Also, included in that exhibit is the job duties for the lead sort and palletize position. One of the job duties listed for the operator position is to "Move tires that have failed or no testing to the No-Read overflow conveyor." Although the Claimant admitted that you have to move tires in both positions, he explained, "Yes, but the Lead has a whole different thing of moving tires. Those tires can be up to almost a 100 pounds." He

also denied he could work as a lead because sometimes they do not have the right amount of people to help the lead. The Claimant stated that if he took the lead position, he could not do what they do as far as climbing on top of the conveyor belt. However, the Claimant admitted that on his FCE, it states that he can climb, kneel, stoop, reach, stand and sit. The Claimant continued to maintain for reasons discussed above that he cannot perform the work of a sort and palletize lead although the description of record indicates otherwise.

The Claimant confirmed that he receives production bonuses in his current job of sort and palletize operator. He agreed that his production bonuses are based on the work of the group, and not based upon his individual work. The Claimant confirmed that he has routinely gotten production bonuses since being in the sort and palletize as of May 2022.

On re-direct examination, the Claimant confirmed that his job in sort and palletize was not one that was simply chosen by him. Instead, the Claimant confirmed that Cooper Tire assigned him the job after consultation with the safety people. The Claimant agreed the job was assigned to him because it was appropriate for his condition.

Dr. Calhoun's medical report of July 9, 2021 was made a part of the record. After reviewing the report, the Claimant confirmed that the end notes state "no repetitive bending, twisting, or lifting." The Claimant agreed that he avoids these activities because they make his pain worse.

On re-cross examination, the Claimant confirmed that Dr. Calhoun's report does not say "no" bending, twisting or lifting." Instead, it reads, "no repetitive" bending, twisting, or lifting."

Tony Thompson

Mr. Thompson was called as a witness on behalf of the Claimant. He verified that as of the date of the hearing, he continued to be employed by Cooper Tire. Mr. Thompson is the vice president of the union at Cooper Tire. Per Mr. Thompson's testimony, he manages the pension funds, insurance policies, and matters of that nature. Mr. Thompson confirmed that he took part in matters involving the Claimant at the time of his injury, and during placement of him to a proper job. Counsel for the Claimant asked Mr. Thompson to explain how the Claimant ended up in the sort and palletize position in 2021. In that regard, Mr. Thompson testified that when an employee disqualifies off a job because of some kind of medical findings, upon receipt of permanent restrictions, they pull them from that job and give them a list of jobs to choose from within their restrictions. According to Mr. Thompson, the company presents the union with a list of jobs; and they give the list to the employee with instructions for the employee to pick a job from the list. Mr. Thompson confirmed that the company and union followed this procedure with the Claimant's placement into another job. He verified that the Claimant's job fits within the restrictions of his functional capacity evaluation.

Under further questioning, Mr. Thompson was asked to recite for the record, the segments of pay for a worker in the sort and palletize job. Mr. Thompson testified that the base rate of pay for the sort and palletize job is \$15.62. However, Mr. Thompson explained that a production bonus, a quality bonus, and a safety bonus, along with a wage increase are added to the top of the average pay for all of the workers. According to Mr. Thompson, the wage increase for every job at the plant is \$1.24 or 1.238. He testified that the Claimant's absolute maximum hourly rate of pay would be about \$20.50 if he

received every possible bonus. Mr. Thompson agreed that there is documentation in evidence showing that the Claimant was earning an average of \$18.94.

He confirmed that this included all potential bonuses. Mr. Thompson was shown another document of record proving that \$33.64 was the absolute maximum the Claimant could earn as a mixer operator.

Under further questioning, Mr. Thompson essentially agreed that there is nothing unusual about the sort and palletizing job having six different segments of pay added to the workers' average pay. According to Mr. Thompson, basically every job at the plant is averaged out using this method.

On cross-examination, Mr. Thompson confirmed that he stated that the absolute maximum rate for S&P (sort and palletize) is about \$20.50. However, he agreed that a Cooper Tire monthly report introduced into evidence shows that the highest pay is \$20.69 for the week of May 21 through May 27, 2022. However, Mr. Thompson explained that he testified that the Claimant's highest pay was about \$20.50, and that he low balled it a bit.

Mr. Thompson agreed that the Claimant's payroll records for May 21, 2022 through May 27, 2022 show his rate as being \$20.16 with all the add-ons. He also agreed that the Claimant has the potential to earn a little bit more.

Regarding other jobs, Mr. Thompson agreed that there are other jobs at Cooper Tire that someone could perform if they had a maximum lifting of 40 pounds. Mr. Thompson further agreed that there are a bunch of classifications in the bead room that pay quite a bit. He further agreed that these jobs are not as physically demanding as some of the other jobs at Cooper Tire. Mr. Thompson confirmed that with the Claimant's

restrictions, he could do the jobs in the bead room. However, he confirmed that these are highly sought after jobs, and by contract you cannot just put the Claimant in any of those jobs. According to Mr. Thompson, the Claimant could go through the contract the right way of the bidding process and bid on one of the bead room jobs. He confirmed that the Claimant could bid on some of the jobs in the bead room and his restrictions would not prevent him from doing some of these jobs.

He testified that at Cooper Tire you have to go through the bidding process. Mr. Thompson testified that the Claimant could physically do his job, but he would have to run for it and get elected. According to Mr. Thompson, his job is chosen every three years and it pays more than \$50,000 a year. Mr. Thompson further agreed that there are jobs at Cooper Tire that the Claimant can do and earn as much as he was earning in the Mixing Room. However, Mr. Thompson testified that the Claimant has to bid for those jobs when they come open. Mr. Thompson further testified that with the Claimant being there no more than six years, he probably would not get the job.

Mr. Thompson testified:

Q But like he said, he loves Cooper Tire, he has seniority and he wants to stay, so his capacity to earn wages is there, correct?

A No, not to earn what he was making. He didn't elect to go to that job. Cooper Tire made him take that job.

On re-direct examination, Mr. Thompson testified that most of the guys in the bead room jobs have twenty-five (25) to thirty (30) years with Cooper Tire. Mr. Thompson specifically testified that these jobs are some of the premium jobs in the plant.

Medical Evidence

A review of the medical records show that on May 21, 2021, the Claimant underwent evaluation by Dr. J. Michael Calhoun. The Claimant presented with acute thoracic back pain since his February 28, 2021 back injury while working on a machine that makes rubber tires. Per these chart notes, the Claimant was evaluated at Urgent Care and started on physical therapy with no improvement. Dr. Calhoun reported that an MRI obtained on April 21, 2021 showed a T8-9 disc protrusion with some lateral recess stenosis on the left. Also, these notes show that the Claimant underwent a lumbar MRI which showed some degenerative changes at L5-S1, but no neural impingement. The Claimant reported that his pain radiated around his lateral side to the anterior left abdomen. The Claimant was given the choice of injections. He elected to move forward with the thoracic epidural steroid injections. Dr. Calhoun continued the Claimant's work restrictions of no lifting over 10 pounds and no repetitive bending, twisting, or lifting.

The Claimant presented to Dr. Calhoun on July 9, 2021 with acute thoracic back pain. According to this clinical note, the Claimant underwent a thoracic epidural injection on June 18, 2021 with no improvement in his left radicular symptoms. At that time, the Claimant had more mid-thoracic pain and some low back pain. As a result, Dr. Calhoun recommended nerve root blocks. The Claimant decided to proceed with the blocks. He continued the Claimant's prior work light duty work restrictions.

On October 14, 2021 the Claimant underwent a functional capacity evaluation. The examiner found that the results of this evaluation indicate that the Claimant put forth a reliable effort, with 51 of 54 consistency measures within expected limits. Most notably, analysis of the data collected during this evaluation proves that the Claimant did put forth

consistent effort and passed all criteria for a reliable effort indicating that a significant degree of effort was put forth. According to this assessment, the Claimant demonstrated limited lumbar flexion and demonstrated poor tolerance to repetitive and sustained stooping and performed these activities at the occasional frequency level. His other functional limitations demonstrated were with pushing/pulling a cart, as he was limited to the occasional level for this activity as well. However, the Claimant performed all other activities at a level consistent with that of an average worker. The Claimant demonstrated functional limitations during his evaluation, which included the ability to perform an occasional bi-manual lift up to 40 pounds, and an occasional carry up to 35 pounds. He also demonstrated the ability to frequently lift up to 20 pounds. Overall, the examiner concluded that the Claimant demonstrated the ability to perform work in the *MEDIUM* classification as defined by the US Dept. of Labor's guidelines over the course of a normal 8-hour workday with limitations as noted above.

An MRI of the Claimant's thoracic spine was performed on March 10, 2022, with the following impression, "Multilevel degenerative disc disease. Small left paracentral disc protrusions at T6-7 and T8-9."

On May 18, 2022 the Claimant presented to Dr. Reza Shahim for follow-up of thoracic spine pain on the second lumbar vertebrae. Per this clinic note, the Claimant was last seen on April 26, 2022, at which time he was given activity guidelines per his current FCE restrictions. Dr. Shahim reviewed the with Claimant in detail his previous MRI of the lumbar spine that revealed spondylosis with stenosis at L4-5 and T 6-7 and T9-10. Treatment options were also explained to the Claimant, which included spinal decompression surgery with risk of residual weakness and numbness that may not

improve. Alternatives to surgery were also given, which included continuing with spinal injections, medications, and physical therapy. The technical aspects of spinal injections were explained to the Claimant, including partial improvement, temporary improvement, and the need for repeat spinal injections. At that time, Dr. Shahim assessed the Claimant with “thoracic spine pain” for which he prescribed Lyrica twice a day. The Claimant was directed by Dr. Shahim to return to work the next day, on May 19, 2022 with the restrictions placed on him by the findings outlined in his FCE. Dr. Shahim’s wrote:

Impression/Plan: Patient with lumbar pain, we have discussed in detail multiple options including surgery vs conservative management. Patient has a multilevel thoracic spondylosis mild lumbar spondylosis his impairment rating is 3% thoracic disc protrusion not surgically treated. I think he is at MMI, and I would follow the functional capacity recommendations. I suspect he has degenerative disc disease and osteoarthritis. He really has not responded well to injections well. I am releasing him at this point since he is at MMI. I did have a long discussion with him that he is not a surgical candidate and I do not believe further treatment will be of much benefit to him.

Adjudication

A. Wage-Loss Disability

The sole issue for determination in this claim is whether the Claimant is entitled to permanent partial disability benefits in excess of his percentage (3%) of permanent physical impairment.

Specifically, in a nutshell, the Claimant contends that he sustained wage-loss disability, over and above his 3% permanent anatomical impairment resulting from his admittedly compensable back injury of February 27, 2021. The Claimant contends that his hourly rate of pay was reduced from \$28.00 to \$17.50 due to his back injury. To the contrary, the Respondents contend that the Claimant is capable of earning the same or

greater wages that he earned at the time of his injury and therefore has not sustained any wage loss disability.

When 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 or her future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

In considering factors that may affect an employee's future earning capacity, the appellate court considers the Claimant's motivation to return to work, since a lack of interest or a negative attitude impedes an assessment of the Claimant's loss of earning capacity. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2)(Repl. 2002).

Here, the Claimant is relatively of a young age, he is 37 years of age. He is a high school graduate. The Claimant has also obtained certification as an auto mechanic. He has a primary work history of performing heavy/laborious work activities before going to work for Cooper Tire in 2016. When the Claimant initially began working for Cooper Tire, he worked in the Mixing Department, as a mixer utility worker. Ultimately, in that

department, the Claimant was promoted to a mixer operator job. Both positions required heavy lifting. But, at the time of his admittedly compensable back injury of February 27, 2021, the Claimant worked as a mixer operator.

Specifically, the Claimant sustained an admittedly compensable injury to his back while removing tire rubber from a machine on February 27, 2021. The Claimant reported his injury to management, and they provided him with proper medical treatment for his back injury. The Claimant underwent conservative care for his back injury, under the care of Drs. Calhoun and Shahim. His medical care for his back injury included light duty work restrictions, a medication regimen, and injections. These injections provided the Claimant with no relief of his symptoms. Therefore, they were discontinued, and the Claimant was released from medical care by Dr. Shahim on May 18, 2022. At that time, Dr. Shahim assessed the Claimant with a 3% permanent anatomical impairment to the body as a whole for his compensable back injury. The Respondents accepted and paid this rating.

The Claimant underwent an FCE in October 2021 with reliable results. He demonstrated the ability to perform the medium classifications of work of the course of a normal 8-hour workday per the guidelines of the US Dept. of Labor's guidelines. The Claimant is permanently restricted to lifting up to 40 pounds, along with other restrictions discussed above in full detail. These are permanent work restrictions that have been placed on the Claimant by his treating physician pursuant to the findings of his FCE. Since the Claimant performed heavy duty work activities as a mixer operator, Cooper Tire prohibited him from returning to work as a mixer operator due to these permanent restrictions. Therefore, after the Claimant was released pronounced to be at maximum medical improvement and released from medical care, he collaborated with the company

and his union representative to find a job within his restrictions. The Claimant currently works as a sort and palletize operator.

His current maximum hourly rate of pay is approximately \$20.69 in his current job. However, had the Claimant been able to continue working as a mixer operator, his current maximum hourly rate of pay as of October 2022 would be \$33.64. Prior to his injury, the Claimant earned \$55,290 for tax year 2019, performing employment duties as a mixer operator. During tax year 2020, the Claimant earned \$46,859, which was during the time he got hurt. He estimated his annual salary for 2022 in his current position is approximately \$38,632.

While the Claimant has not looked for work outside of Cooper Tire, he worked diligently with the company and his union representative to find a job within his restrictions. His testimony demonstrates that he likes working for the Cooper Tire and he has accumulated some seniority with the company. Moreover, the Claimant can make more money in the future via the union contract bidding process, but given his seniority of only six years, and with his restrictions, he will be significantly limited to what he can earn in the future. Mr. Thompson's and the Claimant's testimony led me to this conclusion, along with the medical opinions relating to his of his permanent restrictions. Of note, I found that Mr. Thompson to be an extremely credible witness.

Hence, the evidence demonstrates that the Claimant has successfully returned to work within his restrictions at Cooper Tire. Mr. Thompson's testimony proves that the Claimant was given a list of jobs to choose from and he chose the sort and palletize operator position. Under these circumstances, I do not find that the Claimant's decision

to look for work exclusively at Cooper Tire impedes an assessment of the Claimant's loss of earning capacity.

I do note that the Claimant has been restricted to medium duty work. Most of the jobs at Cooper Tire within the Claimant's reach require heavy duty work restrictions. The Claimant has the potential to make more money than he is currently making. However, the Claimant has suffered a decrease in his wage-earning capacity because he is precluded from returning to work in his job as a mixer operator and other similarly paying jobs, which require a heavy-duty work capacity. He is now permanently restricted to working in a medium duty capacity. His testimony demonstrates that he continues with back pain due to his compensable injury. I found the Claimant to be a credible witness in this regard.

Based on the Claimant's relatively young age, limited education and work experience, permanent work restrictions of medium duty, his prior work having been heavy duty capacity, the nature and extent of his injury and impairment, his post-injury earning, and all other matters probably before the Commission, I find that the Claimant suffered a 7% impairment to his wage earning capacity in excess of his 3% permanent anatomical impairment.

I recognize that the Claimant was presented with potential jobs in the Texarkana area that paid about the same or greater wages that he earned while working as a mixer operator. However, these jobs were only possibilities and hypotheticals, as there is no evidence whatsoever of the Claimant having received a bona fide job offer to be employed at wages equal to or greater than his wages at the time of his accident. Moreover, there is no evidence demonstrating with any certainty the Claimant would have started out on

these job at the highest pay level since he has no past work experience with any of the companies or in that particular type of work. Thus, I am persuaded that it would require an impermissible amount of speculation for me to conclude that the Claimant would in fact earn the same or greater wages that he earned as a mixer operator.

B. Controverted Attorney's Fee

The Respondents have controverted this claim for wage loss disability. Thus, the Claimant's attorney is entitled to a controverted attorney's fee on the indemnity benefits awarded herein pursuant to the statute, explicitly Ark. Code Ann. §11-9-715.

AWARD

In accordance with the findings of fact and conclusions of law set forth, the Respondents are directed to pay benefits as set forth herein.

The Claimant's attorney is entitled to the maximum statutory attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the Claimant and one-half to be paid by the Respondents in accordance with to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the maximum legal rate until paid, pursuant to Ark. Code Ann. §11-9-809.

The Respondents are directed to pay the court reporter's fee within thirty (30) days of receipt of the invoice.

All issues not addressed herein are expressly reserved under the Act.

IT IS SO ORDERED.

Chandra L. Black
Administrative Law Judge

