

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H003380

KEVIN MORGAN, Employee	CLAIMANT
PALUCA PETROLEUM, Employer	RESPONDENT
STARSTONE NATIONAL INSURANCE CO., Carrier	RESPONDENT

OPINION FILED JANUARY 10, 2022

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 LEE J. MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 6, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 15, 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 employee/employer/carrier relationship existed among the parties on April 7, 2020.
3. The claimant sustained a compensable injury to his back on April 7, 2020.
4. The claimant reached maximum medical improvement on July 15, 2021.

5. Respondents accepted and paid permanent partial disability benefits based on a 10% rating to the body as a whole.

6. Claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$565.00 for total disability benefits and \$424.00 for permanent partial disability benefits.

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

1. Claimant's entitlement to permanent benefits for wage loss.

The claimant contends that he is entitled to wage loss disability over and above his impairment rating, and his attorney is entitled to an appropriate attorney's fee.

The respondents contend claimant has received all benefits to which he is presently entitled.

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 September 15, 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 50% to the body as a whole for wage loss resulting from his compensable injury.

3. Respondents have controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole.

### FACTUAL BACKGROUND

Claimant is a 50-year-old man who began working for respondent in April 2019. Prior to his employment with respondent, claimant had a prior injury to his low back as a result of a motor vehicle accident in November 2015. This resulted in a two-level fusion at L4-5 and L5-S1 by Dr. Blankenship in May 2018.

On November 1, 2018, claimant underwent a functional capacities evaluation which indicated a reliable effort. The evaluation determined that claimant had the ability to perform work in the light classification of work with occasional lifting up to 20 pounds and lifting up to 10 pounds on a frequent basis. With respect to this evaluation, it should be noted that it was taken before claimant had reached maximum medical improvement and before he began a work out regimen on his own at a gym.

Following that evaluation claimant returned to Dr. Blankenship on November 15, 2018. He noted that claimant's functional capacity evaluation indicated that he could perform work in the light classification of work. He also noted that claimant indicated that he believed he would get more benefit out of joining a gym than formal physical therapy and Dr. Blankenship agreed with that assessment. Claimant did begin an exercise program at the gym and returned to Dr. Blankenship on March 14, 2019. Dr. Blankenship noted that claimant continued to have some low back pain as well as some leg pain. He indicated that claimant had reached maximum medical improvement and had a 10% impairment rating. He also indicated that he was releasing claimant to take his DOT

physical.

Claimant settled both his workers' compensation claim and a third party claim from the November 2015 accident.

Approximately a month after his release by Dr. Blankenship on March 14, 2019, claimant passed his DOT physical and began working for respondent as a truck driver.

Claimant's job duties with respondent were physical in nature and he described some of those job duties as follows:

Our yard consists of a disposal well where we dispose that water back in the ground, and we'd separate the oil from the water, cook the oil down, and I'd work around the yard there a little bit whenever we didn't have loads to haul, but I was the only driver we had.

And whenever a second company would call in a well that needed to be picked up, I'd go – I'd drive out to the well, climb the ladder, stick the tank, then climb back down the ladder, then I'd drag the hoses off the truck, hook the hoses up, turn the pump on, and load the truck. Once the truck got loaded, I'd unhook the hoses, load the hoses back on the truck, shut the valves, drive back to the yard, and I'd pump the water back into a pit.

At the hearing the claimant testified that the hoses he moved weighed about 50 pounds and that he was able to perform all of his job duties prior to his most recent accident.

On April 6, 2020, claimant was involved in a head-on collision when a car crossed the center line and struck his truck while he was driving for respondent. The parties have stipulated that claimant suffered a compensable injury to his back as a result of that accident. For his compensable injury, claimant eventually returned to Dr. Blankenship for

medical treatment. In a report dated October 19, 2020, Dr. Blankenship indicated that approximately two and a half years earlier he had performed a two-level lumbar fusion and that claimant was doing well prior to his most recent motor vehicle accident. Dr. Blankenship recommended that claimant undergo a second procedure at the L4-5 and L5-S1 levels to repair the prior fusion that had been broken by his most recent accident. Claimant underwent this procedure by Dr. Blankenship in December 2020.

In a report dated July 15, 2021, Dr. Blankenship noted that claimant was still having some low back pain as well as left leg pain. However, he found that claimant had reached maximum medical improvement but did note that claimant might require further treatment in the future. Dr. Blankenship also assigned claimant an additional 10% impairment rating for this compensable injury. This 10% rating was accepted and paid by the respondent.

In addition, Dr. Blankenship stated the following:

I placed a permanent weight-lifting restricting [sic] of 25 pounds on him. He should not do any prolonged stooping or bending. He is not able to return to his original pre-injury job nor is he able to return to driving. I told him that if his pain improves and he would like to consider doing something different on down the road, we can certainly do that but at present I do not feel that he can return to them.

Claimant subsequently underwent a functional capacities evaluation on November 9, 2021. That evaluation report indicates that claimant gave a reliable effort and indicated that claimant demonstrated the ability to perform work in the light classification of work.

Claimant has filed this claim contending that he is entitled to permanent partial disability benefits for wage loss as a result of his compensable injury.

## ADJUDICATION

Claimant contends that he is entitled to permanent partial disability benefits for wage loss over and above his impairment rating. In considering claims for permanent disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors. The factors include 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. A.C.A. §11-9-522(b)(1).

Claimant is 50 years old and has an eighth grade education. He is currently enrolled in the Adult Education Center to obtain his GED.

Claimant's prior work experience includes working as a truck driver for approximately 30 years, as well as working as a welder, in construction, and as a lineman for the telephone company. Claimant testified that all of these jobs are physically demanding.

As previously noted, following claimant's second surgery Dr. Blankenship assigned claimant a 10% impairment rating resulting from injury. Dr. Blankenship had previously assigned claimant a 10% impairment rating as a result of his first injury in November 2015.

In addition to assigning claimant an additional 10% rating, Dr. Blankenship also placed a permanent 25-pound lifting restriction on the claimant and noted that he should not perform any prolonged stooping or bending. He specifically indicated that claimant was not able to return to his prior job of driving.

Claimant also underwent a functional capacities evaluation which was considered

valid and determined that claimant was capable of performing work in the light classification of work.

Following the functional capacity evaluation, respondent had claimant evaluated by Heather Taylor, a vocational rehabilitation specialist. Taylor authored a report dated November 23, 2021, and she also testified at the hearing. Taylor testified that based upon the results of the functional capacities evaluation, claimant could lift up to 20 pounds on an occasional basis, 10 pounds frequently, and five pounds or less constantly. She further testified that it was her impression that claimant was motivated to return to work. She noted that claimant was not able to return to the type of truck driving job he was performing at the time of his injury. She stated that a truck driver on average would earn approximately \$44,000 per year.

Based upon her evaluation of the claimant, Taylor identified several jobs which were open and within claimant's physical limitations. These jobs are set forth in her report of November 23, 2021. Those jobs pay from \$11.00 to \$15.00 per hour with \$11.00 per hour being the primary starting wage.

At the hearing claimant testified that with the help of his daughter he went on line and applied for each of the jobs identified by Taylor. All of this occurred shortly before the hearing and claimant had not been hired or received word back from any of those employers at the time of the hearing.

Claimant testified that he currently suffers from problems with his legs such as a burning if he walks for any distance or stands in one spot for any period of time. Claimant also testified that he does not believe he can go eight hours without needing to recline or lay down in order to get some relief. He testified that he would have to have a job which

would allow him to sit down every five minutes because he cannot stand more than five minutes at a time. I do note that no such restriction was placed upon the claimant by Dr. Blankenship nor by the functional capacities evaluation. In fact, the evaluation indicates that claimant can sit and stand at a frequent level:

Mr. Morgan's ability to perform STANDING was assessed throughout the testing procedure and it was determined that he was able to Stand at the **Frequent** Level.

Mr. Morgan's ability to perform SITTING was assessed throughout the testing procedure and it was determined that he was able to Sit at the **Frequent** Level.

At the hearing, there was a significant amount of testimony regarding the fact that after claimant's first compensable injury he underwent a functional capacities evaluation which placed him in the light classification of work and claimant was able to work out at the gym and improve his condition to the point that he was able to pass a DOT physical and obtain a truck driving job with the respondent and perform physically demanding work without any issues. Likewise, in this particular case, claimant has expressed an interest to again work out in the gym in an effort to improve his physical condition and hopes that he might someday be able to return to work as a truck driver. However, at this point such a finding would be speculative. Dr. Blankenship has specifically stated that claimant is not capable of returning to work as a truck driver at this time.

Furthermore, the functional capacities evaluation indicates that claimant is only capable of performing work in the light duty classification. While the prior functional capacities evaluation also indicated that claimant was only capable of performing work in



the light classification, as previously noted, that evaluation was done several months before claimant reached maximum medical improvement and before claimant had worked out at the gym. In short, the fact that claimant was able to improve his physical condition by working out at the gym and return to a truck driving job after the first injury does not mean that claimant will be able to do the same thing following his second injury. Such a finding would be speculative and claimant's entitlement to permanent disability benefits must be based upon the evidence which exists at the time of the hearing, not facts which may be present in the future.

After my review of the relevant wage loss factors present at the time of the hearing in this case, I find that 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 50% to the body as a whole for wage loss resulting from his compensable injury. According to Dr. Blankenship, claimant is not capable of returning to his prior job as a truck driver. This is confirmed by the valid functional capacities evaluation which indicates that claimant is capable of returning to light duty work. Light duty jobs for which claimant would qualify generally pay approximately \$11.00 per hour as reflected in the report of Taylor. An individual working 40 hours per week at \$11.00 per hour would earn an average weekly wage of approximately \$440.00. Based upon the parties' stipulation with respect to claimant's compensation rates, he was earning \$847.50 per week working for respondent as a truck driver. While a claimant's entitlement to permanent partial disability benefits for wage loss is not simply a mathematical calculation, it is a factor which may be considered.

After my review of all of the relevant wage loss factors presented in this case, I find

that claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole as a result of his compensable injury.

AWARD

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 50% to the body as a whole for wage loss resulting from his compensable low back injury. Respondents have controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole.

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.

Respondents are responsible for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$546.00.

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

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE