

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G707699

DONALD PATRICK, Employee	CLAIMANT
EAGLE CREST GOLF COURSE, Employer	RESPONDENT
MARKEL SERVICE, INC., Carrier	RESPONDENT

OPINION FILED FEBRUARY 3, 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.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 11, 2021, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 5, 2020 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 July 19, 2017.
3. The claimant sustained a compensable injury to his low back on July 19, 2017.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$342.00 for total disability benefits and \$257.00 for permanent partial disability benefits.

5. Claimant reached maximum medical improvement on June 17, 2020.

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

1. Extent of claimant's permanent disability.
2. Attorney's fee.

Prior to the hearing the parties agreed to stipulate that respondent accepted and paid permanent partial disability benefits based upon a 17% impairment rating to the body as a whole. Therefore, the only issues are wage loss and an attorney fee.

The claimant contends that he is entitled to permanent disability in an amount to be determined by the Commission. Claimant contends that his attorney is entitled to an appropriate attorney's fee regarding any permanent disability for which the respondents have not accepted liability prior to the pre-hearing conference.

The respondents contend that all appropriate benefits are being paid with regard to this claim.

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 witness and to observe his 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 August 5, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that respondent accepted and paid claimant permanent partial disability benefits based upon a 17% impairment rating to the body as a whole is also hereby accepted as fact.

3. 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 15% to the body as a whole for a loss in wage earning capacity as a result of his compensable injury.

4. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

FACTUAL BACKGROUND

The claimant is a 56-year-old man employed by respondent as its kitchen manager for more than two years prior to his compensable injury on July 19, 2017. In addition to his cooking duties, he was also required to load and unload trucks, place orders, and wait on guests at tables. Claimant testified that he had to lift 25 to 80 pound cases of meat. Claimant testified that he lifted more than 50 pounds twice a day and 25 pounds at least eight times per day. Claimant testified that his job required repetitive bending and stooping.

Claimant's job duties also required him to place all food and drink orders at Sam's and he would travel to Sam's at least twice a week to pick up food and drink.

Claimant suffered an admittedly compensable injury to his low back on July 19,

2017, when he was at the respondent's clubhouse unloading a 40-count case of bottled water and felt pain in his low back area. Claimant reported this injury and was sent for medical treatment.

After some initial medical treatment which included injections, medications, and physical therapy, claimant came under the care of Dr. Mangels, a neurosurgeon at Tulsa Spine & Specialty Hospital.

Claimant's initial visit with Dr. Mangels occurred on June 18, 2019 at which time he recommended that claimant undergo a lumbar fusion from L2 to S1. This fusion procedure was performed by Dr. Mangels on June 20, 2019, and involved the L2-3; L3-4; L4-5; and L5-S1 levels.

After that surgical procedure, claimant continued to treat with Dr. Mangels who ordered a lumbar MRI scan for further evaluation. The MRI revealed fluid collection and claimant underwent a second procedure by Dr. Mangels on February 18, 2020 which included a lumbar scar revision as well as removal of the spinal fluid.

In a report dated June 17, 2020, Dr. Mangels indicated that claimant had reached maximum medical improvement. He indicated that claimant could lift up to 25 pounds on a permanent basis and that he would see claimant back as needed. In a subsequent report dated August 9, 2020, Dr. Mangels assigned claimant a 17% impairment rating to the body as a whole. As previously noted, the parties have stipulated that respondent accepted and paid benefits commensurate with that rating.

Claimant has filed this claim contending that he is entitled to benefits for a loss in wage earning capacity in excess of the 17% impairment rating.

ADJUDICATION

Claimant contends that he is entitled to permanent partial disability benefits for wage loss in excess of his 17% impairment rating. Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of permanent physical impairment the Commission may take into account various factors. These factors include 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 my review of the relevant wage loss factors in this particular case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 15% to the body as a whole.

First, as previously noted, claimant was assigned a 17% anatomical impairment rating by Dr. Mangels which has been accepted and paid by respondent. The claimant is 56 years old and he is a high school graduate. Claimant also testified that he studied engineering for two years in college.

Claimant's prior work experience has primarily been in the restaurant business. Claimant did work for Mead Container from 1980 to 1988 performing manual labor. Since that time, the claimant has worked in the restaurant business, primarily as a general manager. Claimant's first job for a restaurant was in the late 80's when he became the general manager of a Western Sizzlin in Jacksonville. Claimant eventually moved to Fort Smith and became the general manager at that location. Claimant testified that he was responsible for running the operation, putting in food orders, as well as unloading trucks, sweeping, mopping, serving guests and bussing tables.

After Western Sizzlin, the claimant was the general manager for TGI Fridays from 1993 through 1999. In addition to various administrative duties, the claimant also helped cook, bartend, and unload various food supplies including 50 to 80 pound boxes of meat, potatoes, and dry goods.

Beginning in 2000 the claimant became the general manager for MarketPlace Grill, where he worked for nine years. Claimant testified that he opened three of the MarketPlace Grill restaurants with the Fort Smith store as his home store which he opened in 2001. Claimant testified that his duties required him to hire, oversee the store, unload trucks, take care of guests, and help cook food. He testified that he was required to do anything to help run the restaurant including lifting 50 to 80 pounds.

Thereafter, claimant owned his own company known as D. Patrick Enterprises. Claimant testified that he performed catering work for various local factories and had four off-site kitchens that he would cook for and “commissary them to the job sites and set up hot tables in their cafeterias to serve the food.” Claimant testified that he operated this enterprise full time from 2010 through 2017. In 2017 he began working for the respondent and he also continued to operate D. Patrick Enterprises during the offseason and during the holidays.

Claimant testified that he does not believe that he could perform any of his prior jobs in the restaurant business due to the heavy lifting that was required as well as repetitive stooping and bending.

Claimant testified that on a typical day he gets up and takes his kids to school. He then goes to the river and walks one to two miles depending on how he feels. He then goes to a prayer room at his church for approximately 30 minutes before running errands

if necessary. He then goes home and stretches out for approximately 45 minutes to rest his back before picking up his children at school.

Claimant also testified that he is able to drive a vehicle and take care of his daily and weekly chores for his home. He testified that he does his dishes, sweeping, mopping, laundry, grocery and supply shopping.

The claimant underwent a functional capacities evaluation on June 5, 2018. That report indicates that claimant should alternate sitting and standing with a 25-minute limit for sitting at one time. It also indicates that kneeling, squatting and crouching should be limited to an occasional basis and not for any sustained period of time. Notably, this evaluation was performed in 2018 before claimant underwent the surgical procedures by Dr. Mangels in June 2019 and February 2020.

There is no indication that Dr. Mangels has imposed the results of the functional capacities evaluation on the claimant's ability to return to work. In Dr. Mangels' report of June 17, 2020, the only restriction he placed on the claimant was a 25-pound lifting restriction. Page 57 of claimant's Exhibit 1 contains a Physician Recommendation Report completed by Dr. Mangels. That report indicates that claimant's restrictions were effective as of that date and the only restriction is a 25-pound lifting restriction. Dr. Mangels did not indicate on that form that claimant was restricted from sitting, standing, or walking. Likewise, Dr. Mangels did not indicate that claimant should alternate sitting or standing nor that he was limited from kneeling, squatting, climbing, bending, stooping, twisting, or crawling. The only restriction on that report from Dr. Mangels is a 25 pound lifting restriction.

It should also be noted that claimant filed for and received social security disability

benefits. This decision is not binding on the Commission. Claimant testified that he was essentially earning the same money on social security disability as he was earning at Eagle Crest.

Q. Are you receiving less money on your Social Security Disability than you were earning working?

A. No.

Q. You are receiving as much money on Social Security as you were when you were working?

A. Which?

Q. My question is are you receiving less money on Social Security Disability than you were earning when you were working?

A. At Eagle Crest, it's probably pretty much about the same, but the other jobs before that as general manager, no. I was making about three times as much.

The parties stipulated that claimant is entitled to compensation at the rate of \$342.00 per week for total disability benefits. This total disability rate equates to an average weekly wage of \$513.00 per week. Claimant testified that he is currently drawing \$2,480.00 per month in social security disability benefits.

While claimant did seek some employment following his injury after the respondent closed, he further admitted that he had not sought any employment following his release by Dr. Mangels on June 17 of 2020 and that at this point he would continue drawing his social security check.

Q. Are you currently working anywhere?

A. No.

Q. Why not?

A. Well, back in October of '19 I was awarded my full disability, so I haven't actively looked for work. I didn't get released from Dr. Mangels until June 17th of 2020.

Q. After the second surgery, you made zero effort to apply for any jobs; right?

A. Yes.

Q. You have not even identified a potential job that you were interested in or that you would try to do?

A. No.

Q. So we have the 25-pound restriction and the results of your FCE which state that you can do work and lift up to 25 pounds and that you should limit crouching, bending, and stooping, and my point is you have not even attempted to procure any work within those restrictions.

A. That's true.

Q. As long as you are getting that [\$2,480.00 per month in social security disability], you are not applying or looking for work; right?

A. No.

Q. You are just going to keep on drawing that Social Security check?

A. A disability check, yes.

In considering factors that may impact a claimant's future earning capacity, the Commission make consider motivation to return to work because of a lack of interest or

negative attitude that impedes the assessment of a loss in wage earning capacity. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W. 3d 848 (2001).

Here, claimant admits that he has not looked for any employment within his restrictions and he currently plans to continue drawing social security disability.

I find that claimant has suffered a loss in wage earning capacity in an amount equal to 15% to the body as a whole. The claimant is only 56 years old and has a high school education with two years of engineering study in college. While claimant is no longer capable of lifting more than 25 pounds, claimant does have skills from working as a general manager in restaurants since the late 1980s. In addition, claimant operated his own business for some seven years. Thus, claimant has job skills which would be transferrable to other occupations falling within his 25 pound lifting restriction placed upon him by his treating physician, Dr. Mangels.

Accordingly, based on the foregoing evidence, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 15% to the body as a whole.

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 15% to the body as a whole for loss in wage earning capacity attributable to his compensable injury. 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 paying the court reporter's charges for preparation of the hearing transcript in the amount of \$468.20.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE