BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G307065

RUSSELL A. PAYNE, Employee CLAIMANT

ARKANSAS DEPARTMENT OF TRANSPORTATION, Employer RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION, Carrier RESPONDENT

OPINION FILED DECEMBER 19, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CHARLES H. MCLEMORE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 4, 2023, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 4, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The prior Opinion of March 4, 2019 is final and res judicata.

3. Respondent has accepted and paid or is paying permanent partial disability benefits based upon impairment ratings of 14% and 12% assigned by Dr. Knox.

4. Claimant reached maximum medical improvement on May 24, 2023.

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

1. Wage loss disability.

2. Attorney's fee.

3. Respondent's entitlement to an offset for disability retirement benefits pursuant to A.C.A. §11-9-411.

The claimant contends that he is entitled to wage loss disability over and above his impairment ratings. The claimant contends that his attorney is entitled to an attorney's fee in regard to any wage loss disability awarded in this case.

The respondent's contentions are attached to the Commission's Pre-Hearing Order included in the hearing transcript as Commission Exhibit #1.

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 October 4, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable 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 50% to the body as a whole.

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

4. Pursuant to A.C.A. §11-9-411 respondent is entitled to an offset in an amount equal to $189.06 per week.

FACTUAL BACKGROUND

Claimant is a 55-year-old man who suffered a compensable injury to his cervical spine when the hood of a truck fell on his head and neck area on May 17, 2013. After some initial medical treatment, claimant underwent surgery on September 24, 2013 in the form of a fusion and discectomy by Dr. Queeney for herniated discs at C5-6 and C6-7. On October 24, 2013, Dr. Queeney released claimant to return to work with restrictions.

Claimant continued to have complaints involving his neck and sought medical treatment from his primary care physician, Dr. Wilson. By order dated January 27, 2014, claimant was granted a change of physician to Dr. Wilson. Claimant's treatment at that time included cervical epidural steroid injections; medications; work restrictions; and physical therapy. When claimant's condition did not improve, Dr. Wilson referred claimant for a neurosurgical evaluation with Dr. Luke Knox. After some conservative treatment by Dr. Knox, claimant was seen by Dr. Knox's partner, Dr. Armstrong. On June 22, 2017, Dr. Armstrong performed surgery at the C3-4 and C4-5 levels.

Following that surgical procedure, Dr. Knox opined that claimant had an impairment rating in an amount equal to 14% to the body as a whole. 10% of that rating was attributable to the first surgery by Dr. Queeney and 4% to the second surgery by Dr. Armstrong.

This claim was the subject of a prior hearing on January 28, 2019. Following that hearing, an opinion was filed on March 4, 2019, finding that respondent had not controverted payment of either the 10% or 4% impairment ratings, and that respondent was not liable for payment of a penalty on the 10% impairment rating. It also found that claimant's attorney had provided bona fide legal services and was entitled to a fee equal to claimant's portion of the attorney fee in the amount of 12.5%. This opinion was not appealed and the parties have stipulated that it is final.

Since the last hearing on January 28, 2019, claimant has continued to treat with Dr. Knox and Dr. Armstrong. In 2022, Dr. Armstrong performed a third surgical procedure which consisted of a fusion from C5-C7. Dr. Knox has opined that claimant reached maximum medical improvement as of May 24, 2023, and he assigned claimant an additional impairment rating equal to 12% to the body as a whole. The parties have stipulated that respondent has accepted and paid, or is paying, permanent partial disability benefits based upon the 14% and 12% ratings assigned by Dr. Knox.

After his first two surgeries, claimant returned to work for respondent as a crew leader. He testified that he essentially continued performing his regular job duties which included heavy manual labor. Claimant did not return to work for respondent or for any other employer after the third surgery. Claimant did not believe he could continue working for respondent and respondent indicated that it could not accommodate claimant's permanent work restrictions. Claimant has filed for and is receiving disability retirement benefits from respondent.

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

an offset for any disability retirement benefits pursuant to A.C.A. §11-9-411.

ADJUDICATION

Claimant contends that he is entitled to wage loss disability over and above his impairment ratings. Claimant did not specifically contend that he is permanently totally disabled; however, claimant testified that if there was some kind of work he could do he would be doing it and that he does not believe he could hold down a 40 hour per week job given his medication and physical limitations. Permanent total disability is defined in A.C.A. §11-9-519(e)(1) as the "inability because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Furthermore, claimant has the burden of proving by a preponderance of the evidence that he suffers from an inability to earn any meaningful wage in the same or other employment. A.C.A. §11-9-519(e)(2).

I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. Instead, I find based upon the appropriate wage loss factors that claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. In considering claims for permanent disability benefits in excess of the 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 all other matters reasonably expected to affect his future earning capacity. A.C.A. §11-9-522(b)(1).

The claimant is a 55-year-old high school graduate. He has worked for the

respondent for approximately 25 years. Claimant previously worked a variety of manual labor jobs. These included work at Nichols Welding Supply; working at a sand plant that was a subsidiary of Chrisman Ready-Mix; working in the melt furnace, melting aluminum for custom wheels at Superior Wheels; and working at Chrisman Ready-Mix operating a rock crusher, pit loader, and haul trucks.

As previously noted, claimant has worked for the respondent for 25 years. Claimant began his employment with respondent as a laborer and worked up to a job as a crew leader. As a crew leader, claimant spent some two to three hours in his office per day before going out to a job site. Claimant was responsible for tracking time of employees, inputting mileage for all equipment, and checking service records. He also testified that he had paper files to maintain such as maintenance records. Claimant testified that he used a particular computer program to keep track of time and mileage. After performing his office duties, claimant would go to the job site where he was responsible for supervising a crew. However, claimant's job also required him to perform much of the manual labor performed by the laborers. This included operating skid steers, dozers, track hoes, pavers, rollers, and dump trucks. Claimant was also required to train new employees, set up jobs, and order asphalt and other materials.

As previously noted, respondent indicated it could not accommodate claimant's permanent work restrictions and return him to his prior job as a crew leader.

At Dr. Knox's request, claimant underwent a functional capacities evaluation on April 12, 2023. The evaluation determined that claimant gave a consistent and reliable effort with 51 of 53 consistency measures within expected limits. The evaluation determined that claimant had the ability to lift/carry up to 20 pounds on a frequent basis

with an occasional right upper extremity lift of 30 pounds and a left upper extremity lift of 20 pounds. The evaluation determined that claimant demonstrated the ability to perform work in the medium classification of work over the course of a normal eight hour day.

Following the evaluation, claimant returned to Dr. Knox on May 24, 2023 who noted in his report that he had reviewed claimant's functional capacity evaluation which had been done appropriately; had consistent findings; and released claimant to return to medium class work. He further noted that he did not believe claimant should pursue a job that would require jarring and vibration nor in the operation of heavy equipment. Other than those limitations, Dr. Knox indicated the functional capacity evaluation should be referred to for complete details on claimant's limitations.

On September 11, 2023, claimant met with Keondra Hampton for a vocational rehabilitation evaluation. At that evaluation Hampton obtained information regarding claimant's physical limitations, his work history, his education, and various other factors. Hampton indicated that claimant was capable of working within the medium classification of work and her report lists various job openings that would be compatible with claimant's skills, physical capabilities, work history and education. These jobs ranged in wages of $16.08 per hour up to $23.75 per hour. In a subsequent letter from Hampton to claimant dated October 9, 2023, Hampton identified various other jobs which ranged in wages of $14.70 per hour to $21.84 per hour.

Apparently, there was some miscommunication and circumstances involving sickness and vacations which led to claimant not specifically applying for any of these jobs. However, the relevancy of these jobs identified by Hampton is the fact that they are jobs available within claimant's physical limitations and skill levels.

It is claimant's testimony that he does not feel that he is capable of performing a 40 hour per week job because he is only capable of working two or three days in a row before he might be unable to work due to pain. Claimant also indicated that he is currently taking opiate medication in the form of hydrocodone as a result of his work-related injury. Notably, neither the functional capacity evaluation nor Dr. Knox indicated that claimant was limited to working only two to three days per week and Dr. Knox did not indicate that claimant was incapable of working while taking his hydrocodone. In fact, according to claimant's testimony, he had been taking hydrocodone and muscle relaxers since 2013 and was continuing to work for the respondent.

> A The hydrocodone and the muscle relaxers.
>
> Q Have you been taking those consistently since - -
>
> A Since 2013, yes.
>
> Q Okay. How often did you take those? Did you take them four times a day?
>
> A Most of the time.
>
> Q Since 2013?
>
> A On and off. Like I said, back then it was, you know, you have good days and you have bad days. My second surgery, I took a lot more after the second surgery than I did the first.

Thus, claimant's use of hydrocodone did not prevent him from working subsequent to 2013 as a crew leader for the respondent.

Finally, I note that claimant testified that he has not applied for, nor looked for any job. A claimant's lack of interest in employment is an impediment to the Commission's

full assessment of a claimant's loss and is a factor to be considered in determining wage loss. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W. 2d 276 (1982).

After my review of the relevant wage loss factors presented in this case, I find that claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Instead, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. Claimant underwent a functional capacities evaluation which determined that he was capable of performing work in the medium classification of work. Dr. Knox in his report of May 24, 2023 noted that the evaluation released claimant to return to work in the medium classification of work and in addition to the restrictions set forth in the evaluation stated that claimant should not perform a job which required jarring and vibration or the use of heavy equipment. The claimant is a 55-year-old high school graduate and a vocational rehabilitation evaluation identified various jobs which fall within claimant's limitations and skills according to Hampton. Accordingly, I find that claimant is entitled to permanent partial disability benefits based upon a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

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

The final issue for consideration involves respondent's contention that it is entitled to an offset for disability retirement benefits pursuant to A.C.A. §11-9-411. That statute states that any benefits paid to an injured worker shall be reduced in an amount equal to, dollar for dollar, the amount of benefits the injured worker has received for the same

period of disability. The reduction only applies to that portion paid for by the employer. Here, claimant filed for and received disability retirement benefits from the respondent. Respondent submitted into evidence on Page 19 of Respondent's Exhibit #2 a worksheet setting out its calculations regarding the amount of this offset. Based upon the employer's contribution to claimant's retirement disability, respondent is entitled to a disability offset credit in the amount of $189.06 per week. Although there was some initial issue regarding the calculation of this amount, the parties at the hearing agreed that the offset amount of $189.06 is accurate.

Accordingly, I find that respondent is entitled to an offset for permanent partial disability benefits owed in the amount of $189.06 per week.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury. However, claimant has proven 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 based upon a loss in wage earning capacity. Respondent has controverted claimant's entitlement to unpaid indemnity benefits. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

In addition, respondent is entitled to an offset in the amount of $189.06 per week

for retirement disability benefits claimant is receiving from respondent pursuant to A.C.A. §11-9-411.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of $797.45.

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

IT IS SO ORDERED.

_____

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE