

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H001421

LARRY RAINEY, Employee	CLAIMANT
CITY OF FAYETTEVILLE, Employer	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, Carrier/TPA	RESPONDENT

OPINION FILED NOVEMBER 9, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by MICHAEL L. ELLIG, Attorney, Fort Smith, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, No. Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 19, 2022, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 31, 2022 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 January 27, 2021 is final.
3. The claimant was earning an average weekly wage of \$805.11 which would entitle him to compensation at the weekly rates of \$537.00 for total disability benefits and \$403.00 for permanent partial disability benefits.

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

1. Claimant's entitlement to permanent partial disability benefits for permanent impairment and wage loss.

2. Attorney's fee.

The claimant contends he is entitled to permanent partial disability benefits for both impairment and wage loss. He further contends his attorney is entitled to the statutory fee on such benefits.

The respondents contend the claimant cannot prove by a preponderance of the evidence that he is entitled to an impairment rating. Respondents are not aware of a doctor who has assigned an impairment rating. It is respondents' position that if claimant cannot prove he is entitled to an impairment rating, then he cannot receive any wage loss disability. Further, if the claimant does prove he is entitled to an impairment rating, he still cannot prove by a preponderance of the evidence that he is entitled to wage loss.

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 31, 2022 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 7% to the body as a whole for permanent impairment.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent benefits for wage loss resulting from his compensable injury.

4. Respondent has controverted claimant's entitlement to the 7% impairment rating to the body as a whole.

FACTUAL BACKGROUND

The claimant is a 45-year-old man who graduated from high school. Claimant began working for respondent in July 2015 performing curbside recycling with his job duties requiring him to drive a truck through neighborhoods picking up recycling bins and sorting items to be recycled into various bins on his truck. At the end of his route claimant would be required to dump the contents of each particular recycling bin.

On January 29, 2020, claimant was performing his job when he developed a sharp pain radiating down his back into his right leg and hip area. Claimant reported this pain to his supervisor and was eventually sent to Arkansas Occupational Health where he was evaluated by Delana Rice, APRN, for complaints of low back pain. Rice diagnosed claimant's condition as low back pain and ordered a CT scan. She also prescribed Hydrocodone and placed work restrictions on the claimant.

Claimant underwent a CT scan on February 5, 2020 and according to Rice's report of February 6, 2020, the CT scan showed degenerative changes only. Rice prescribed claimant additional medication and physical therapy on that date. Notes from claimant's physical therapy indicate that claimant reported no improvement as a result of the

physical therapy.

On February 27, 2020, claimant was evaluated by J. Daniel Nicholas, PA-C, at Occupational Medicine. Nicholas ordered additional physical therapy as well as an MRI scan. Rice also ordered an MRI scan which claimant underwent on March 26, 2020. The MRI scan was read as showing bilateral L5 spondylolysis with grade 1 spondylolisthesis at L5-1 and spondylolysis at the L3-4 level.

Claimant eventually received a change of physician to Dr. Knox, neurosurgeon, and was evaluated by Dr. Knox on June 11, 2020. Dr. Knox diagnosed claimant's condition as: (1) sciatica of the right side; (2) spondylolisthesis of the lumbar region; and (3) a lumbar herniated disc. Dr. Knox, in his medical report, stated:

Reviewing his MRI scan, there appears to be a rather prominent central disc protrusion at L4-5 with underlying neuroforaminal encroachment at L5-S1 on the right. I suspect this is the culprit of his continuing difficulties.

Dr. Knox recommended a lumbar epidural injection and also reformatted claimant's physical therapy and prescribed medication. Respondent paid for claimant's initial visit with Dr. Knox, but subsequently denied any additional medical treatment.

A prior hearing was conducted on January 13, 2021, on the issue of claimant's entitlement to additional medical treatment from Dr. Knox. In an opinion filed January 27, 2021, this administrative law judge found that claimant had met his burden of proving by a preponderance of the evidence that he was entitled to additional medical treatment from Dr. Knox. That opinion was not appealed and the parties have stipulated that it is final.

Subsequent to the January 13, 2021 hearing, claimant has continued to receive

medical treatment from Dr. Knox. A review of Dr. Knox's medical records indicates that he placed work restrictions on the claimant of no lifting more than 20 pounds as well as no excessive bending, lifting, or stooping. Dr. Knox also recommended physical therapy and epidural steroid injections. However, according to Dr. Knox's report of April 20, 2021, claimant elected not to pursue the epidural injections.

On August 10, 2021, Dr. Knox noted that claimant had suffered a recent exacerbation of his back and right leg pain. He gave claimant an injection of Depo-Medrol and took him off work for a short period of time.

Claimant's next visit with Dr. Knox occurred on August 17, 2021, at which time he noted that claimant's injection might have lasted a few days. He again recommended that the claimant remain off work for a short period of time and that he would consider redoing claimant's MRI scan and considering surgical decompression/stabilization.

Claimant returned to Dr. Knox on September 16, 2021, and indicated that he was doing better but still had some stress when getting in and out of his truck. Dr. Knox refilled claimant's prescription and recommended that claimant undergo a second MRI scan. He also noted that claimant was hesitant about pursuing surgery and indicated that claimant should continue with his same job restrictions.

Claimant has not seen Dr. Knox in his office since September 16, 2021. Instead, claimant contends that he has talked to Dr. Knox by telephone and gets his medications refilled.

After his compensable injury, claimant returned to work for respondent and his job duties were changed from recycling to driving a roll-off truck. In addition, he testified that he also performed other job duties such as running a machine that bailed recyclables.

Claimant continued working for respondent until August 2, 2022, when he was terminated due to issues with his CDL license. Some time later in August 2022 claimant became employed by NCS Containers where he drives various trucks including flatbeds and dump trucks.

Claimant has filed this claim contending that he is entitled to permanent partial disability benefits for his compensable low back injury. Claimant seeks payment for a permanent impairment rating as well as wage loss resulting from his compensable injury.

ADJUDICATION

Permanent impairment is any permanent functional or anatomical loss remaining after the healing period has been reached. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W. 2d 411 (1994). The Commission has adopted the *American Medical Association's Guides to the Evaluation of Permanent Impairment* (4th Ed. 1993) to be used in assessing anatomical impairment. See Commission Rule 099.34; A.C.A. §11-9-521(h). It is the Commission's duty, using *The Guides*, to determine whether the claimant has proven that he is entitled to permanent anatomical impairment. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W. 3d 904 (2001).

Initially, it should be noted that Dr. Knox has not assigned the claimant an impairment rating. In fact, Dr. Knox has not even indicated that claimant has reached the end of his healing period.

At the time of claimant's last visit with Dr. Knox he was recommending another MRI scan. An e-mail submitted into evidence by respondent indicates that the requested MRI scan was approved. Claimant testified that he did not hear from the provider about

scheduling the MRI scan and testified at the hearing that at this point he is not interested in surgery.

Q And then also the last visit with Knox, I also see that he recommended surgery; correct?

A Correct.

Q And you have already said this, but I just want to make sure we are clear, you are not interested in the surgery; right?

A Not at this point, no.

Claimant testified that since his last visit with Dr. Knox on September 16, 2021, he has not seen Dr. Knox in his office, but instead has talked to him over the phone and has been given refills for his prescription medications. Claimant testified on direct examination that Dr. Knox has not indicated any treatment other than surgery that might resolve or substantially improve his condition. He further stated that Dr. Knox's treatment has essentially provided symptomatic relief. Based on that as well as claimant's desire not to proceed with surgery, he has filed this claim contending that he is entitled to permanent partial disability benefits as a result of his compensable injury.

Given the fact that claimant does not wish to proceed with any surgery which might be recommended by Dr. Knox, as well as claimant's testimony that Dr. Knox's current treatment is only providing symptomatic relief, as well as claimant's request for permanent benefits, I find that claimant's healing period has ended and that consideration of permanent benefits is appropriate.

Although Dr. Knox did not prescribe an impairment rating, the Commission has the authority to review *The Guides* and assign a rating based upon the evidence presented.

I find based upon a review of *The Guides* and the evidence presented that claimant is entitled to a permanent physical impairment rating in an amount equal to 7% to the body as a whole.

After reviewing claimant's MRI scan, Dr. Knox opined that claimant had a lumbar herniated disc. Table 75, Section II, Subsection C indicates that for an unoperated on lumbar herniated disc an individual is entitled to a 7% impairment rating. Based upon the opinion of Dr. Knox that claimant suffers from a herniated disc as well as my review of *The Guides*, I find that claimant has a 7% permanent impairment rating as a result of his compensable injury.

However, I find that claimant has failed to prove by a preponderance of the evidence that he has suffered a loss in wage earning capacity as a result of his compensable injury. A.C.A. §11-9-522(b)(2) provides that if a claimant has returned to work at wages equal to or greater than their average weekly wage at the time of the accident they are not entitled to permanent partial disability benefits in excess of their permanent physical impairment rating. Here, claimant initially returned to work for respondent earning the same wages he earned prior to the accident. However, as previously noted, the claimant was terminated by respondent on August 2, 2022 for issues involving his CDL license.

Claimant testified that he subsequently went to work for NCS Containers driving various trucks. Claimant acknowledged that his hourly rate with NCS Containers is greater than his hourly rate with the respondent. However, claimant is working fewer hours for NCS Containers than he worked for the respondent. Accordingly, at the time of the hearing, claimant's average weekly wage was not equal to or greater than the average

weekly wage he was earning at the time of his accident. Therefore, claimant is not barred from receiving benefits for loss in wage earning capacity pursuant to A.C.A. §11-9-522(b)(2).

However, after considering the relevant wage loss factors, I find that even though claimant is not barred from receiving benefits for wage loss, that he has failed to prove by a preponderance of the evidence that he has suffered any loss in his wage earning capacity as a result of his compensable injury. In considering whether a claimant has suffered a loss in wage earning capacity, the Commission may consider various factors. These include the percentage of permanent physical impairment as well as the claimant's age, education, work experience, and other factors reasonably expected to affect his future earning capacity. A.C.A. §11-9-522(b)(1). Here, the claimant has suffered a permanent impairment in an amount equal to 7% to the body as a whole. In addition, Dr. Knox has placed permanent restrictions on the claimant which include no lifting over 20 pounds as well as no excessive bending, lifting, or stooping.

While claimant is not earning the same average weekly wage he was earning at the time of his injury and therefore is not barred from receiving benefits for wage loss, claimant did acknowledge that his hourly wages are greater than those he was earning with the respondent. Furthermore, claimant acknowledged that his hours are limited simply because the work is not available.

THE COURT: But you are making more per hour than you were making at the City of Fayetteville; correct?

THE WITNESS: Just a little, yes. Not a whole lot.

THE COURT: Okay. And the reason you are not working as many hours is they just don't have the work

available?

THE WITNESS: Right, they just don't, as far as I know. I mean right now we just don't have a lot of hours.

Thus, while claimant is not earning an average weekly wage equal to or greater than the average weekly wage he was earning at the time of his injury so as to be barred from receiving benefits for a loss in wage earning capacity, the evidence nevertheless indicates that claimant does have the capacity to earn the same wages he was earning at the time of his injury. Claimant testified that when he initially began working for NCS Containers he was working 35 to 40 hours per week. Thus, claimant has the capacity to earn the same wages or greater wages than he was earning at the time of his injury.

This is also supported by claimant's prior job history. Although claimant testified on direct examination that his prior jobs had been physical manual labor jobs, claimant was specifically questioned about those prior jobs on cross examination. Claimant's prior work history contains significant work that did not involve physical manual labor. For instance, claimant testified that beginning in 2003-04, he worked for Snyder's-Lance as a sales rep for snack products. Claimant testified that that job required him to drive around to stores talking to managers and making product sales. Claimant performed that job for six or seven years until Hurricane Katrina resulted in him moving to Fort Smith. There is no indication that claimant's job with Snyder's-Lance required physical manual labor. Likewise, claimant also testified that he worked for J.B. Hunt in Human Resources for approximately five years. Claimant's job required him to recruit drivers and he testified that the job required a lot of paperwork and the use of the phone. Thus, claimant does

have a significant job history of performing work which did not require physical manual labor.

In short, after my consideration of the various wage loss factors, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity as a result of his compensable injury. While he has a 7% permanent impairment as a result of his injury and he has been placed on permanent restrictions by Dr. Knox, claimant is currently earning more per hour than he was earning with the respondent. Claimant's average weekly wage is not as great simply because the hours are not available. However, the evidence indicates that claimant has the capacity to earn wages equal to or greater than he was earning at the time of his injury. In fact, claimant testified that when he initially began working for NCS Containers he was working 35 to 40 hours per week. Furthermore, claimant has a job history of performing jobs which do not require physical manual labor. Claimant worked as a sales rep for six or seven years and worked in Human Resources for J.B. Hunt for five years recruiting drivers and using the telephone and completing paperwork. Based upon this evidence, I find that claimant has failed to prove that he has suffered a loss in wage earning capacity 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 7% to the body as a whole based upon a 7% permanent impairment resulting from his compensable lumbar spine injury. However, claimant has failed to prove by a preponderance of the

evidence that he has suffered a loss in wage earning capacity as a result of his compensable injury. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 7% 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. This fee is to be paid one-half by the carrier and one-half by the claimant.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$508.95.

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE