

DIVISION IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
SAM BIRD, Judge

CA06-592

DECEMBER 20, 2006

DOUGLAS SMITH

APPELLANT

APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION  
[NO. E902248]

V.

HAJOCA CORPORATION and  
TRAVELERS INSURANCE COMPANY  
APPELLEES

AFFIRMED

Appellant Douglas Smith sustained a compensable injury to his lower back on February 8, 1999, while moving heavy steel valves during his work as a truck driver for appellee Hajoca Corporation. He underwent two surgeries as the result of this injury. Hajoca paid all temporary total disability benefits and accepted an eleven-percent whole-body impairment rating, but it controverted permanent disability in excess of the impairment rating. This issue came before the administrative law judge for a hearing on February 24, 2005.

The law judge found that wage loss in the amount of eleven percent over and above the eleven-percent impairment rating was reasonable. The law judge's written opinion included the following:

This additional rating for wage loss is based upon the claimant's education, age, transferrable job skills and his physical impairment and limitations. The claimant has a life history of being an over the road truck driver. The claimant's functional capacity evaluator estimated that the claimant would not be able to return to his former job of truck driving and recommended that he do only sedentary type work with lifting of no more than eight pounds and at a job where he would be able to sit or stand as needed.

The law judge ruled that the eleven-percent wage loss and the eleven-percent impairment rating entitled Smith to a disability rating of twenty-two percent to the body as a whole. In a decision of February 3, 2006, the Workers' Compensation Commission affirmed and adopted the law judge's decision.

Smith raises one point on appeal, contending that the Commission erred in determining that he sustained only an eleven-percent wage-loss disability when his functional capacity evaluation showed that he was no longer physically able to perform the job duties of his former employment. We affirm the Commission's decision.

Arkansas Code Annotated § 11-9-522(b)(1) (Repl. 2002) states the following:

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation 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.

Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005). When a claim is denied

because the claimant has failed to show an entitlement to compensation by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

Smith contends on appeal that he was entitled to wage-loss greater than that assigned by the Commission. Hajoca Corporation agrees with Smith that his compensable injury resulted in loss of his previous employment and in lingering physical problems and major physical limitations; however, Hajoca asserts that there exists the possibility of sedentary employment, which Smith has not investigated for five years.

Smith relies upon the following evidence, which was before the Commission. Smith was forty-three years old at the time of the hearing, had a high school education, and had been a truck driver for most of his adult life. His functional capacity evaluation established that he was no longer able to perform the duties of a truck driver, and he agreed with the functional capacity evaluation's lifting restrictions of less than ten pounds and the need to alternate between sitting and standing. He testified that he had also worked in the past with heavy equipment, but that such work required bending, pulling, prying, and heavy lifting that were beyond the limitations of the evaluation. He testified that he was taking medication several times a day, that his pain interfered with his ability to sleep, that he had problems with walking, and that he could not go eight hours at a time without needing to lie down. The functional capacity evaluation indicated that he gave full physical effort and that his reported pain level was higher after the evaluation than before. Smith's wife testified that

he could not complete yard work because of pain; that he was formerly very active and a workaholic but no longer could carry more than a little bit of laundry at a time; and that his condition significantly worsened when his medications ran out.

Smith asserts that there is no evidence that he has any transferrable skills because his former jobs were limited to truck driving and heavy-equipment work. He argues that any employment he might hope to obtain would likely be at minimum wage and that there is no evidence that he could perform meaningful employment on any sustained basis. He concludes that he is totally and permanently disabled, or, alternatively, that he is disabled to an extent that greatly exceeds the eleven-percent wage-loss disability awarded by the Commission.

“Permanent total disability” is the inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002). The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Lee, supra*. In making this determination, the Commission may consider factors such as a claimant’s lack of motivation to return to work or failure to attempt to seek work. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998).

The Commission noted Smith’s testimony about the possibility of employment after he sustained his compensable injury. He testified that he had not worked or looked for work since 2000 because he did not feel that he could do anything. He stated that he had done some telephone work and light-duty work while volunteering at the Red Cross. He also said

that he had not investigated rehabilitation or retraining after 2003, after initially being interested in home inspections but later deciding that he could not do the required crawling in attics and under houses. We hold that the Commission's decision displays a substantial basis for denying Smith's claim of wage-loss disability in excess of eleven percent.<sup>1</sup>

Affirmed.

HART and GRIFFEN, JJ., agree.

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<sup>1</sup>Although the dissenting member of the Commission argued that the appellant is entitled to permanent disability benefits based on an income replacement approach, permanent disability benefits have always been awarded to compensate for the *diminution* in wage-earning capacity.