

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F211782

JAMES BRADLEY, Employee	CLAIMANT
STANDARD REGISTER COMPANY, Employer	RESPONDENT
THE TRAVELERS INSURANCE CO., Carrier	RESPONDENT

OPINION FILED AUGUST 29, 2003

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

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by ROBERT MONTGOMERY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 6, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 4, 2003, and a pre-hearing order was filed on June 5, 2003. A copy of the pre-hearing order has been marked 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 relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his right shoulder and left elbow on January 8, 2002.
4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rates of \$425.00 per week for total disability benefits and \$319.00 per week for permanent partial disability benefits.
5. Respondent has accepted and is paying permanent partial disability benefits

based upon a 15% rating to the body as a whole.

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

1. Whether claimant is permanently and totally disabled as a result of his right shoulder and left elbow injury, or alternatively;
2. Claimant's entitlement to wage loss disability; and,
3. Controverted attorney's fee.

The claimant contends he is permanently and totally disabled as a result of his upper extremity injuries which have been accepted by the respondents. Alternatively, the claimant contends he is entitled to significant wage loss as a result of his body as a whole injury and a controverted attorney fee on all benefits found due.

The respondents contend that it has paid appropriate benefits for the claimant's compensable injury and is not aware of any unpaid benefits owed to the claimant.

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 the pre-hearing conference conducted on June 4, 2003, and contained in a pre-hearing order filed June 5, 2003, 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 injuries. Claimant has proven by a preponderance of the evidence that as a result of his compensable injuries he has suffered a loss in wage earning capacity in an amount equal to 60 percent to the body as a whole.

3. Respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole.

FACTUAL BACKGROUND

The claimant is a very nice 55-year-old gentleman. After graduating from high school and attending two years of college the claimant joined the United States Marines where he was honorably discharged in 1971. After his discharge claimant went to work for the respondent in 1971 and worked there continuously until September 2002. Initially, claimant was a forms packer; putting forms in boxes, sealing the box, and sending it to the shipping department. Claimant next worked as a collator; operating a machine which performed various functions such as collating, gluing, fastening, and crimping statements. Finally, claimant worked as a press operator. This job required claimant to put rolls of paper in position on a press, prep the press, clean the press, and remove finished rolls. Claimant testified that these rolls weighed up to 1600 pounds and that he was sometimes required to pull and yank the rolls in order to get them into the proper position.

Claimant suffered a compensable injury to his right shoulder in August 2000 while working for the respondent. He was initially seen by Dr. Abernathy who eventually referred claimant to Dr. Mitchell. On December 24, 2000, Dr. Mitchell performed surgery on the claimant's right shoulder to repair a subacromial impingement. After this surgery claimant was released to return to work at full duty by Dr. Mitchell. However, the claimant continued to have problems with his right shoulder. In addition, claimant testified that as a result of his continued right shoulder problems he began overcompensating with his left arm which also resulted in an injury to his left elbow. These continued complaints culminated in the claimant seeking additional medical treatment from Dr. Mitchell on January 23, 2002.

It should be noted that the parties have stipulated that claimant's compensable

injuries to his right shoulder and left elbow occurred on January 8, 2002. According to claimant's testimony, this is the date he again complained to the respondent of additional right shoulder and left elbow problems and it was treated as a new injury. Since the respondent has accepted claimant's injuries as compensable, the specific injury date is not relevant except for the purpose of a factual background.

As a result of claimant's continued right shoulder complaints, Dr. Mitchell referred claimant to Dr. Park for a second opinion on February 1, 2002. Claimant was evaluated by Dr. Park on February 19, 2002, at which time Dr. Park indicated that claimant's exam was consistent with an impingement-type discomfort. Dr. Park also indicated that it might be necessary to perform exploratory surgery to determine the source of claimant's impingement. On July 11, 2002, Dr. Park indicated that exploratory surgery should be performed and scheduled the procedure for August 1, 2002. Dr. Park also noted at that time that claimant was overusing his left arm which had resulted in a condition which he diagnosed as "tennis elbow syndrome."

Before the surgery was performed claimant wanted a second opinion and as a result he was referred to Dr. Mark Powell. Claimant was first evaluated by Dr. Powell on August 6, 2002, at which time Dr. Powell assessed claimant as suffering from a possible rotator cuff tear. Dr. Powell indicated that he wanted to review the claimant's MRI scan before a decision was made on surgery. In a report dated August 8, 2002, Dr. Powell indicated that he had reviewed the claimant's MRI scan and diagnosed a partial rotator cuff tear. He recommended conservative treatment to be followed by an arthroscopic procedure if necessary. Claimant did not improve and as a result surgery was performed by Dr. Powell on September 27, 2002. The operative report reveals that no rotator cuff tear was present, but that impingement and a labral tear were present.

Following claimant's second surgical procedure he continued to have problems with his right shoulder. In a report dated December 12, 2002, Dr. Powell indicated that

claimant would not be able to return to heavy and strenuous work. Dr. Powell recommended that the claimant retrain in a supervisory position. On February 20, 2003, Dr. Powell indicated that claimant had reached maximum medical improvement and ordered a functional capacities evaluation and the assignment of an impairment rating. The functional capacities evaluation was performed on March 4, 2003, and claimant was assigned a 15% impairment rating. Dr. Powell agreed with the 15% impairment rating in a report dated April 4, 2003.

Respondent accepted liability for the 15% impairment rating to the body as a whole and has been paying permanent partial disability benefits in accordance with that rating. Claimant has filed this claim contending that he is permanently totally disabled as a result of his compensable injuries. Alternatively, claimant contends that he has suffered a loss in wage earning capacity as a result of his compensable injuries.

ADJUDICATION

Claimant contends that he is permanently totally disabled as a result of his compensable right shoulder and left elbow injuries. Permanent total disability is defined as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." A.C.A. §11-9-519(e)(1). Furthermore, claimant has the burden of proving by a preponderance of the evidence that he is permanently totally disabled. A.C.A. §11-9-519(e)(2); *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979).

In considering whether a claimant is entitled to permanent partial disability benefits in excess of their permanent physical impairment, the Commission may take into account in addition to the permanent physical impairment various factors including the claimant's age, education, work experience, and other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

After reviewing the relevant wage loss factors in this case, I find that claimant is not permanently totally disabled as a result of his compensable injury. However, I do find that claimant has suffered a significant loss in his wage earning capacity. Based upon the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

In finding that claimant is not permanently totally disabled, I note that the Court of Appeals in *Henderson Brothers v. Winchester*, 268 Ark. 710, 594 S.W. 2d 866 (Ark. App. 1980), stated that ordinarily even a 20% anatomical disability would not be sufficient to support a finding of total disability. In that particular case, the Court found that the 20% anatomical disability did support a finding of total disability based upon evidence that the claimant had no education, was illiterate, and intellectually functioned in the mentally retarded age. The Court also noted that the claimant had no job skills and little capacity for retraining.

I do not find those factors present in this particular case. Here, as previously noted, the claimant is 55 years old. He is a high school graduate and attended college for two years. Following service in the United States Marines claimant began working for respondent in 1971 where he has performed jobs which have involved physical labor. There is no question that claimant cannot return to his prior physical jobs. Following claimant's second surgical procedure he was assigned a 15% permanent impairment rating to the body as a whole by Trinity Rehabilitation and by Dr. Powell. The functional capacities evaluation dated March 4, 2003, indicates that the evaluation was an accurate representation of claimant's physical capacities. Specifically, the summary of the evaluation states:

Both of Mr. Bradley's arms perform fairly during non-resistive repetitive tasks if he is able to keep his right elbow by his side. During activities involving use of his arms against resistance in virtually all planes of motion, his performance deteriorates and causes him pain. I recommend that he returns to a permanent job where he can use his right arm at his side,

where right arm reaching and overhead reaching are not required, and where 1 pound or less is routinely handled by the right arm. In regard to the use of his left arm, I recommend that he routinely handle 1 pound or less with his palm up during tasks and that he not be required to perform gripping activities using his left arm. In terms of constant use of his arms, I believe he should seek a position where he does not use his right shoulder or his left wrist and hand for repetitive activities.

The functional capacity evaluation went on to state that claimant's recommended work level is "sedentary".

The documentary evidence also indicates that Dr. Powell has completed various forms on behalf of claimant regarding his ability to work. My review of those forms indicates that Dr. Powell's statements are somewhat contradictory. For instance, on an evaluation form which is contained on Page 64 of Claimant's Exhibit 1, Dr. Powell indicates that claimant cannot work full time or part time. However, this contradicts other statements and forms completed by Dr. Powell. For instance, on the very next page Dr. Powell also completed a form indicating that while claimant was totally disabled from his own occupation, he was released to a less physically demanding occupation. Furthermore, on Page 66 Dr. Powell again noted that claimant was disabled from his regular occupation, but indicated that claimant was not totally disabled for any occupation.

It should also be noted that in a medical report dated March 25, 2003, Dr. Powell indicated that the claimant could return to work with no pushing, pulling, or lifting more than two pounds.

At the hearing claimant testified that he is currently drawing disability benefits from the respondent. He also testified that he is eligible for retirement benefits and that he has applied for social security disability benefits.

Finally, claimant testified that since he last worked for the respondent he has not looked for employment. The Commission may consider a claimant's motivation to return to work since a lack of interest impedes the Commission's assessment of a claimant's loss

of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984).

In summary, in order to be entitled to permanent total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he has the inability to earn any meaningful wages in the same or other employment. After consideration of the relevant wage loss factors presented in this case, I find that claimant is not permanently totally disabled but do find that claimant has suffered a significant loss in wage earning capacity. Claimant is 55 years old, has a high school education, and two years of college. Claimant has suffered compensable injuries to his right shoulder which have resulted in two surgical procedures and the assignment of a 15% impairment rating. Claimant has also suffered a compensable injury to his left elbow for which he has not undergone surgery and has not been assigned a permanent physical impairment rating. On the other hand, claimant's prior job activities have involved heavy strenuous physical labor to which claimant cannot return. The functional capacities evaluation, and the physical limitations assigned by Dr. Powell, are significant. Finally, claimant is currently drawing disability benefits, has filed for social security disability benefits, is eligible for retirement benefits, and has not looked for employment. Given all of these factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that as a result of his compensable injuries he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. Respondent has controverted claimant's entitlement to these benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an

attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE