

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F209663**

<b>LARRY W. CHAPMAN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>ASSOCIATED BRIGHAM CONTRACTORS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>GALLAGHER BASSETT, INSURANCE CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 23, 2003**

Hearing before Chief Administrative Law Judge David Greenbaum on May 9, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Mark Ledbetter, Attorney-at-Law, Memphis, Tennessee.

Respondents represented by Mr. William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted May 9, 2003, to determine issues set out further below.

A prehearing conference was conducted in this case on March 12, 2003, and a Prehearing Order was filed March 13, 2003. At the hearing, the parties announced that the stipulations contained in the Prehearing Order remained factually correct. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including August 3, 2001; that claimant sustained a compensable spinal injury, as well as a compensable shoulder injury on said

date; that he earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability; that claimant's healing period ended October 24, 2002; that respondents had accepted a fifteen percent (15%) whole body impairment related to the cervical injury, as well as a nine percent (9%) whole body impairment related to the shoulder injury, for an overall twenty-four percent (24%) impairment; and that respondents had controverted all permanent disability in excess of the permanent impairment ratings. While respondents acknowledged that claimant had sustained an overall twenty-four percent (24%) impairment as the result of his admitted injuries, because respondents had failed and/or refused to pay any permanent disability benefits at the time of the within hearing, respondents have controverted said benefits.

At the prehearing conference, the sole issue presented for determination concerned the extent of claimant's permanent disability. Subsequent to the prehearing conference, specifically, by letter dated April 25, 2003, respondents raised the issue of whether the Arkansas Workers' Compensation Commission had jurisdiction over this claim.

Relative to the issue of permanent disability, the parties indicated that their contentions were properly set out in the Prehearing Order. The claimant contended, in summary, that his permanent disability greatly exceeded the

impairment ratings in an amount to be determined by this Commission; and that a controverted attorney's fee should attach to any benefits awarded in excess of 24% to the body as a whole. Conversely, respondents contended that claimant's permanent disability was limited to his anatomical impairment.

Concerning jurisdiction, respondents contended that it paid this claim under Indiana Law and that Indiana, and not Arkansas, had jurisdiction over the claim, maintaining that the claimant worked in Indiana, was injured in Indiana, and was supervised out of an office in Indiana, giving Indiana exclusive jurisdiction. Alternatively, respondents contended that if Arkansas had jurisdiction, they were entitled to a credit for all overpayments made toward permanent disability. Respondents indicated that all benefits were paid and continued to be paid under Indiana Law. It was agreed by the parties that respondents paid sixty-one (61) weeks of total disability benefits at the rate of \$458.00 per week. Despite respondents' assertion that it had continued to pay permanent disability benefits toward the claimant's impairment rating, the record reflects that no such payments had been made. (Tr.5-6, 13)

In response to the respondents' contention relative to jurisdiction, the claimant pointed out that his contract of hire with the employer was entered into in the State of Arkansas; that the claimant, at all times, resided in Arkansas and continued to work within the borders of this State, while maintaining that the only contact with Indiana was because the employer sent

him to that State to work on a job-site. The claimant asserted that the employer had more substantial contacts with Arkansas than with Indiana, including having its main office located in Arkansas, and that Arkansas has, and should continue to maintain, jurisdiction over this claim. The claimant agreed that respondents were entitled to a credit for any overpayment in total disability benefits. (Tr.10)

The claimant testified in his own behalf. Heather Naylor was called as a witness for the respondents. The record is composed solely of the transcript of the May 9, 2003, hearing containing numerous exhibits, together with the evidentiary deposition of Phillip Minyard, introduced as "Respondent's Exhibit B" and retained in the Commission file in bound form.

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 Ark. Code Ann. §11-9-704:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On August 3, 2001, the claimant sustained injuries to both his spine and shoulder which arose out of and during the course of his employment

with Associated Brigham Contractors, at which time he earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability.

3. The respondents have paid appropriate temporary total disability, to date.
4. The claimant's healing period ended October 24, 2002.
5. The claimant has sustained a twenty-four percent (24%) whole body impairment as the result of the August 3, 2001, admitted injury.
6. The claimant has proven, by a preponderance of the credible evidence, that he has sustained substantial wage-loss disability as the result of his August 3, 2001, industrial injury. Specifically, a preponderance of the evidence reflects that the claimant has sustained an overall permanent disability of sixty percent (60%) to the body as a whole, the twenty-four percent (24%) impairment acknowledged, as well as a thirty-six percent (36%) wage-loss disability.
7. Respondents have failed and/or refused to pay any permanent disability benefits through the date of the within hearing. Accordingly, respondents have controverted all permanent disability to which the claimant is entitled.
8. Respondent is entitled to a credit for overpayment of total disability benefits.

9. The respondents have not controverted any other benefits, to date.

#### DISCUSSION

The claimant, Larry Wayne Chapman, testified in his own behalf. The claimant is fifty-three (53) years old. He has a high school education, but maintained that he always had a problem reading. The claimant's work history has consisted primarily of construction work involving heavy, manual labor. The claimant first began working for the respondent in 1995 or 1996. His primary work involved lifting and installing steel rebar of various sizes used in the construction of buildings. A number of photographs were introduced as an illustration of this work. (Tr.20-21)(Cl. Ex. B [1-6])

The record reflects that the claimant has, at all relevant times been a resident of Arkansas. The record further reflects that the employer, Associated Brigham Contractors, at all times maintained an office in Arkansas. In fact, the claimant was hired at their office located near the Nucor Steel Plant compound in Blytheville, Arkansas. It is further undisputed that, at the time of the claimant's admitted injury, he was working at a job-site in the State of Indiana; however, the claimant was contacted in Arkansas and dispatched by his employer to the job-site in Indiana where he worked approximately three (3) or four (4) months before his injury occurred. After receiving initial treatment in Indiana, the claimant returned to Arkansas where the bulk of his medical treatment has been provided. The claimant's primary treating physicians have

been Dr. John T. Woloszyn, an orthopedic surgeon in Jonesboro, Arkansas, and Dr. Rebecca Barrett-Tuck, a neurosurgeon in Jonesboro, Arkansas. As reflected by the stipulations, the end of claimant's healing period, as well as claimant's permanent impairment is not disputed. Both Dr. Woloszyn and Dr. Tuck have placed significant physical restrictions on the claimant's activities. The claimant has not returned to gainful employment.

The record reflects that the claimant has undergone two (2) vocational rehabilitation assessments. Respondents had the claimant evaluated by Heather Naylor, a rehabilitation counselor with Systemedic Corporation in Little Rock, Arkansas. Ms. Naylor testified at the hearing on behalf of the respondents. Her reports dated February 25 and March 25, 2003, were introduced as exhibits. (Resp. Ex. A, pp.22-31)

In addition, the claimant was referred by his attorney to Phillip M. Minyard, a rehabilitation consultant in Bartlett, Tennessee, who performed a vocational evaluation and issued an April 2, 2003, report in which he concluded that the claimant's "loss of vocational access" was at least 95%. (Cl. Ex. A, pp.18-21)

The evidentiary deposition of Mr. Minyard was taken at the instance of the respondents and introduced as "Respondent's Exhibit B."

Rather than conduct an exhaustive analysis of the competing opinions of the parties' vocational experts, suffice it to say that I did not find either to be

persuasive. I feel compelled to point out that neither Ms. Naylor nor Mr. Minyard administered any tests in which to reach an informed conclusion. However, both agreed that based upon the claimant's previous singular work history and education that he had very few, if any, transferrable skills. Based upon Dr. Tuck's medical report, Ms. Naylor concluded that the claimant could perform entry level, light-duty, unskilled labor, earning minimum wage or perhaps slightly above minimum wage. At the time of claimant's admitted injury, he was earning \$17.00 per hour for regular duty, as well as earning over-time pay. (Tr.52, 61-62, 67)

#### JURISDICTION

Arkansas Code Annotated §11-9-707(Repl. 2002) provides that in any proceeding for the enforcement of a claim for compensation a *prima facie* presumption exists that the Arkansas Workers' Compensation Commission has jurisdiction. Our Supreme Court, in *International Paper Co. vs. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971) set out various contacts which the Commission may consider in determining jurisdiction, including (1) the place where the injury occurred, (2) the place of the making of the contract, (3) the place where the employment relationship exists or is carried out, (4) the place where the industry is localized, (5) the place where the employee resides, or (6) the place whose statute the parties expressly adopt by contract. The Court further noted in *Tidwell*, the State's interest to have a remedial procedure

available for its residents and to secure compensation for its residents, physicians, and hospitals. *Id.* at p.493-94.

The claimant's employment contract was entered into in this State. The employment relationship existed primarily in Arkansas. The employer has an office and is primarily localized in Arkansas. The claimant resides in Arkansas. The claimant has been treated primarily in Arkansas hospitals and by Arkansas physicians. In the event the claimant receives any type of welfare assistance, it would come from this State. The fact that the claimant's injury occurred in another State, and the respondent/insurance carrier elected to pay benefits based upon the laws of another State are of little relevance. The claimant, and not the respondent, has the right to make his election of remedies in this State. *Biddle vs. Smith & Campbell, Inc.*, 28 Ark. App. 46, 773 S.W.2d 840 (1989); *Towery vs. Hi-Speed Electric Co.*, 75 Ark. App. 167, 56 S.W.3d 391 (2001).

#### PERMANENT DISABILITY

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury,

the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters are motivation, post-injury income, credibility, and demeanor. *Glass vs. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville vs. Guess*, 10 Ark. App. 313, 633 S.W.2d 946 (1984); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manufacturing Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

\_\_\_\_\_The parties have stipulated that the claimant has sustained a twenty-four percent (24%) whole body impairment, including a fifteen percent (15%) whole body impairment related to the claimant's cervical injury and a nine percent (9%) whole body impairment related to the claimant's shoulder injury. It appears that the only work that the claimant is capable of performing is entry-level, light-duty, unskilled labor, earning minimum wage or slightly above. Accordingly, the claimant has sustained substantial wage-loss disability.

However, he is not permanently totally disabled. It must be noted that in considering a claim for permanent disability, the Commission and the Courts shall no longer consider the "odd-lot doctrine." Ark. Code Ann. §11-9-522(e)

In view of the foregoing, and after consideration of the claimant's age, education, and work experience, it is herein concluded that a finding of permanent disability in the amount of sixty percent (60%) to the body as a whole fairly and accurately reflects the extent of claimant's permanent disability.

It must further be noted that although respondents stipulated that it had accepted and was paying a twenty-four percent (24%) whole body impairment, the record reflects that respondents terminated all disability benefits on October 24, 2002, when the claimant reached maximum medical improvement and has not made any payment toward the claimant's admitted impairment. Accordingly, respondents have controverted all permanent disability. Respondents have not controverted any other benefits, including temporary total disability and/or medical treatment.

#### AWARD

Respondents are hereby directed and ordered to pay, to the claimant, permanent disability benefits at the rate of \$308.00 per week, beginning October 25, 2002, and continuing for two hundred seventy (270) weeks, representing an overall permanent partial disability of sixty percent (60%) to the

body as a whole.

All accrued benefits shall be paid in lump sum and without discount.

Respondents may claim a credit for overpayment of temporary total disability in the amount of \$2,928.00, representing an overpayment of \$48.00 per week for sixty-one (61) weeks paid.

Additionally, claimant's attorney, Mr. Mark Ledbetter, is hereby awarded the maximum statutory attorney's fee on this entire Award, one-half ( $\frac{1}{2}$ ) to be paid by the claimant and one-half ( $\frac{1}{2}$ ) to be paid by the respondents pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge