

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F011175

GARY L. POTTER, EMPLOYEE

CLAIMANT

FLUOR CORPORATION, EMPLOYER

RESPONDENT

**RSKCo,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED SEPTEMBER 5, 2003

Hearing before Chief Administrative Law Judge David Greenbaum on July 25, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 25, 2003, to determine claimant's entitlement to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on June 18, 2003, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. 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 employment relationship existed at all relevant times, including August 2, 1999; that claimant sustained a compensable injury

to his right shoulder on said date; that he earned sufficient wages to entitle him to the maximum compensation rates of \$375.00 per week for temporary total disability and \$281.00 per week for permanent partial disability; that claimant's healing period ended March 30, 2001; that the claimant had been assessed a fourteen percent (14%) whole body impairment, which respondents had accepted and paid; and that respondents had controverted all permanent disability in excess of the impairment rating.

The sole issue presented for determination concerned claimant's entitlement to wage-loss disability, if any.

Claimant contended, in summary, that he sustained substantial wage-loss disability as the result of his admitted injury in an amount to be determined by this Commission and that a controverted attorney's fee should attach to any additional benefits awarded. Conversely, respondents maintained that the claimant did not sustain any permanent disability in excess of the impairment rating.

The claimant testified in his own behalf. Gay Signoff, a vocational counselor, was called as a witness by the respondent. The record is composed solely of the transcript of the July 25, 2003, hearing containing numerous exhibits.

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. The stipulations agreed to by the parties at the prehearing conference conducted June 18, 2003, and contained in the Prehearing Order are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that he sustained wage-loss disability in excess of the fourteen percent (14%) permanent impairment previously accepted and paid.
4. In addition to the claimant's functional or anatomical loss of fourteen percent (14%) to the body as a whole, he has also sustained a wage-loss disability in the amount of fifteen percent (15%) to the body as a whole for an overall permanent partial disability of twenty-nine percent (29%) to the body as a whole.
5. Respondents have controverted all permanent disability in excess of claimant's permanent impairment.

DISCUSSION

_____The claimant, Gary Lee Potter, testified in his own behalf. The claimant

is forty-four (44) years old. He has a high school education. In addition to his formal schooling, the claimant has obtained vocational training in welding and in reading blueprints. The claimant's primary work experience has been in the construction field. Claimant has been an welder since approximately 1982. The claimant has performed general welding and has also worked as a boilermaker, a craft involving pipe-fitting and rigging. The claimant worked for the respondent, Fluor Corporation, off and on for approximately five (5) years. He stated he was classified as a millwright/welder when he last worked for the employer. Claimant's job duties included substantial overhead work, requiring the use of both arms to weld rig and feed wire cord overhead. At the time of the claimant's injury, he was earning \$17.50 per hour and was working substantial overtime. The claimant sustained an admitted injury to his right shoulder on August 2, 1999. The employer initially referred the claimant to the HealthSouth Clinic in Jonesboro, Arkansas, where the claimant came under the care of Dr. Antosh. Although the claimant's work activities were limited by the shoulder injury, he continued working for almost one year following the injury. The claimant maintained that his shoulder injury grew progressively worse and that he was eventually referred by the insurance claims adjustor, Ms. Beth Carter, to a specialist, Dr. J. D. Allen in Batesville, Arkansas. Following an MRI which revealed a large, torn rotator cuff of the right shoulder, the claimant underwent surgical repair on September 25, 2000. The claimant asserted that

the surgery did not improve the condition of his shoulder and that he was eventually referred to Dr. Bruce Safman, a physical medicine and rehabilitation specialist with Arkansas Orthopedic Specialists in Little Rock, Arkansas. Dr. Safman has remained the claimant's primary care physician since January 26, 2001. Dr. Safman opined that the claimant had reached maximum medical improvement on March 30, 2001, at which time he assessed a fourteen percent (14%) total body impairment which respondents have accepted and paid. Dr. Safman has continued to provide the claimant with maintenance care which has included trigger point injections and medications.

As previously pointed out, the claimant continued working full-time for the respondent/employer for approximately one year following his compensable injury. The claimant was then taken off work following surgery on September 25, 2000. Dr. Safman released the claimant with significant physical restrictions on his work activities on February 23, 2001, specifically, no repetitive or stressful use of the right shoulder. Again, Dr. Safman assessed a permanent impairment on March 30, 2001. (Cl. Ex. A, pp.29-32)

The record reflects that the respondent/employer refused to take the claimant back to work because of the physical restrictions imposed upon him. The claimant subsequently obtained work with a different employer, The Cajun Company, earning \$13.65 per hour. Apparently, said company was able to offer the claimant assistance in performing his work. The claimant worked for

Cajun Company through on or about May, 2002, at which time the job ended. The claimant has not returned to gainful employment since that time. (Tr.26-27, 35, 59)

The record reflects that prior to the hearing, the claimant made application for social security disability which was denied. An appeal of the denial was pending. It must be noted that the claimant sustained injuries prior to his August 2, 1999, compensable injury, and that, in addition, sustained subsequent injuries, specifically, a carpal tunnel injury to the right wrist, as well as a left shoulder injury. (Tr.31-32, 45)(Cl. Ex. A, pp.47, 50)

Gay Signoff, a vocational counselor with Systemedic Corporation, was called as a witness for the respondents. Ms. Signoff previously worked for Cascade Disability Management, Inc. She was retained by the respondents to perform a vocational assessment on the claimant in July, 2001, and offered numerous medical reports which were introduced without objection. (Resp. Ex. A, pp.1-41)

I did not find either the testimony or the reports by Ms. Signoff to be of significant, probative value. Although Ms. Signoff indicated that the claimant did not appear to be motivated and diligent about looking for jobs that she identified, I feel compelled to point out that the record reflects that the claimant actually secured employment and worked full-time earning \$13.65 per hour, as well as overtime work through May, 2002. All the efforts by Ms. Signoff pre-

dated the claimant's employment at the Cajun Company. However, in response to questions by this administrative law judge, Ms. Signoff conceded that all the jobs she identified for the claimant paid less wages than the claimant earned for the respondent herein. She further indicated that claimant's permanent restrictions would significantly limit the type of work he could find.

WAGE-LOSS 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 concerning 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 a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's 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); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross vs. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886

(1996). 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 living at that time, he is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manf. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

In determining the factors which may affect an employee's future earning capacity, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *Oller vs. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *City of Fayetteville vs. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

The record reflects, and the claimant has demonstrated that he is capable of earning substantial post-injury wages. However, the record as a whole, including the medical evidence reflects that the claimant has sustained a significant functional or anatomical loss and that the physical restrictions imposed upon him by the injury affect his earning capacity. After consideration of the claimant's age, education, and work experience, together with his permanent impairment, I find that a wage-loss disability of fifteen percent (15%) to the body as a whole fairly and accurately reflects the extent of claimant's wage-loss. Accordingly, I hereby make the following:

AWARD

_____Respondent, TPA, RSKCo, is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$281.00 per week beginning March 31, 2001, and continuing for 130.5 weeks, representing an overall permanent partial disability of twenty-nine percent (29%) to the body as a whole, fourteen percent (14%) attributable to the claimant's impairment previously accepted and paid, and fifteen percent (15%) for claimant's wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount, and respondents may claim credit for permanent disability benefits previously paid.

Additionally, claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to A.C.A. §11-9-715; Coleman vs. Holiday Inn, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc., Arkansas Workers' Compensation Claim #E019760, (March 5, 1992).

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

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge

