

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110652

LENA BOVA, EMPLOYEE

CLAIMANT

HAWORTH, INC, EMPLOYER

RESPONDENT

**FEDERAL INSURANCE/CHUBB SERVICE
CORP, CARRIER/TPA**

RESPONDENT

OPINION FILED MARCH 3, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on December 19, 2003, in Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JIM BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE DAVID HOFFMAN, Attorney at Law, Monticello, Arkansas.

STATEMENT OF THE CASE

_____A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On October 28, 2003, a prehearing conference was conducted in this claim from which a prehearing order of October 29, 2003, was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated a part of the record as Commission's Exhibit #1. During the course of the hearing it was ascertain that the claimant had not in fact been paid any permanent disability benefits to correspond with a twelve percent anatomical impairment to the body as a whole as erroneously reflected in the prehearing order.

The testimony of Ms. Lana Bova, the claimant, and Mr. Kenny Broadway, coupled with

medical reports and other documents comprise the record in this claim.

DISCUSSION

Lana Bova, the claimant, with a date of birth of April 23, 1964, commenced her employment with respondent on October 23, 2000. Claimant left the employment of respondent in February 2002. Claimant completed the tenth grade and later obtained her GED.

Prior to securing employment with respondent on October 2000, claimant had last been employed at Emerson Electric. There is no evidence in the record to reflect that the claimant experienced physical limitations or restrictions on her employment activity prior to October 2002. Respondent-employer is a manufactory of office cubicals and room dividers.

The testimony of the claimant reflects that when she commenced her employment with respondent on October 23, 2000, she worked in the wood plant. Claimant moved from the wood plant of respondent until her transfer to panacea and was later moved to PFA (panel fabric assemble). Claimant had been working as a panel fabric assembly for two months at the time she suffered her June 19, 2001, compensable injury. Claimant testified, regarding the discharge of her employment duties:

It's where there's two people at a turn table, and they're putting fabric on one side of the panel and then flip it over and put fabric on the other side of the panel. Then you pick it up and move it over to the other conveyor, and it goes up to get hardware on it. (T. 7)

Claimant further testified regarding the weights of the panel and the manner in which she sustained her injury on June 19, 2001:

The ones that I hurt myself on, probably 40 to 50 pounds maybe. They were stuck on a line and I

reached down and pulled them loose and something pulled in there. (T. 8)

The evidence in the record reflects that after the claimant's injury was reported to appropriate supervisory personnel of respondent, the claim was accepted as compensable and claimant was furnished access to medical treatment. Claimant ultimately came under the care and treatment of Dr. David Collins, a Little Rock orthopedic physician, relative to the June 19, 2001, compensable injury. The testimony of the claimant reflects that once she learned she was going to have to have surgery relative to her right shoulder she secured the services of her current attorney. The claimant estimate the date at some point in September 2001.

A review of the medicals in the record reflects that the claimant was seen initially by Dr. David Collins, on September 10, 2001, at the request of Dr. Thomas Day relative to her June 19, 2001, right shoulder injury. (JX. 1, p5) Claimant underwent additional diagnostic studies under the care of Dr. Collins, to include an arthrogram, which disclosed evidence of full-thickness rotator cuff tear. As a consequence of the afore, a recommendation was had that the claimant undergo surgical treatment. (JX. 1, p6) The evidence discloses that claimant was permitted to continue performing limited duty work pending surgery by Dr. Collins. On October 10, 2001, claimant underwent surgery under the care of Dr. Collins for repair of full-thickness of rotator cuff tear on the right shoulder. (JX 1, p3-4)

Claimant was off work following the October 10, 2001, surgery pursuant to the directions of Dr. Collins until January 2002, when she was released to limited duty work. Claimant received temporary total disability benefits during the period she was off work from October 10, 2001, through January 2002.

The testimony in the record reflects that following the surgery of October 10, 2001, under the care of Dr. Collins, claimant underwent six weeks of physical therapy. Claimant's testimony reflects that when she was released to limited duty work, restrictions on her employment activities entailed lifting weights no greater than fifteen pounds over shoulder height. Claimant presented the limited duty release to supervisory personnel of respondent and work was provided from her within the restrictions. The credible testimony of the claimant reflects that claimant last received indemnity benefits from respondent in either the last week of December 2001 or the first week of January 2002, when she commenced performing light duty work for respondent pursuant to the release authored by Dr. Collins.

The testimony of the claimant reflects that when she returned to work in January 2002, under restrictions, respondent accommodated her with respect to her job assignment. Claimant testified that the assigned job duties putting hardware on the panels. Claimant testified that at times she could not performed the assigned task because the air driven pneumatic tool would cause her to twist her shoulder. Claimant noted that she was right handed. Claimant also acknowledged that she usually worked with a co-worker when assigned to a light duty job. The testimony of the claimant reflects that she continued to perform the light duty job for a period of one month and left the employment of respondent in February 2002.

There is no evidence in the record to reflect that there was a reduction in the claimant's hourly earning rate during the time she performed restricted or light duty work upon returning to the employment of respondent in January 2002. Claimant testified initially that at the time of her injury she was earning \$9.00 plus an hour, closer to \$10.00 per hour than \$9.00 per hour. (T. 6) Later during redirect examination claimant testified that she was earning \$10.00 or maybe a little

more during her employment with respondent, but at least \$10.00 per hour. (T. 16)

The testimony of the claimant reflects that at the time she terminated her employment with respondent on February 2002, she was still assigned to restricted duty placing hardware on the panels. Claimant was not fully release by Dr. Collins relative to her compensable injury until the April 17, 2002, visit. Claimant testified, regarding her decision to terminate her employment with respondent:

I realized I wouldn't be able to handle the panels. They were - - some of them were like huge, five foot by five foot, and they were very heavy and trying to flip them. And I realized my shoulder wouldn't hold up to that. (T. 11)

Nonetheless, claimant acknowledged that at the time she ceased her employment with respondent in February 2002, she relayed that the reason she was quitting was to return to school. Claimant testified that it was her plan to return to school at the time she left the employment of respondent.

Claimant acknowledged that she never requested vocational rehabilitation from respondent nor did she request a functional capacity evaluation to determine the limits of her physical ability following her surgery and final release. When questioned why she did not make such requests, claimant responded that she was not aware of the existence of the afore. Claimant left the employment of respondent in February 2002. Claimant secured the services of an attorney in September 2001.

The evidence discloses that after leaving the employment of respondent in February 2002, within three weeks claimant had secured employment with Frito Lay. The testimony of the claimant reflects that at the time she commenced her employment with Frito Lay she was earning

approximately \$10.00 an hour, however at the time she terminated the employment in July 2003, she was earning \$11.00 per hour. The testimony of the claimant reflects that she was able to discharge her employment duties with Frito Lay from February 2002 through July 2003.

Claimant's testimony reflects that the weight of the boxes lifted at Frito Lay was approximately ten pounds, and that while she had to stack boxes to a pallet, resulting in the need to occasionally toss boxes on top of the pallet, she was able to perform the job duties. Claimant testified that while working at Frito Lay she did take over-the-counter medication, Aleve, for pain.

Regarding the termination of her employment at Frito Lay, claimant initially testified that she had to quit the job because her shoulder would not hold up do the repetitiveness of the job.

(T. 13) Claimant testified regarding the physical stress at the job at Frito Lay:

Because I had to take Aleve to keep up with the repetitive - - doing this over and over and over put a strain on this shoulder. (T. 26)

Nevertheless, an overall review of the claimant's testimony regarding her job duties and ability to discharge same while in the employment of Frito Lay from February 2002 through July 2003, reflects that as an employee of same every two hours she received a fifteen minute break, and that employees never remained on the same line for over an hour before being rotated. Regarding the impact of the repetitiveness of her job at Frito Lay on her right shoulder claimant testimony testified:

Yes. I had started having - - it wasn't all the time, but I'd have a sharp twinge in there, and it just - - it scared me that it was going to go out and I - - like I said I - (T. 28)

After leaving the employment of Frito Lay in July 2003, claimant secured employment with Heritage, a telemarketing company, in August 2003, earning \$7.00 per hour. Claimant remains in the employment of Heritage.

There is no evidence in the record to reflect that the claimant sought medical treatment for complaints relative to her right shoulder between the time she left the employment of respondent in January 2002, while assigned to a limited duty job, and April 17, 2002. On April 17, 2002, claimant was seen by Dr. Collins. The April 17, 2002, report of Dr. Collins reflects, in pertinent part:

Ms. Bova returns at the six month interval following rotator cuff repair on the right. She is essentially asymptomatic. She manifests full range of motion with no crepitation and power at 5/5.

She is released to activities without restrictions. Precautions are reviewed. She has sustained permanent partial impairment as it is related to her work related injury. This is on the basis of surgical alterations of the deltoid muscle and coracoacromial archway, contents of the subacromial space and rotator cuff. Impairment is equal to 20% to the upper extremity equal to 12% to the body as a whole. She will be seen on an as needed basis. (JX 1, p7)

Among the precautions noted by the claimant during the final visit with Dr. Collins is her assertion that she should limit her lifting activity to fifteen pounds over the shoulder. Claimant acknowledge that following the April 17, 2002, visit to Dr. Collins she did not again present to respondent for employment. Indeed, claimant noted that she had employment at the time of the April 17, 2002, visit.

The testimony of Kenny Broadway, a five and a half years employee of respondent-

employer reflects that during the pertinent time period that the claimant sustained her compensable injury and was released to limited duty work, he was her supervisor in the fabric area. Mr. Broadway testified that the policy of respondent-employer was that when an employee was released to restricted duty following surgery, suitable employment would be found for the employee in some area of the plant. The location of the assigned job duties would be dependant upon the restrictions imposed on the employee. In the instant of the claimant, Mr. Broadway noted that she was assigned job duties doing hardware assembly upon her return in January 2002. Mr. Broadway testified that the claimant did not register complaints with him regarding her ability to perform the job duty and that to the best of his knowledge she appeared to tolerate the work well during the time.

Mr. Broadway testified regarding the policy of respondent-employer with regard to employees returning to work after having undergone surgery:

When they come back with restrictions, we will find something for them to do within the plant. After their restrictions are lifted - - for example, the panels building. You know, she was saying that she would go into panels building. We usually have a ramp upstage over a number of weeks that we'll build an hour and two hours a day to kind of ramp up. (T. 35)

Mr. Broadway explained that "ramp up" entailed increasing gradually the amount of work the employee does in the time frame:

They'll build panels for an hour. Then they'll do something else to relax their shoulder or whatever part, you know, that's been injured. And then they'll go back in, you know, after a couple of hours and build a couple hours or an hour, you now, depending on the restrictions. (T.35)

Mr. Broadway testified that had the claimant returned and her restrictions entailed a prohibition against building panels respondent could have found something else for her to do. The testimony of Mr. Broadway reflects that respondent was never given an opportunity to find work to accommodate the claimant on a permanent basis, noting that when she left the employment of respondent she was still on restrictions. Regarding the claimant's departure from her employment of respondent, Mr. Broadway testified:

When she left. And I believe she told me that she was going back to school, and she signed a piece of paper saying she was going back to school. (T. 36)

Mr. Broadway testified that since respondent has received the April 17, 2002, report of Dr. Collins relative to the claimant's release, had the claimant returned to respondent accommodations would have been made to place her in suitable employment:

We would have probably put her in the flipper door area. It's a lot lighter work, and that's where a lot of the people that have restrictions that are permanent or something like that, you know, some kind of restrictions, usually go to work at. (T. 36)

The testimony of Mr. Broadway reflects that claimant would have continued earning the same hourly wage rate in the flipper door department as she was earning in the PFA department.

The testimony of the claimant reflects that she last received indemnity benefits from respondent shortly prior to returning to restricted duty in January 2002. Claimant denies that she received any indemnity benefits following the April 17, 2002, evaluation by Dr. Collins. There is no evidence in the record to reflect that respondent, as of the December 19, 2003, date of the hearing, had paid any indemnity benefits relative to the 12% anatomical impairment assessed the claimant by Dr. Collins. The issues reflected in the prehearing order, Commission's Exhibit #1,

did not include controversion of permanent impairment as an issue to be addressed during the course of the hearing. At the conclusion of the hearing respondents were directed to insure that the claimant was brought current on her anatomical impairment benefits.

After a through consideration of all of the evidence in this record, to include testimony of the witnesses, a review of the medical reports, and application of the appropriate statutory provision, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 19, 2001, the relationship of employee-employer-carrier existed among the parties.
3. On June 19, 2001, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$257.00/\$193.00 for TTD/PPD benefits.
4. On June 19, 2001, the claimant sustained an injury arising out of and in the course of her employment.
5. The claimant's healing period ended April 17, 2002.
6. The claimant has a permanent partial disability in the amount of 12% to the body as a whole.
7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of June 19, 2001.

CONCLUSIONS

The compensability of the claimant's June 19, 2001, injury is not disputed. Pursuant to the October 29, 2003, pre-hearing order, the sole issue to be addressed during the course of the

hearing in this claim is that of wage loss benefits, which claimant maintains she suffered as a result of the June 19, 2001, compensable injury.

The parties acknowledge as a result of the June 19, 2001, compensable injury claimant was rendered temporarily totally disabled for a period of time and received corresponding temporary total disability benefits. Additionally, there is no evidence in the record to reflect that the claimant's entitlement to medical benefits as a result of her compensable injury was ever controverted. Finally, the parties acknowledge that the claimant had been assessed with a permanent impairment of 12% to the body as a whole by her treating surgeon on April 17, 2002, as a result of her compensable injury.

It was only during the course of the hearing that the evidence disclosed respondent had not paid any indemnity benefits relative to the claimant's anatomical impairment. Subsequent to the hearing respondents were directed to pay all accrued indemnity benefits relative to the anatomical impairment. Additionally, because of the failure to pay the benefits timely respondents were directed to pay, pursuant to Ark. Code Ann §11-9-802(b) an 18% penalty on the unpaid installments comprising 12% anatomical impairment. (Com. Ex. #12)

The present claim is one of wage loss benefits relative to the claimant's June 19, 2001, compensable injury. This claim is covered by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

In the instant claim, claimant suffered a injury to her right shoulder within the course and scope of her employment with respondent. As a result of the injury claimant underwent surgery under the care of Dr. David N. Collins. In January 2002, claimant was released by Dr. Collins

to return to limited or light duty work in the employment of respondent. Limitations placed upon the claimant's employment activity at the time of her release to light duty work by Dr. Collins included a prohibition against lifting greater than fifteen pounds over shoulder high. Claimant was provided appropriate work by respondent pursuant to the limited duty release of Dr. Collins.

Claimant was assigned the job duty of placing hardware on panels. Claimant used a pneumatic air gun or tool in placing the hardware on the panel. While claimant asserts that at time she experienced some difficulty in discharging her employment duties due to the fact that she is right handed and on occasion would have to twist her right arm and shoulder in placing the hardware on the panel with the pneumatic tool, there is no evidence to reflect that she was unable to perform her job duties. Claimant acknowledged that in her assigned job duties on the hardware she worked with a co-worker. Claimant did not seek medical treatment under the care of her treating physician subsequent to her release to limited duty work in January 2002.

Claimant was last seen by a physician relative to her compensable injury on April 17, 2002, when she was seen by Dr. Collins, six months subsequent to the surgery.

At the time of claimant's April 17, 2002, evaluation by Dr. Collins a physical examination was performed. Dr. Collins' report of the visit reflect that claimant was "essentially asymptomatic" relative to her right rotator cuff repair. Claimant had full range of motion with no crepitation and power at 5/5. While the claimant was cautioned by Dr. Collins with respect to her physical activity relative to the right shoulder she was released to activities without restrictions and was assessed with a permanent physical impairment of 12% to the body as a whole as a result of the injury and surgery in the treatment of the compensable injury.

Claimant left the employment of respondent in February 2002, after having worked one

month performing the assigned restricted job duties, and approximately two and a half months before reaching maximum medical improvement on April 17, 2002. Claimant informed supervisory personnel of respondent at the time she left the employment of same in February 2002, that she was doing so in order to return to school. While claimant maintains that the plan was in fact for her to return to school when she left the employment of respondent in February 2002, within three of the leaving the employment of respondent she secured employment with Frito Lay, earning wages comparable to those in the employment of respondent. Claimant remained in the employment of the subsequent employer, Frito Lay, from February 2002 through July 2003. Claimant left the employment of Frito Lay in July 2003, when she began to experience occasional twinges in her right shoulder during the discharge of her employment duties. Claimant did not seek medical treatment relative to her right shoulder with the onset of the afore symptoms, however occasionally utilized over-the-counter medication, Aleve, for pain. Claimant has not been seen by a physician relative to her right shoulder since the April 17, 2002, final evaluation by Dr. Collins.

When the claimant left the employment of respondent in February 2002, she was still assigned to limited duty work and had not reached maximum medical improvement relative to the compensable injury. Claimant asserts that she left the employment of respondent because she felt that when she was fully released she would not be physically capable of performing her regular job duties lifting the large panels in the PFA area. Claimant's testimony reflects that she was fearful that she would reinjure right shoulder when reassigned to her regular job duties without restrictions.

The credible evidence in the record reflects that claimant was provided work within her

restrictions when release to limited duty in January 2002. Additionally, the credible evidence reflects that respondent had work available for the claimant within any restrictions placed upon her by her treating physicians at the time she left the employment of respondents. Additionally, the evidence discloses that respondents had in place transitional programs returning injured employee to appropriate work upon release by the employee's treating physician. Claimant failed to give the respondents an opportunity to provide work to her upon her final release by her treating physician on April 17, 2002, relative to the compensable injury.

At the time claimant left the employment of respondent in February 2002, there is no evidence in the record to reflect that she was earning less than she had earned at the time of her June 19, 2001, injury. When claimant left the employment of respondent in February 2002, she secured employment with a different employer earning comparable wages as those she had earned in the employment of respondent. When claimant left the employment of the subsequent employer in July 2003, she was earning \$11.00 per hour, and increase of approximately one dollar from the time she started with that employer in February 2002.

Ark. Code Ann. §11-9-102(4)(F)(ii) provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a pre-existing disease or condition or the nature process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resulted condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is defined as more than 50% of the cause. Ark. Code Ann. §11-9-102(14).

Wage loss is the extent of which a compensable injury has affected a claimant’s ability to earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W. 2d 685 (1916). Ark. Code Ann. §11-9-522(b) provides in pertinent part:

- (1) 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 factors reasonably expected to affect his future earning capacity.
- (2) However, so long as the employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

In the instant claim, claimant, with a date of birth of April 23, 1964, was 39 years of age at the time of the hearing in this claim. Claimant, though completing the tenth grade, later obtained her GED. Subsequent to her compensable injury, claimant was returned to appropriate work in the employment of respondent earning wages equal to or greater than her average weekly wage at the time of the June 19, 2001, compensable injury. Claimant voluntarily left the

employment of respondent in February 2002, while work was available for her within her restrictions, in the employment of respondent. Upon leaving the employment of respondent in February 2002, claimant secure employment earning wages equal or greater than her average weekly wage at the time of her June 19, 2001, in the employment of respondent.

There is no evidence in the record to reflect that the claimant sought medical treatment relative to her June 19, 2001, compensable injury subsequent to her release to limited duty work in January 2002, for complaints associated with the injury. Claimant was seen in follow-up by her treating physician relative to the compensable injury on April 17, 2002, at which time she was asymptomatic relative to the right rotator cuff repair surgery. Claimant acknowledged that she underwent her physical examination relative to her compensable injury at the time of the April 17, 2002, visit to Dr. Collins. There is no evidence in the record to reflect that the claimant has sought or obtained medical treatment relative to her right shoulder since the April 17, 2002, final evaluation by Dr. Collins, although she was released to return to same on an as needed basis.

Claimant remained in the employment of Frito Lay, the subsequent employer, from February 2002 though July 2003. The records does not reflect evidence that the claimant sought or obtained medical treatment relative to her right shoulder during the afore time period. Further, the evidence disclosed that while claimant earned ten dollars per hour at the time she commenced her employment with Frito Lay in February 2002, at the time she terminated her employment with same in July 2003, she was earning eleven dollars per hour.

In August 2003, claimant obtained employment with Heritage Company, a telemarketing operation. Claimant earns seven dollar per hour in her employment with the Heritage Company.

Claimant's job duties in her current employment includes entering data in a computer, and talking in the telephone through the use of a headset. While the April 17, 2002, final report of Dr. Collins noted that precautions were reviewed with the claimant at the time she was released to activities without restrictions, the report does not reflect limitations on claimant's employment activities. Claimant's testimony reflects that she uses as a guide with respect to her employment activities earlier restrictions which entailed a prohibition against lifting weights greater than fifteen pounds over shoulder height. In that regard, claimant's testimony reflects that the weights of boxes of chips lifted in her employment with Frito Lay were ten pounds or less. In her current employment, claimant does not lift weights greater than fifteen pound over the shoulder in the discharge of her employment duties.

Ark. Code Ann. §11-9-522(c) provides:

- (1) The employer or his workers' compensation insurance carrier shall have the burden of proving the employee's employment or the employee's receipt of a bona fide offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident.
- (2) Included in the stated intent of his section is to enable an employer to diminish payment of benefits for a functional disability, disability in access of permanent physical impairment, which, in fact, no longer exist, or exists because of discharge for misconduct in connection with the work, or because the employee left his work voluntarily and without good cause connection with the work.

In the instant claim, the evidence reflects that claimant's departure from the employment of

respondent in February 2002, was of her own volition. At the time of the claimant's departure she remained within her healing period relative to the compensable injury and was provided appropriate work within the restrictions. Claimant relayed to supervisory personnel of respondent that her departure from the employment of same on February 2002, was due to the fact that she was returning to school. Claimant did not relay to the employer that she was terminating her employment because of her work or inability to do same presently or in the future. Further, at the time the claimant left the employment of respondent she was assigned to restricted duty and being accommodated by respondent in that regard. Claimant did not make inquiry of respondent whether she would be returned to her pre-injury job duties before deciding to voluntarily leave the employment of same. The credible evidence in the record reflects that the claimant left her employment with respondent in February 2002, without good cause connection with the work.

It is therefore my opinion, after a through consideration of all of the evidence in this record, that the claimant has failed to sustain her burden of proof by a preponderance to the credible that she has suffer a loss of earning capacity in excess of her anatomical impairment of 12% to the body as a whole. Claimant's claim for permanent partial disability benefits or loss of earning capacity in excess of her anatomical impairment of 12% to the body as a whole is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge