

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009604

EVELYN D. CHAMLEE, EMPLOYEE

CLAIMANT

**COOPER ENGINEERED PRODUCTS,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED JANUARY 6, 2004

Hearing before Administrative Law Judge J. Mark White on November 20, 2003, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Ronald L. Griggs, Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Norwood Phillips, Attorney at Law, El Dorado, Arkansas.

STATEMENT OF THE CASE

On November 20, 2003, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on July 21, 2003, and a Prehearing Conference Order was entered that same day. A copy of the July 21, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee/self-insured employer relationship existed between the parties on July 26, 2000; that the claimant sustained a compensable injury on July 26, 2000; that the claimant earned sufficient wages to be entitled to a temporary total disability rate of \$363 and a permanent partial disability rate of \$296; that the claimant's healing period ended on December 12, 2002; and that the claimant received a permanent partial disability rating of 15% to the body as a whole.

The parties agreed that the issues to be presented were whether the claimant is permanently and totally disabled, or in the alternative entitled to wage-loss disability over and above her anatomical impairment rating; and controversion and attorney's fees.

The claimant contends that she is permanently and totally disabled.

Respondents contend that the claimant's permanent partial disability does not exceed 15% to the body as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, deposition transcripts and other matters properly before the

Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.
4. The claimant has proven by a preponderance of the evidence that she is entitled to benefits for wage-loss disability in an amount equal to 35% to the body as a whole.
5. The respondents have controverted the claimant's entitlement to wage-loss benefits.

DISCUSSION

The claimant contends that she is permanently and totally disabled. "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). The claimant bears the burden of proving that she is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant’s anatomical impairment rating, the Commission may consider “such factors as the employee’s age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.” ARK. CODE ANN. § 11-9-522(b)(1). These “other matters” may include the claimant’s motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant sustained a compensable injury on July 26, 2000, to her back and shoulders when she slipped and fell on some oil. The respondents accepted the injury as compensable and paid benefits. The claimant underwent surgery on her right shoulder and unsuccessfully attempted to return to work with the respondent-employer. She then had surgery on her left shoulder, again followed by an unsuccessful attempt to return to work. This second attempt was at a light-duty job inspecting parts; she testified she was unable to perform this job because it caused swelling in her hands and arms. She ceased working because of her pain on April

15, 2001, and she has not attempted to work since that time.

Dr. David Collins assigned the claimant an anatomical impairment rating for her shoulders of 15% to the body as a whole. No impairment rating has been assigned for the claimant's back complaints. Her treating physician, Dr. D'Orsay Bryant, has diagnosed her with posterior annulus fibrosis at L5-S1, but he has recommended against surgery. As of the hearing, the claimant was still using medication, a TENS unit, and a back brace to alleviate her back pain. Notably, Dr. Bryant admitted in his deposition that he could not, within a reasonable degree of medical certainty, determine whether this fibrosis is causally related to the claimant's compensable injury.

The claimant also has an extensive medical history of conditions unrelated to the claim at hand. There is no evidence that she has received impairment ratings for any of these injuries and illnesses incurred both prior to and subsequent to the compensable injury.

Since her injury, the claimant has undergone two functional capacity evaluations (FCE), the most recent on September 19, 2002. The evaluator reported that the claimant provided a slightly sub-maximal effort, but that her subjective complaints of pain appeared to be reasonable and reliable. The FCE results indicate the claimant cannot perform her pre-injury job; that she is able to lift and carry no

more than 18 pounds; that she is extremely limited in the amount of above-shoulder work she can perform; that she has little difficulty with reaching activities below shoulder level; and that she has limitations in how long she can sit or stand. The study concluded that the claimant is capable of work at the sedentary physical demand level, and that further rehabilitation would be of no benefit. Notably, the study reported that the claimant “does not anticipate being able to work. She has filed for permanent disability.” The previous FCE reached similar conclusions.

As for the remaining wage-loss factors: the claimant is 46 years of age. She has a high school education, but she has received no other specialized training other than on-the-job training provided in her previous jobs. She worked for the respondent-employer as a machine operator for 18 years. Prior to this, she worked as a security guard for six months; as a machine operator for a sawmill for one year; and as a school custodian. The claimant’s motivation to work appears limited; there is no evidence that she has ever sought employment in a less strenuous occupation or otherwise attempted to earn a living since she stopped working for the respondent-employer on April 15, 2001. She testified that she is still able to drive, though in the course of a 32-mile drive she must stop once to relieve the stiffness in her back. She testified that she can sit or stand comfortably for only 30 to 40 minutes at a time, and that she is able to walk back and forth to her mother’s house,

approximately 100 yards from her own.

Dr. Bryant has opined that the claimant is totally disabled. In light of Dr. Bryant's deposition testimony, I find that the probative value of his conclusion is limited, and that his conclusion is entitled to little weight. It appears that his actual conclusion is that the claimant is disabled from performing her pre-injury job, not that she is unable to perform *any* job. Moreover, he seemed to say that his statement was merely a reflection of the claimant's opinion, and not his own expert medical opinion. In his deposition, he testified as follows:

Q. Mr. Griggs asked you if you really believed she was totally disabled and you said you did, but in forming that belief you considered non-medical factors, did you not?

A. I was referring to the manual related job at Cooper.

...

Q. So you did consider her employment when you said she was totally disabled, am I correct?

A. I was referring to her job at Cooper.

Q. I understand, but isn't that outside the prerogative of the medical opinion?

A. I will tell you this. This question about when I said she was disabled, this was entirely- - - I didn't just say that. That was at her request that I wrote that. It wasn't anything I germinated on my own. It was her request.

Q. I understand that. If she had requested that you said she was able to go back to work, would you have done that?

A. The answer is yes.

He later testified, “the data would indicate that she is disabled and unable to perform *that job*” (emphasis added). He testified that he gave this conclusion specifically to enable the claimant to apply for a disability pension from the respondent-employer. An opinion of “totally disabled” given by a doctor who testifies that he would have given the exact opposite opinion if the claimant had asked, can in no way be reasonably considered a reliable, expert medical opinion. Given these ambiguities, I cannot find that Dr. Bryant’s opinion is entitled to great weight.

Given Dr. Bryant’s unreliable opinion; given the claimant’s education, work experience and relatively young age; given her limited motivation to return to work; and given the FCE results showing that she is capable of performing sedentary work, I cannot find that the claimant is unable to earn meaningful wages in any employment. The evidence establishes that she is capable of working in some form of gainful employment, albeit not in her pre-injury job. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she is permanently and totally disabled.

However, the evidence does establish that because of her compensable injury, the claimant has sustained wage loss in excess of her assigned anatomical impairment rating. Given her work restrictions, her continuing shoulder problems, her limited job training, and her inability to perform her pre-injury job, she is clearly unable to earn the same wages she earned prior to her injury. Therefore, given the factors outlined above I find that the claimant has proven by a preponderance of the evidence that she is entitled to benefits for wage-loss disability in an amount equal to 35% to the body as a whole.

AWARD

The claimant has proven by a preponderance of the evidence that she has sustained wage loss in excess of her assigned anatomical impairment rating. The respondents are hereby directed and ordered to pay benefits for wage-loss disability in an amount equal to 35% to the body as a whole.

The claimant's attorney, Mr. Ronald L. Griggs, is hereby awarded the maximum statutory attorney's fee on the wage-loss benefits awarded, pursuant to ARK. CODE ANN. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this

award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. §
11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge