

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105462

MARK G. SWAYK

CLAIMANT

SALINE NURSING CENTER

RESPONDENT EMPLOYER

INS. CO. - STATE OF PENNSYLVANIA

RESPONDENT CARRIER

ORDER AND OPINION FILED JANUARY 8, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DALE GRADY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on November 12, 2003. A prehearing conference was held on September 23, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference and prior to the hearing, the parties agreed to the following stipulations:

1. On January 9, 2001, there was a compensable injury.
2. The compensation rates are \$306/229.
3. Temporary total disability benefits have been paid.
4. The respondents have accepted and paid an 8% permanent impairment rating to the arm.

The claimant contends that respondents paid the incorrect temporary total disability rate and claimant is entitled to the difference in what was paid and the correct rate. The claimant contends he is entitled to temporary partial disability benefits. The claimant further contends that he is entitled to a permanent impairment rating to his shoulder as well as the rating to his arm. The claimant also contends that he is entitled to Ark. Code Ann. §11-9-505 benefits and wage loss benefits and attorney's fees.

The respondents contend there is no permanent impairment rating to the shoulder, only a rating to the arm and that has been paid. The respondents further contend there is a rating for the shoulder but it is not documented by objective medical findings but is based on active range of motion and not based on the *AMA Guides, 4th Ed.* The respondents contend that since the only permanent impairment rating is a scheduled injury, there is no wage loss. The respondents further contend that the claimant is not entitled to both 505(a) benefits and wage loss because they are exclusive. The respondents further contend that there can be no 505(a) penalty because there was no unreasonable refusal to rehire.

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. On January 9, 2001, there was a compensable injury.
2. The compensation rates are \$306/229.
3. Temporary total disability benefits have been paid.
4. The respondents have accepted and paid an 8% permanent impairment rating to the arm.
5. The claimant is entitled to the difference in the temporary total disability paid and the correct rate.
6. The claimant is entitled to temporary partial disability entitling him to \$12 per week in temporary partial disability benefits for the weeks he worked making less money until his full release to return to work.
7. The claimant has failed to prove that he is entitled to a 4% permanent impairment rating to his shoulder.
8. The claimant has proven by a preponderance of the evidence that he is entitled to benefits pursuant to Ark. Code Ann. §11-9-505 for one year following his full release to return to work.
9. The respondent employer is entitled to credit for any wages the claimant earned or any unemployment benefits to which the claimant was entitled for the one year following his full release from the doctor.
10. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits.

DISCUSSION

The claimant, 46 years old, began his employment with the respondent employer in April 2000, where he was maintenance supervisor. The claimant repaired electrical problems, air conditioners, kitchen appliances and all around maintenance. On January 9, 2001, the claimant and another employee were lifting a garbage can of water and insulation to place in a dumpster. The fellow employee let his side slide and the claimant yanked the can back up and began having pain in his right arm. The claimant sought medical treatment and had right elbow surgery.

According to the claimant, Dr. Jay Lipke sent him to physical therapy for treatment of his right bicep and upper right shoulder. The claimant testified that he cannot reach his billfold in his right back pocket as he cannot reach back because of his shoulder. Dr. Lipke released the claimant and assigned a permanent impairment rating on August 12, 2002. According to the claimant, the insurance company made him a settlement offer and he refused. Shortly after that event, the claimant testified that he was fired from the respondent employer. The claimant testified that while he was employed with respondent he received a one dollar per hour raise and was employee of the month and had a clean record.

According to the claimant, after he was hurt he continued to work for the respondent and was answering the telephone at the front desk and performing other light work but could only work 40 hours per week with no overtime and made less money.

The claimant testified that if he had to miss work for any reason, it was not unusual for his daughter or wife to call in for him since he had no home telephone. The

claimant testified about getting a call in August 2002, that his parents had been in a wreck in Memphis and he left to go get them. He notified the nurse after receiving the call and left. The claimant picked up his parents, drove them back to Arizona and returned home to Arkansas. He was gone a total of four days and each day his daughter called in for him. According to the claimant, Beverly Gallagher, director of the respondent employer, advised him that he was being terminated for not calling in himself. The claimant applied for unemployment but did not actually draw unemployment, but received a credit for an unemployment overpayment he had received several years ago. The claimant testified that he received credit for \$1,000 in overpayment.

The claimant began working for Exxon and worked there a short time before going to work for Wal-Mart at \$6.76 per hour. The claimant currently is a Wal-Mart employee working in stocking, lifting up to 50 pounds.

Under cross examination, the claimant testified that his shoulder started hurting while he was still working after the initial injury. While the claimant has not had shoulder surgery, he has had a diagnostic MRI. The claimant has treated with Dr. Lipke and Dr. Bradley Pierce for his shoulder. According to the claimant, he demonstrated how far back he could move his shoulder for Dr. Lipke and no further treatment is currently being undertaken.

The claimant returned to work for the respondent employer in June 2002, following his injury and worked until August 2002. The claimant confirmed that he made an emergency trip to Memphis to pick up his parents who were involved in a car accident and he and his wife drove the parents to their home in Arizona. The claimant

confirmed he was gone for four days and his daughter called in to the supervisor each day. The claimant confirmed that he told the woman at the front desk he was leaving after receiving the call from his parents which he considered an emergency.

Under cross examination, the claimant confirmed that he was physically able to perform the maintenance job for the respondent employer after the doctor released him on August 12, 2002; however, the employer fired him for not personally calling in himself even though he had previously had family members call him in sick before. The claimant confirmed that he can perform maintenance type work but has been unable to find a job in that field.

Laksha Caple, daughter of the claimant, testified that she would call in for her father when he was unable to go to work. Ms. Caple testified that when her father went to Arizona, she called his supervisor, Beverly, on three occasions and Beverly wanted to talk to her father personally on the fourth day.

Linda Swayk, wife of the claimant, testified that she called in to her husband's work when he was unable to go in to work, as did a friend, Martin Jeffers, and their daughter, Laksha. Ms. Swayk testified there was never a problem with someone calling in for the claimant. According to Ms. Swayk, the claimant wore a beeper and could be contacted at any time with the beeper. Ms. Swayk testified that her husband was fired for not personally calling in himself even though others had called in for him many times before without a problem.

Sharon Harrison testified that she previously worked for the respondent employer before she had a stroke. Ms. Harrison testified that on occasion she had someone call in for her when she could not be at work and was never disciplined for

that. Ms. Harrison was unaware of an employer policy that the employee had to personally call in. Ms. Harrison worked for the respondent employer for two to three years.

Martin Jeffers, a friend of the claimant, testified that he called the employer on about four occasions when the claimant could not report to work. Mr. Jeffers explained that the claimant did not have a telephone. Mr. Jeffers testified that he never experienced any problem with the employer for his calling in for the claimant.

The claimant first contends that the temporary total disability rate paid by respondents was wrong. The respondents agree the correct and appropriate compensation rates are \$306 for temporary total disability and \$229 for permanent partial disability. The claimant is entitled to the difference in what was paid and what should be paid.

The claimant next contends he is entitled to temporary partial disability benefits for the period of time he worked after his compensable injury until he was terminated. The claimant contends he was only able to work 40 hours per week and was not able to work overtime as he had done before the injury. The medical evidence supports the claimant's testimony that he was released to return to work in a light-duty capacity until August 12, 2002, when Dr. Lipke released him to full duty. The documentation supports the claimant's testimony that he was able to work 40-hour weeks without overtime and as a result made less money than before his injury. Ark. Code Ann. §11-9-520 provides that the injured employee is entitled to two-thirds of the difference between his average weekly wage prior to the accident and his wage earning capacity after the accident. In the present case, the claimant was earning \$458 weekly before

the accident and was earning \$440 after the accident while on light duty, making an \$18 difference, entitling the claimant to \$12 weekly in temporary partial disability benefits for the weeks he worked making less money.

The claimant next contends he is entitled to a 4% body as a whole permanent impairment to his shoulder in addition to the 8% permanent impairment the respondents have paid for the upper arm. The respondents contend that the shoulder rating was not documented by objective medical findings under Ark. Code Ann. §11-9-102(16)(A)(i) and was based on active range of motion and was not based on the *AMA Guides, 4th Ed.* The claimant contends that Dr. Lipke assigned a 4% rating to the body as a whole for the shoulder problems. Dr. Lipke utilized the *5th Edition* of the *AMA Guides* when he assigned his rating on August 12, 2002, and provided the tables he utilized in assigning the rating; however, these tables relate to Lack of Flexion and Extension of the shoulder and Lack of Abduction and Adduction of the shoulder. Dr. Lipke's report fails to indicate if he utilized active or passive range of motion when he was making his assessment. The Court of Appeals in *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000), held that passive range of motion evaluations performed by the examiner and not under the voluntary control of the patient were objective findings and satisfied Ark. Code Ann. §11-9-102(16)(A)(i). The claimant testified that the doctor asked him to demonstrate his range of motion. With that being the only evidence as to the method of testing, it fails to satisfy the objective and measurable physical findings as required by the statute. Further, Dr. Charles Pierce, Jr., an orthopedic surgeon, performed an independent medical evaluation on the claimant on March 29, 2002, and

opined that the claimant's lack of motion should resolve with physical therapy in four to six weeks and no permanent impairment was anticipated. No surgery was recommended, only conservative physical therapy. I find the claimant has failed to prove by a preponderance of the evidence that he has sustained a permanent impairment to his shoulder as a result of his compensable arm injury sustained on January 9, 2001.

The claimant next contends he is entitled to benefits pursuant to Ark. Code Ann. §11-9-505 for one year following the date he was terminated from the respondent employer. The respondents contend the claimant was terminated for good cause.

Our workers' compensation laws serve to provide disability benefits to legitimately injured workers, to pay reasonable and necessary medical expenses and to return the worker to the workplace. See, *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Ark. Code Ann. §11-9-505 reads as follows:

(a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

The Court reviewed §505(a)(1) in *Torrey, supra*, and held that before §505(a)(1) applies, the following criteria must be satisfied. First, the employee must prove that he sustained a compensable injury. Second, he must demonstrate that there is suitable employment within his physical and mental limitations with his employer. Next, he must

prove that the employer has refused to return him to work. Last, he must demonstrate that the employer's refusal is without reasonable cause. See, *Torrey, supra*.

In considering the employer's refusal to return the claimant to work, the present case has similarities to *Congo Stove v. Edward Rickenbacker*, 77 Ark. App. 346, 74 S.W.3d 238 (2002), where the Court affirmed the Commission's holding that the employer terminated the claimant without reasonable cause and the respondent was liable to claimant for Section 505(a) benefits. In that case, the respondent terminated the claimant upon the claimant's attempt to return to work because the claimant allegedly failed to maintain contact with the employer. The Commission found that the employer's refusal to return the claimant to work was without reasonable cause because the claimant was off work pursuant to a doctor's orders and an independent nurse was aware of the claimant's off work status. The Court affirmed the award of Section 505(a) benefits.

In the present case, the claimant was released to full duty on August 12, 2002, when Dr. Lipke assigned his impairment rating. The employer released the claimant from employment because he personally did not call in for four days when he was responding to his parents' car accident. There was evidence presented that the claimant's daughter called in for him each day and she had called in for him in the past when he had to be off work and this was without any problem. The claimant's friend, Martin Jeffers, and the claimant's wife also had called in for the claimant without problems. Another former employee of respondent, Sharon Harrison, testified that she had previously had family members call in to the respondent employer when she had been off work and there were never any problems. I was not persuaded that the

employer had a bona fide reason for terminating the claimant and find the employer acted unreasonably in terminating claimant and refusing to return him to work. The evidence was clear that the employer had accepted others to call in for the employees when they were off work. In the present case, the claimant did not have a home telephone and he relied on friends and family to notify the employer if he had to miss work and this was never a problem until August 2002. The claimant presented very credible testimony about his parents having a car accident in Memphis and upon being notified, the claimant testified that he told the employee who answers the telephone for the employer where he was going, since the supervisor was in a meeting at the time he was leaving.

The claimant presented un rebutted testimony that his job was open at the time he was terminated and that he was able to perform the job duties of his job with the respondent employer. I find that the claimant has satisfied the criteria to be entitled to Section 505 benefits. The claimant sustained a compensable injury, he provided testimony that his job was still available and that his employer terminated him and he provided sufficient proof that the employer's refusal to return him to work was without reasonable cause. I simply was not persuaded that the employer's decision to terminate the claimant from his job was based on a bona fide reason. I find the claimant has proven by a preponderance of the evidence that he is entitled to one year's wages from the time he was terminated pursuant to Ark. Code Ann. §11-9-505(a)(1). The respondent employer is entitled to credit for any wages the claimant may have earned in that one-year period and credit for any unemployment benefits the claimant may have been entitled during that one-year period.

The claimant next contends that he is entitled to wage loss benefits. The claimant sustained a scheduled injury with a permanent impairment rating assessed and was paid for that scheduled injury and additional benefits are not provided by the statute except as noted in Ark. Code Ann. §11-9-521(g). While the claimant contends that he sustained a shoulder or body as a whole injury and impairment, I have found that the medical evidence does not support a permanent impairment rating for the shoulder, which satisfies Ark. Code Ann. §11-9-102(16) and Arkansas Workers' Compensation Commission Rule 34. In order to be entitled to wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. See, Ark. Code Ann. §11-9-522; Ark. Code Ann. §11-9-102(F)(ii)(a); and *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996). I find the claimant has failed to prove that he has sustained a permanent impairment to the body as a whole and, therefore, is not entitled to any wage loss disability.

ORDER

The respondent and claimant agree the correct compensation rates are \$306 for temporary total disability and \$229 for permanent partial disability. The claimant is entitled to the difference in the temporary total disability paid and the correct rate. The preponderance of the evidence provides the claimant is entitled to temporary partial disability entitling him to \$12 per week in temporary partial disability benefits for the weeks he worked making less money until his full release to return to work. The claimant has failed to prove by a preponderance of the evidence that he is entitled to a

4% permanent impairment rating to his shoulder. The claimant has proven by a preponderance of the evidence that he is entitled to benefits pursuant to Ark. Code Ann. §11-9-505 for one year following his full release to return to work. The respondent employer is entitled to credit for any wages the claimant earned or any unemployment benefits to which the claimant was entitled for the one-year period following his full release to return to work. The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715, *Coleman v. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990) and *Chamness v. Superior Industries*, W.C.C. E019760 (Opinion filed March 4, 1992).

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.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE