

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F208893

GUDELIA VALLADARES, Employee

CLAIMANT

ALLEN CANNING COMPANY, Self-Insured Employer

RESPONDENT

OPINION FILED OCTOBER 7, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by CONSTANCE G. CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On September 13, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 24, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to her right shoulder on July 23, 2002.
4. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$254.00 for total disability benefits and \$191.00 for permanent partial disability benefits.
5. Respondent has accepted and is paying permanent partial disability benefits based upon a 13% rating to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant is entitled to permanent disability benefits in excess of the 13% to the body as a whole due to wage loss.
2. Application of A.C.A. §11-9-522.
3. Attorney fee.

The claimant contends she is entitled to permanent disability benefits over and above her 13% impairment rating.

The respondent controverts claimant's entitlement to permanent and total disability and its position is that the claimant is not entitled to any further permanent partial disability benefits above the 13% to the body as a whole. Furthermore, respondent pleads the provisions of A.C.A. §11-9-522 as a bar to an award of further benefits as the claimant refused to return to an open position the respondent had ready and available for her. Respondent pleads off-set for social security benefits.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 24, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Pursuant to A.C.A. §11-9-522(b)(2) claimant is not entitled to permanent partial disability benefits in excess of her permanent physical impairment.

FACTUAL BACKGROUND

The claimant is a 71-year-old Hispanic woman who moved to the United States twenty years ago. Claimant began working for the respondent in July 2000 and suffered a compensable injury to her right shoulder when she slipped and fell on July 23, 2002. Claimant was initially treated by Dr. Holder and diagnosed with a right shoulder strain. Dr. Holder gave claimant a shot, prescribed medications, prescribed a sling, and returned claimant to work with restrictions. Due to claimant's continued complaints of pain Dr. Holder requested an MRI scan of the claimant's right shoulder. The MRI scan revealed a dislocation and claimant was referred to the emergency room where she underwent a shoulder reduction. Following that procedure claimant was referred to Dr. Evans, an orthopaedic surgeon. Dr. Evans prescribed a shoulder immobilizer, took claimant off work, and prescribed physical therapy. Dr. Evans, believing that claimant might have a possible rotator cuff tear, ordered an MRI arthrogram which did confirm a tear of the claimant's rotator cuff. As a result, Dr. Evans performed surgery on claimant's right shoulder to repair the tear on December 11, 2002. Following claimant's surgery she underwent additional therapy and was eventually released to return to work for respondent by Dr. Evans.

Claimant returned to work for the respondent performing the same job she had performed prior to her injury. Claimant's job with the respondent was on its "pick line". An individual working on this line was responsible for removing small items of trash in green beans as they passed by on a conveyor. These small items would include sticks, leaves, and even frogs. When claimant initially returned to work for respondent she was restricted to working four hours per day. Dr. Evans subsequently increased claimant's ability to work to eight hours per day and ten hours per day. When claimant began working ten hours per day she had increased complaints of pain and as a result Dr. Evans reduced claimant's work restrictions back to eight hours per day. Claimant continued to work at her job on the

“pick line” until she voluntarily terminated her employment with respondent on July 18, 2003.

Claimant has filed this claim contending that she is entitled to permanent partial disability benefits in excess of her permanent physical impairment rating of 13% to the body as a whole.

ADJUDICATION

As previously noted, claimant contends that she is entitled to benefits in excess of her permanent physical impairment rating as a result of a loss in wage earning capacity resulting from her compensable injury. On the other hand, respondent contends that claimant is barred from receiving permanent disability benefits over and above her impairment rating pursuant to A.C.A. §11-9-522. That statute states in pertinent part:

(b)(2) However, so long as an employee, subsequent to his or her 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 or her average weekly wage at the time of the accident, he or she 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.

(c)(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or work voluntarily and without good cause connected with the work.

Claimant contends that she voluntarily terminated her employment with respondent because she was asked to work more hours than permitted by Dr. Evans; because medication made her drowsy; and because the work she was performing was outside her

physical limitations. I find no merit to these contentions. Instead, after reviewing this case impartially, without giving the benefit of the doubt to either party, I find that respondent returned claimant to work at wages equal to or greater than those she was earning at the time of her injury and that claimant left her work voluntarily without good cause. Therefore, claimant is not entitled to permanent disability benefits in excess of her permanent physical impairment rating.

Following the surgery in December 2002 and subsequent follow-up evaluations, Dr. Evans on February 5, 2003 completed a slip indicating that claimant could return to work as of February 7, 2003 with restrictions. The restrictions imposed by Dr. Evans included no lifting and work seated or standing, but only at waist level. Claimant apparently did not return to work for the respondent until April 2003. In an effort to return claimant to work within Dr. Evans' restrictions, the respondent carrier employed Elaine Ivey, an RN case manager for Concentra Integrated Services. Ivey testified at the hearing that she was responsible for managing and coordinating medical care for injured workers. She was responsible for the claimant's case and met with claimant and an interpreter for doctor's appointments, physical therapy, and relayed information to the respondent. Based upon Dr. Evans' recommendations regarding claimant's work restrictions, the respondent proposed to return claimant to her prior job on the "pick line". Ivey went to the respondent's plant and observed this job and discussed the job requirements with Dr. Evans. In addition, Dr. Evans was given a job analysis setting forth the requirements of the job. This job analysis for a line inspector was approved and signed off by Dr. Evans on April 2, 2003. That analysis indicates that claimant should work for two weeks at four hours per day before returning to work eight hours per day. That job analysis indicates that claimant can occasionally lift 0 to 10 pounds and that she should perform simple grasping at the waist level only.

Testifying on behalf of respondent was Larry Schilling, the respondent's plant

manager. Schilling testified that before claimant was returned to work he had a meeting with Ivey and was informed of the claimant's restrictions. Schilling testified that the pick table has a conveyor which moves product such as green beans in front of an employee. Employees are required to pick foreign materials out of the product such as sticks and leaves. Schilling testified that there was no quota on the amount of material that must be removed and that claimant was only required to reach at waist level or just above waist level directly in front of her. Schilling testified that conveyors in the respondent's plant are at different heights and that claimant was placed at one that came to her waist. Schilling testified that there was no actual lifting on the job and that the heaviest item removed would be a frog or a small stick. Anything heavier than those items is automatically removed by the machinery. Schilling testified that before claimant returned to work he had a conversation with claimant through an interpreter who also worked for the respondent named Dianna Lomas. Schilling testified that he informed claimant that they understood her restrictions and that she would be responsible for clocking out and working only her limited hours. Schilling testified that after he discovered that claimant had worked nine hours on her first day he informed her the next day that she was only to work four hours.

After claimant returned to work for respondent, Dr. Evans in a report dated April 25, 2003 noted that claimant could continue working with the restriction of work at waist level only and that she could increase her working time to 10 hours per day.

On June 11, 2003, Dr. Evans authored a report indicating that claimant was claiming that she was working above shoulder level. Dr. Evans ordered additional physical therapy and a decrease in claimant's work schedule to eight hours a day, five days a week, at her present job or a ten hour day, six days per week at a lighter job. Dr. Evans' next office note of August 20, 2003 indicates that claimant had quit her job because the respondent had required her to work at or above shoulder level.

Initially, I find that the respondent made available to claimant work within her

physical restrictions and that she was earning wages equal to those she was earning at the time of her accident. Claimant testified on cross-examination that she was working the same job as before she got hurt and that she was making the same wages as before. I also find that the job provided to claimant by the respondent was within the restrictions set forth by Dr. Evans. Dr. Evans had released claimant to return to work indicating that she could sit or stand and work at waist level. Dr. Evans had approved the job analysis indicating that claimant could occasionally lift 0 to 10 pounds and that she could perform simple grasping at the waist level. Larry Schilling testified that respondent specifically placed claimant at a conveyor that was at her waist level.

While claimant testified that this job required her to exceed her physical limitations, I do not find claimant's testimony regarding her job duties credible. To the contrary, I find more credible the testimony of respondent's witnesses. With regard to claimant having to perform jobs outside her restrictions, Larry Schilling testified that claimant did make those complaints. However, Schilling testified that he also informed claimant that she was not to perform any work outside her restrictions and that claimant should come see him if any supervisor asked her to do so. In fact, because claimant was exceeding her hours and had those complaints, Schilling prepared a document which was translated into Spanish. According to Schilling he, the claimant, claimant's son, and Dianna Lomas were present at a meeting where claimant was given this document. This document states that claimant is to only work eight hours a day, five days per week, and that she is not to exceed the physical limitations imposed by her physician. Further, if asked to perform any activity in excess of her limitations she is to report same to Schilling with no repercussions. Schilling testified that he had claimant sign this document because she had made complaints that she was being forced to perform jobs outside her restrictions and they were having trouble getting claimant to clock out on time. As a result, Schilling posted a supervisor to go and tell the claimant to clock out.

Schilling also testified that he never saw the claimant performing any job duties other than her assigned duties at her work station and that he personally checked on the claimant after her complaints. Schilling also testified that he informed claimant that she should take breaks when she needed to and that he would terminate any supervisor who asked her to exceed her limitations. Because of claimant's continued complaints and personality conflicts with other workers on the first shift, Schilling testified that he moved the claimant to the second shift. Schilling testified that supervisors on the second shift were Hispanic and he felt that claimant might feel more comfortable with them.

Also testifying on behalf of respondent was Tina Teague, a production manager on the respondent's first shift. Teague testified that after claimant returned to work she checked on the claimant several times each day. Claimant testified that she never observed the claimant performing any job other than the one on the pick line. Teague testified that on several occasions she had to tell the claimant it was time for her to leave work.

Also testifying was David Tellez, a production supervisor for respondent on the second shift and claimant's supervisor. Tellez testified that Spanish is his native language and that he communicated with claimant in Spanish. According to Tellez' testimony, the claimant never made any complaints to him about her ability to perform her work. Tellez testified that he personally observed the claimant performing her job and noted no specific difficulties.

Based upon the foregoing evidence, I find that respondent provided claimant a job within her physical limitations. I find insufficient evidence that claimant was required to perform work in excess of her physical limitations.

Claimant also contends that she was unable to continue working for the respondent because of drowsiness caused by her pain medication. Other than claimant's testimony, she has offered no credible indicating that the pain medication caused drowsiness which

would prohibit her from performing her job activities. Claimant's treating physician, Dr. Evans, had prescribed this medication and had released claimant to return to work without any indication that the medication would have an adverse effect on claimant's ability to perform her job.

Finally, claimant also contends that she terminated her employment with respondent because she was informed that she was going to have to work more hours than permitted by Dr. Evans. I find no merit to this argument. First, as previously noted, Larry Schilling testified that the respondent had difficulty getting claimant to clock out at the required time. In fact, Schilling testified that he specifically told claimant that she should not work more than her allotted time and that he had to assign a supervisor to tell the claimant to clock out. This supervisor was Tina Teague who testified that on several occasions she had to inform claimant that it was time for her to leave.

At the end of the hearing the claimant for the first time indicated that the supervisor who informed her that she was going to have to work additional hours was named Julio. On rebuttal, Schilling testified that there is no supervisor named Julio in the respondent's plant. Schilling testified that there is an hourly employee named Julio Acosta, but that he has no supervisory duties and was not claimant's supervisor. Claimant's supervisor was David Tellez who testified that he never informed claimant that she was going to have to work more than eight hours.

Given this evidence I do not find that respondent required claimant to work more hours than approved by Dr. Evans. Nor do I find that respondent had plans to make claimant work more than her approved hours. To the extent that claimant occasionally exceeded her approved hours, I believe that this was due to claimant's failure to follow the respondent's instructions. The evidence indicates that Schilling informed claimant on multiple occasions to timely clock out. In fact, Schilling had these instructions translated into Spanish and given to claimant in written form. The need to follow these instructions

was explained to claimant and her son. In addition, Schilling also assigned a supervisor, Tina Teague, to insure that claimant promptly clocked out.

In reaching this decision, I do note that claimant continued to be evaluated by Dr. Evans and also received a second opinion from Dr. Benafield. A review of Dr. Benafield's medical reports indicates that he in 2004 may have imposed more stringent physical limitations on the claimant's ability to work. However, I find that Dr. Evans' opinion regarding claimant's physical limitations is entitled to greater weight than that of Dr. Benafield. Dr. Evans is the physician who performed surgery on claimant's shoulder and evaluated the claimant on multiple occasions. On the other hand, the medical reports indicate that claimant has seen Dr. Benafield on only one or two occasions.

Furthermore, I believe it is also important to note that in August 2003 shortly after claimant had voluntarily terminated her employment with the respondent that claimant continued to undergo physical therapy. The physical therapist's notes of August 19, 2003 indicate that claimant was inconsistent in her efforts when performing any activities with her right arm and hand. Likewise, the physical therapist's notes of August 26, 2003 also indicate that claimant gave an inconsistent effort.

Finally, I note that on July 15, 2004 Dr. Evans checked a box indicating that claimant was capable of performing sedentary work with sedentary work defined on the form. However, Dr. Evans also completed another form that date indicating that claimant was capable of standing or walking a total of eight hours a day in addition to sitting eight hours a day. He also indicated that the claimant could occasionally lift and carry and that her ability to reach, handle, finger, and feel were limited. It is unclear whether Dr. Evans had seen the claimant since his release of her from his care almost one year earlier. Furthermore, even under those restrictions provided by Dr. Evans in July 2004, I find that the job provided to claimant by the respondent was within those physical limitations.

Accordingly, for the foregoing reasons, I find that respondent provided to the claimant a job within her physical limitations at wages equal to those she was earning at

the time of her injury. I also find that claimant voluntarily left her employment without good cause connected to the work. I find insufficient credible evidence that claimant's job duties exceeded her physical limitations, that pain medication she was taking caused drowsiness which prohibited her from performing her job activities, or that claimant was required or informed by respondent that she would have to work hours in excess of the limitation imposed by Dr. Evans. For these reasons, I find that pursuant to A.C.A. §11-9-522 that claimant is barred from receiving permanent partial disability benefits over and above her permanent physical impairment rating.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits in excess of her permanent physical impairment rating. Pursuant to A.C.A. §11-9-522(b)(1) claimant is barred from receiving permanent disability benefits in excess of her permanent physical impairment rating. Therefore, her claim for additional compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE