

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308931

DEBRA RICHARDSON	CLAIMANT
SUPERIOR INDUSTRIES	RESPONDENT
CROCKETT ADJUSTMENT INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 19, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 7, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On April 7, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left rotator cuff on April 7, 2002.

4. All authorized medical expenses have been paid.

5. The respondents accepted a whole body impairment rating of 6 percent on April 7, 2005.

6. The claimant is entitled to a compensation rate in the amount of \$406 for temporary total disability and \$305 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. The extent of the claimant's permanent impairment.
2. Wage loss over the impairment.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that she is entitled to permanent disability in an amount to be determined by the Commission. The claimant anticipates that she will receive a permanent impairment rating from a physician; however, if she does not, the claimant contends that the Commission should take judicial notice that a person that undergoes a rotator cuff repair has sustained permanent impairment and the extent of that permanent impairment should be determined by reference to the Fourth Edition of the American Medical Associations Guide to Permanent Impairment. The claimant contends that the respondents have controverted all permanent disability benefits.

In regard to the foregoing issues the respondents contend that, based on the present medical evidence, no physician has assigned a permanent anatomical impairment rating that meets the requirements of the Arkansas workers' Compensation Act and,

therefore, the issue of permanent disability is premature at the present time.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and the deposition of Dr. Mark Allard marked Claimant's Exhibit No. 2. The respondents submitted medical records marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified and it has been stipulated by the parties that she sustained a compensable injury to her left shoulder while working for the respondent on April 7, 2002. The claimant testified that she worked in quality control and when picking up a tire which weighed from thirty to fifty pounds, she felt a pop in her left shoulder. The claimant testified that as a result of this left shoulder injury she was seen by Dr. Mark Allard and he did surgery on her shoulder. The claimant testified that, in her opinion, she still has problems with her shoulder, noting that she does not have any strength in it and that she does have some pain in her arm that will shoot from her thumb to her shoulder. The claimant testified that Dr. Allard has given her a weight lifting restriction of ten pounds and as a result of this restriction, the respondents have refused to provide work for her. The claimant testified that she had worked for the respondent for eight and a half years prior to her injury.

The claimant testified that she has looked for work at several places including Lazy Boy, McKee's Bakery as well as all the factories around Westville, her hometown in Oklahoma. The claimant testified that she also has looked for work at video stores and did work for the Casino for a period of time. The claimant testified that her daughter helped her get a job beginning initially in maintenance and then she trained to be a dealer. The claimant testified that she lost this job because she would drop cards when she would pull them out of the shoe. The claimant explained that a shoe is an apparatus which shuffles cards automatically and is designed so that a dealer can pull out one card at a time. The claimant testified that prior to her injury in April 2000 she did not have problems holding things and she has not had any injury subsequent to that date which would cause her shoulder to continue to hurt. The claimant testified that if the respondent would make work available for her within her restrictions she would go back to work immediately.

The claimant testified that she is forty-eight years old and went through the ninth grade. The claimant testified that in the past she has worked in a hatchery as well as factory work. The claimant testified that all of her jobs have required her to use both hands repetitively. The claimant testified that she did not know if she could do the work required in a hatchery but she would be willing to try. The claimant testified that when she last worked for a hatchery, she was in a supervisor's position but now she would have to go in as a regular laborer.

On cross examination, the claimant testified that she has not applied for jobs in any of the area poultry plants. The claimant testified that she did receive her GED in December 1987 but has not had any other vocational or technical training since getting her GED. The claimant explained that her job for the respondent required her to make measurements and inspection of the wheels as they come off the line and to log this information. The claimant testified that she and her husband have a computer in their home but she does not know how to use it. The claimant testified that she also has gone to the unemployment office in Oklahoma as well as the temporary services in Oklahoma looking for work. The claimant testified that when she started working for the casino she was doing light maintenance, emptying ash trays, emptying trash barrels and carrying the trash out to the trash bin. The claimant testified that while doing this job she went to blackjack dealing school so she could become a dealer. The claimant testified that the work at the casino is the only job she has had since leaving the respondent. The claimant testified that she has not filed for social security and that she did draw some unemployment benefits. The claimant testified that she and her husband share the cooking duties and that she does most of the house work as well as laundry. The claimant testified that as a hobby she likes to work cross word puzzles. The claimant testified that she also has an exercise machine which she uses at the encouragement of her doctor to help work on her shoulder.

On redirect examination, the claimant testified that when she was working for the respondent she made \$13.50 per hour and her work at the casino paid her \$7.00 an hour. The claimant explained that she was willing to work at a lesser rate of pay in order to have some money coming in. The claimant acknowledged that a letter had been sent to the respondent setting forth that she was ready, willing and able to perform any suitable employment within her restrictions for the respondent but that they had not offered her any position of any kind. The claimant testified that she has gone out and tried her best to find work, noting that she had put in an excess of two dozen applications for employment.

The medical evidence in this record indicates that the claimant began to be seen for complaints of her left shoulder on April 9, 2002. The claimant's treatment continued and she underwent extensive physical therapy through May 2002. Dr. Mark Allard, in his letter dated July 6, 2003, sets forth that he performed a left rotator cuff tendon reconstruction on the claimant on October 8, 2002. In this same letter, Dr. Allard sets forth his recommended restrictions for the claimant subsequent to her surgery and would recommend that these restrictions be made permanent. Dr. Allard sets forth that the claimant should not lift with her arms extended away from her body and should not lift things repetitively over shoulder level. The doctor recommended that she not lift anything more than ten pounds if she has to lift it above her shoulder height and that she should not have to do any type of repetitive activity over her shoulder level.

In Dr. Allard's deposition taken on April 7, 2005, he testified at length concerning his examination of the claimant initially as well as the surgery which he performed on October 8, 2002, on the claimant's left rotator cuff. Dr. Allard testified as to his follow up appointments with the claimant and as to her progression of increased range of motion and healing. Dr. Allard testified that on January 6, 2003, he saw the claimant on follow up from her surgery noting that she had begun her strengthening exercise program the week before. At that time, the possibility of her returning to work was discussed, noting that the claimant's strength and range of motion were increasing. On February 5, 2003, Dr. Allard testified that the claimant reports that she felt like she was making progress and was having less pain and gaining in strength. The doctor notes that the claimant did have some pain with abduction but her motion was looking great. Dr. Allard stated that the claimant was still in her healing period. Dr. Allard testified that he next saw the claimant on March 21, 2005, some two years after his last visit with the claimant. The claimant had complaints of left sided neck pain and some shoulder pain, further stating that her current problems did not feel like the pain she had in her shoulder prior to her rotator cuff surgery. Dr. Allard went through a long discussion concerning impairment ratings for rotator cuff surgery. Ultimately, the doctor agreed that he was unable to assess a permanent impairment rating because even though he believed that there had been some permanent change in the integrity of the claimant's shoulder he believes that if a person

has full range of motion they cannot have a permanent impairment rating. Dr. Allard explained that the reason he put permanent restrictions on the claimant was because he did not want to put at risk the rotator cuff reconstruction. On cross examination, Dr. Allard agreed that he performed two procedures on the claimant, a resection of the distal clavicle and the rotator cuff tear repair. For the distal clavicle, Dr. Allard used Table 27 of the A.M.A. Guides, Forth Edition, to rate the claimant with a 10 percent upper body extremity permanent impairment which converts to a 6 percent whole body impairment according to the Tables. Dr. Allard agreed that the A.M.A. Guides, Forth Edition, do not specifically cover a rotator cuff tear as to impairment. Dr. Allard assessed the claimant as being a patient who has had a previous rotator cuff reconstruction and has normal active range of motion and good strength. The doctor agreed that the restrictions which he gave her are primarily to prevent re-injuring her shoulder. The doctor agreed that should the claimant violate her restrictions, it does not mean that she would re-injure her shoulder just that there would be a greater possibility of injuring her shoulder. Dr. Allard agreed that he essentially released the claimant from his care in February 2003 as to her rotator cuff injury. The doctor stated that when he saw the claimant on March 21, 2005, it was not for her compensable injury.

After a review of this complete record, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to an additional impairment rating for her

rotator cuff reconstruction. Dr. Allard has clearly stated that, in his opinion, the claimant has undergone some permanent anatomical loss due to her torn rotator cuff and its subsequent repair but since the A.M.A. Guides, Forth Edition, do not address an impairment rating for a rotator cuff repair and range of motion and loss of strength are not allowed to be used in assessing a permanent impairment rating, he cannot assess an impairment rating based on his belief that there is permanent loss. When asked what impairment the claimant does have due to her rotator cuff injury. Dr. Allard responded, "The best way I can phrase this, and the fairest way I can phrase it is she is a patient who has---has had a previous rotator cuff reconstruction, and has normal range of motion and good strength. Dr. Allard, in his deposition, recalled a previous workers compensation patient who had a successful rotator cuff reconstruction and at the end of their healing period this patient's range of motion, strength and where they were in life were assessed as 0 percent impairment. Therefore, based on Dr. Allard's assessment of the claimant's situation as it relates to her rotator cuff reconstruction the claimant is not entitled to an impairment rating. I do find, however, that the claimant has proven by a preponderance of the evidence that she is entitled to wage loss over and above her 6 percent permanent impairment rating which the respondents have accepted in the amount of 10 percent. This would entitle the claimant to a total disability rating of 16 percent to the body as a whole. This is based on the claimant's lack of transferrable job skills, limited education, age and

permanent restrictions. See Grimes v. North American Foundry, 316 Ark. 395, 872 S.W. 2d 59 (1994).

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On April 7, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left rotator cuff on April 7, 2002.

4. All authorized medical expenses have been paid.

5. The respondents accepted a whole body impairment rating of 6 percent on April 7, 2005.

6. The claimant is entitled to a compensation rate in the amount of \$406 for temporary total disability and \$305 for permanent partial disability.

7. The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional impairment for her rotator cuff tear. See discussion above.

8. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss disability in the amount of 10 percent over and above her 6 percent impairment rating which the respondents have accepted. This would give the claimant a permanent disability rating of 16 percent to the body as a whole. See discussion above.

9. The respondents have controverted this claimant's entitlement to wage loss.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to prove that she is entitled to an additional impairment for her rotator cuff compensable injury.

The claimant has proven that she is entitled to wage loss in the amount of 10 percent over and above her 6 percent permanent impairment rating for her compensable injury, therefore, the respondents should pay to this claimant wage loss in the amount of 10 percent.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE