

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309568

ROY D. YANCEY

CLAIMANT

B & R CONSTRUCTION CO.

RESPONDENT EMPLOYER

**ARKANSAS HOME BUILDERS ASSOCIATION
SECOND INJURY FUND**

**RESPONDENT CARRIER No. 1
RESPONDENT NO. 2**

ORDER AND OPINION FILED FEBRUARY 15, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE W. H. "DUB" ARNOLD, Attorney at Law, Arkadelphia, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on January 18, 2005. A prehearing conference was held on November 9, 2004 and a prehearing order was filed on the same date. The prehearing order was introduced into evidence as Commission Exhibit No. 1 without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on August 5, 2003.
2. The compensation rates are \$279/209.
3. Respondent No. 1 accepted the claim as compensable and has accepted a 7% body as a whole impairment rating.

The claimant contends he is entitled to wage loss benefits, future medical and attorney's fees.

Respondent No. 1 contends the claimant sustained a compensable shoulder injury and respondents have paid and continue to pay all reasonable and necessary medical benefits associated with the injury. Respondent No. 1 further contends the claimant has not sustained any wage loss disability and there is employment available that would pay him equal or greater wages than he was earning in August 2003. Alternatively, Respondent No. 1 contends if wage loss is awarded, wage loss would be based on a combination of all the claimant's pre-existing conditions and the 2003 injury and, therefore, the responsibility of the Second Injury Fund.

Respondent No. 2 contends the claimant cannot demonstrate that he has suffered any wage loss disability as a result of the compensable August 2003, injury. Alternatively, if wage loss is awarded, Respondent No. 2 contends the wage loss disability is the result of the 2003 injury in and of itself and not a combination of that injury and any prior condition.

ISSUES TO BE LITIGATED

1. Wage loss.
2. Attorney's fees.

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. There was a compensable injury on August 5, 2003.
2. The compensation rates are \$279/209.
3. Respondent No. 1 accepted the claim as compensable and has accepted a 7% body as a whole impairment rating.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a diminished wage earning capacity.

DISCUSSION

The claimant, 60 years old, began his employment in March 2003 with the respondent employer and continued until August 5, 2003, when he sustained an injury. The claimant was hit by the bucket of a backhoe and knocked into a metal fence post causing injury to his left shoulder. The claimant went to the doctor the following morning and had a MRI and rotator cuff surgery was scheduled for September 4, 2003. The claimant underwent the repair of the complete tear in the rotator cuff; however, the bicep tendon was not reattached. Later, an infection developed and some additional procedures had to be undertaken.

According to the claimant, Dr. Stephen Hudson did a final evaluation and placed him on permanent restrictions with no overhead work with his left arm and no lifting over 10 to 20 pounds with the left arm. The claimant was sent for a second opinion to Dr. John Young in Florence, Alabama. Dr. Young kept the restrictions that Dr. Hudson assigned.

The claimant contends he has sustained wage loss disability since he can no longer return to his construction job with his restrictions. In considering a claim for permanent disability based on incapacity to earn, the Commission is required to consider all competent evidence, including the claimant's age, education, medical evidence, work experience, and other matters reasonable expected to affect earning power. Ark. Code Ann. §11-9-522(b)(1); See, *Buford v. Standard Gravel Co.*, 68 Ark. App. 262, 5 S.W.3d 478 (1999).

Claimant at the time of the hearing was 60 years old with some vocational technical school training in electronics. The claimant had a distinguished career with Reynolds Metal Company and spent a little over 31 years performing computer programmer functions, data processing manager, senior accountant and acting plant controller. The claimant retired from his employment with Reynolds/Alcoa in February 2003 and went to work for the respondent employer in March 2003, driving trucks and heavy equipment. Respondents employed a vocational consultant to work with the claimant on employment possibilities within his work restrictions and identified a number of jobs. The claimant testified at the hearing that he did not pursue any of the jobs identified because he was not really interested in any of them. The claimant had applied for a bus driver position at the University of Alabama on his own but had not heard from that opportunity.

In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

After considering all the credible evidence, to include the claimant's physical condition and the wage loss factors, I find the claimant has failed to prove by a preponderance of the evidence that he has sustained wage loss disability. The claimant certainly has some left shoulder limitations; however, he has failed to pursue employment possibilities identified by the vocational consultant. The only two jobs the claimant has pursued were with the respondent employer and the one part time bus driving job. I was not persuaded the claimant was motivated to return to work, especially in his failure to apply for any of the job opportunities the vocational counselor provided.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a diminished wage earning capacity. The claimant for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**