

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501461

WARREN BAKER

CLAIMANT

**JONES HEAVY HAULING
(SELF-INSURED)**

RESPONDENT EMPLOYER NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

ORDER AND OPINION FILED SEPTEMBER 25, 2006

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE R. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE MELISSA ROSS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on August 2, 2006. A prehearing conference was held on May 16, 2006 and a prehearing order was filed on May 17, 2006. 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, the parties agreed to the following stipulations:

1. There was a January 27, 2005, compensable right shoulder injury.
2. The claimant's average weekly wage is \$657.
3. The compensation rates are \$438/329.
4. Respondent No. 1 has accepted an 18% permanent impairment rating to the body as a whole.

5. The end of the healing period is July 20, 2005.

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

Respondent No. 1 contends that all appropriate benefits have been paid in this matter, including the 18% impairment rating. Respondent No. 1 contends the claimant cannot prove he is entitled to wage loss benefits, but if wage loss is awarded, then the Second Injury Fund should be responsible.

Respondent No. 2 contends that the claimant is not entitled to any permanent disability benefits in excess of the 18% that has been paid by Respondent No. 1; however, if wage loss is owed, the claimant cannot prove there is combination of disabilities greater than the last injury to create a Second Injury Fund liability. Lastly, Respondent No. 2 contends the claimant was 60 years old at the time of the injury and he is limited to 260 weeks of benefits, pursuant to Ark. Code Ann. §11-9-522(f).

ISSUES TO BE LITIGATED

1. Wage loss.
2. Liability of the Second Injury Fund.
3. 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 January 27, 2005, compensable right shoulder injury.
2. The claimant's average weekly wage is \$657.
3. The compensation rates are \$438/329.
4. Respondent No. 1 has accepted an 18% permanent impairment rating to the body as a whole.
5. The end of the healing period is July 20, 2005.
6. The claimant has proven by a preponderance of the evidence that he has sustained a 35% diminished wage earning capacity in excess of the 18% permanent impairment that has been accepted by Respondent No. 1.
7. Respondent No. 1 remains wholly responsible for wage loss benefits awarded.
8. The Second Injury Fund bears no liability in wage loss benefits.
9. 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 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 61 years of age, has completed four years of college in automotive engineering. The program would be a little higher than a mechanic and the claimant received this degree in 1962 in Australia. The claimant worked in mechanic work for

three years but began driving 18-wheel trucks and has done that for most of his working career. The physical requirements included loading, unloading, tarping and scheduling. Lifting requirements were from 10 to 150 pounds with about every load.

The claimant verified that he had pre-existing injuries before his January 27, 2005, shoulder injury with the respondent employer. The claimant had an ankle injury when he was 20, in 1980 he had a knee injury requiring surgery, a left shoulder injury requiring surgery about 20 years ago, left carpal tunnel surgery before 1992, and left forearm injury in 2004 with surgery. According to the claimant, none of these conditions caused him to be unable to work after each healed.

The claimant sustained a compensable injury on January 27, 2005, when he was reaching up to get hold of the tarp bar to pull down to secure his load when he injured his right shoulder. The claimant sought medical treatment and eventually had surgery by Dr. John Wilson, who reattached a muscle in the shoulder. About July 2005, the claimant was at maximum medical improvement and was released. The claimant described his problems with the right shoulder now as difficulty reaching and stretching and inability to lift like before. The claimant testified that shifting would be a problem with truck driving now and if he had to load and unload, the lifting part would be a problem. The claimant testified that most over-the-road trucks are standard transmission. According to the claimant, he has limited range of motion of his right arm and can lift 45 to 50 pounds a few times without pain.

The claimant sought and found a part-time job as a courier driver for a pharmacy, delivering medications to nursing homes. The claimant drives a small van and works about 28 hours per week. The claimant verified that he only received the

vocational rehabilitation report from Ms. Owen two days ago and he had not had an opportunity to pursue any of the possible jobs.

Under cross examination, the claimant verified he has had a pacemaker since 2000 and takes medication. The claimant verified that Dr. Van DeBruyn advised on October 3, 2002, that driving trucks was not necessarily the safest option because of shock possibility with a pacemaker. The claimant verified that for each of his previous injuries, he had recovered completely and had no impairments before his January 27, 2005, injury. The claimant also verified that he did not actually physically load and unload with the respondent employer; however, he did have to physically maneuver the steel beams on the flatbed to ensure proper distribution for transporting. The claimant also had to drag chains to strap down his load and the chains weighed from 100 to 200 pounds. The claimant verified the work was physical, required the use of both arms and was considered heavy work. Before the injury, the claimant verified that he played golf every chance he got but does not now. While the claimant has some computer skills, he contends he needs to improve his computer skills in order to secure a job requiring regular computer use. The claimant verified that he believed he could work 40 hours per week at his current job, if work was available, but he only can get part time with his employer.

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

In the present case, the claimant has proven by a preponderance of the evidence that he has sustained a 35% wage loss disability in addition to his 18% body as a whole permanent impairment. The claimant sustained a compensable right shoulder injury while placing a tarp on his 18-wheel load of product. The claim was accepted and medical benefits were provided, to include surgery to reattach muscles to his shoulder. Respondent No. 1 accepted an 18% permanent impairment rating as assigned by Dr. John Wilson on July 20, 2005. Dr. Wilson's report stated the claimant was released to sedentary work or escort vehicle work. The claimant participated in a Functional Capacity Evaluation on May 10, 2006 and his abilities provided he could handle medium duty work.

The claimant testified that he was no longer able to drive cross country because he was not able to handle all the shifting required in the 18-wheel truck. Also, he was not able to handle the loading and unloading involved in hauling, nor the chaining and tarping that is necessary to secure a load. The claimant was no longer able to continue

working for the respondent employer as a truck driver. The claimant found employment on his own working for Central Pharmacy Company as a courier driver where he delivers medications to nursing homes. The claimant makes \$8 per hour and is working part-time for 28 hours per week at night. That is all the hours available from the employer.

Respondents' witness, Tanya Owen, a vocational rehabilitation counselor and a life care planner, prepared a labor market analysis based on the claimant's current physical capacities and past relevant work experience and educational background. This report was only furnished to the claimant two days before the hearing; therefore, affording the claimant no real opportunity to pursue any possibilities. The date the report was prepared reflects July 20, 2006; therefore, there was not a large block of time to act on any of the possibilities. Ms. Owens did not meet with the claimant to discuss any problems he might have, but she did rely on the Functional Capacity Evaluation and medical evidence that was provided to her. Ms. Owen identified a number of jobs, not all had openings and the pay scale was not available on all the jobs. Certainly, Class A truck drivers had the most opportunity; however, the claimant has testified that the constant shifting would prohibit him from that type work now.

I found the claimant to be a most credible witness who quite obviously was motivated to return to work, since he found a part-time job on his own working as a courier. The claimant's current employment only has 28 hours available per week, but the claimant has now demonstrated that he can perform this type work and feels he would be able to work 40 hours per week if a similar job was available. However, even with a 40-hour per week job making \$8 per hour, his average weekly wage would be

\$320, as compared to his previous employment averaging \$657. Clearly, the claimant has sustained a diminished wage earning capacity, and I find he is entitled to 35% wage loss over his 18% permanent impairment.

Respondent No. 1 contends that if wage loss disability is awarded, it would be the responsibility of the Second Injury Fund. In *Mid-State Const. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set forth a tripartite test for Second Injury Fund liability. The test requires:

1. The employee must have suffered a compensable injury at his present place of employment.
2. Prior to that injury the employee must have had a permanent partial disability or impairment.
3. The disability or impairment must have combined with the recent compensable injury to produce the current disability status.

In the present case, the claimant did suffer a compensable injury at his present place of employment and the claimant has had other injuries and conditions; however, none of these injuries or conditions have prevented the claimant from being gainfully and fully employed until the most recent injury on January 27, 2005. Since suffering the right shoulder injury, the claimant is no longer able to perform his previous truck driving job. I find the claimant's current limitations in his employment are related to his right shoulder injury and not to the other injuries or the pacemaker that he has. The claimant's pacemaker was implanted in 2000 and he continued to work following that procedure as well as continuing to work after all the other injuries or procedures that have been performed. I am unable to find the claimant's current disability is the combination of his other injuries and conditions and the January 27, 2005, injury. I find

the claimant's current disability is related to the January 27, 2005, injury. Therefore, I find the Second Injury Fund bears no liability in any wage loss benefits the claimant is now entitled to receive. Respondent No. 1 remains wholly responsible for the wage loss benefits awarded.

ORDER

The claimant has proven by a preponderance of the evidence that he has sustained a 35% diminished wage earning capacity in excess of the 18% permanent impairment that has been accepted by Respondent No. 1. Respondent No. 1 remains wholly responsible for wage loss benefits awarded. The Second Injury Fund bears no liability in wage loss 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 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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**