

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606191 (06/01/05)

GARY GILLEY, EMPLOYEE

CLAIMANT

AVERITT EXPRESS, INC., EMPLOYER

RESPONDENT

AMERICAN CAS. CO. OF READING PA., CARRIER

RESPONDENT

OPINION FILED JUNE 20, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 4, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represent by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to additional workers' compensation benefits. On February 20, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. As a result of an independent medical evaluation performed on March 21, 2007, by Dr. David N. Collins, claimant amended his contention relative to the amount of his anatomical impairment from 6% to the body as a whole

to 12% to the body as a whole. Respondents continue to maintain that the has not sustained any wage loss and that the extent of his anatomical impairment is 6% to the body as a whole.

The testimony of Gary Gilley, the claimant, Gary Owens, and Jason Brooks, coupled with medical reports and other documents comprise the record in this case.

DISCUSSION

Gary Dale Gilley, the claimant, with a date of birth of September 21, 1948, is a high school graduate. Claimant is a two year veteran of the U.S. Army where he gained experience as a truck driver. Claimant's work experience throughout his adult life has consisted of truck driving, which he has done since November 1967. Claimant explained that he was driving a truck when he got drafted in the Army and that he drove a truck during his military service. Claimant had never attended a vocational or technical school.

The testimony of the claimant reflects that as a truck driver he had experience pulling flat beds, low boys, tankers, freight boxes, dry boxes and just all general freight. Claimant has also hauled steel, gasoline, and machinery. Most of the claimant's driving entailed over-the-road driving.

Claimant testified that he begin his employment with respondent in January 2005, and worked for approximately four (4) months before being out for two (2) weeks. Claimant then returned to the employment of respondent and worked until his he had his surgery. On June 1, 2005, claimant suffered a work-related injury. In describing the mechanics of the injury claimant testified:

Well, I was in Mississippi, and it had been raining. I was backing up and trying to see how close I could get to this place to back up to the line and, like I said, it was raining and muddy, and I'd

go back a little ways and see how much I liked, then get back in my truck and back up some more. And when I started to get out the next time, then my feet were wet, and I slipped on the side of the truck, getting out. (T. 11).

Claimant injured his left shoulder in the accident. Claimant ultimately came under the care of Dr. Henry Stroope, a Jonesboro orthopedic surgeon, relative to his injury.

Claimant continued to work for respondent following the June 1, 2005, left shoulder injury. The claimant stopped working for respondent in February 2006 just prior to undergoing surgery by Dr. Stroope on his left shoulder. Claimant testified that he was not returned to work following his February 2006 surgery.

The testimony of the claimant reflects that during his employment by respondent he was paid by the mile and for loading and unloading. Claimant estimated that his average weekly earning in his employment with respondent ranged from \$1,000.00 to \$1,200.00, depending on the number of miles run. Claimant worked approximately one month in 2006, for respondent before undergoing the February 2006, left shoulder surgery under the care of Dr. Stroope. The W-2 Form received by the claimant from respondent for the year 2006 reflects the claimant's earnings as \$5,400.00. (CX. #3).

Following his February 2006 surgery, by Dr. Stroope claimant was eventually released to return to work, however was not able to return to the employment of respondent. Claimant did secure employment driving a dump truck for Gary Barker of Barker Construction. Claimant hauled dirt, gravel and rock as a dump truck driver. In describing the differences in his job as a dump truck driver as oppose to the over-the-road truck driving he performed for respondent, claimant's testimony reflects:

Well, before, you could drive for four or five hours without stopping, with Averitt, and driving a dump truck, it's just - you may drive four miles from loading to unloading, you'll sit in line on each end, you'll get out of the truck - you're not sitting there for very long at a time at all. (T. 15).

In describing the geographical region that he drove during his employment with respondent, claimant testified:

Well, we run an area, say, from here to Chicago, over into Michigan, plum back down to Florida, back into Dallas, out to El Paso, Texas, back up to Tulsa, just to from the middle of the United States to, oh, I don't know what area you call it, the Mississippi Valley or Ohio Valley. I don't know what part of the country you call it, but we run pretty well all over. We didn't go to the extreme Northeast and we didn't go to the West Coast. But, other than that, we pretty well went anywhere. (T. 15).

As a long-haul driver claimant was restricted to 11 hours of driving at a time with a mandatory 10-hour break thereafter, pursuant to DOT regulations. The testimony of the claimant reflects that while employed by respondents he was able to stop as frequently as he wanted as time permitted. Claimant's testimony reflects other physical requirements of his job with respondents:

Well, we'd have to unload some of it, like appliances. We'd haul a lot of appliances - big washing machines, dishwashers, refrigerators, deep freezers - and the washers and dryers and dishwashers, they'd be stacked on top of each other. You'd have to either reach up and slide - get the top one down to the floor, or else break them over and move them to the back of the trailer, on top of each other. Sometimes you'd have a two-wheel dolly and sometimes you'd just have to drag them.

* * *

Well, you'd have to, of course, open your doors to unload. We had swinging doors, and you'd have to run your dolly down on your drop, or hook up trailers and pull the steel latch - king pin latch, which you had to reach over and - or bend over and reach between the tires and the trailer to reach in and pull it - pull the fifth-wheel to release it, and then climb up on the frame of the tractor to undo your air lines and your light cord - pig tail. (T. 16-17).

Claimant acknowledged being released to return to work activities by Dr. Stroope upon reaching maximum medical recovery. Claimant testified regarding his residual physical complaints with respect to his compensable left shoulder injury:

I can't pick up near what I could before. I can't - I can't reach out and pick up anything to speak of. I can't lift. I can't reach above me. I've got two children. I've got a three-year-old son and a four-year-old daughter we adopted, and I can't even pick them up like I used to could. I can't do near what I could with my left shoulder.

* * *

Yes. It's hard for me to even put my shirttail in. My wife had to help me put my belt in the back loops - I can't reach around there. I can't reach up - I can't reach up or over or to the side - not near like I could. (T. 17-18).

Claimant asserts that his lack of strength and range of motion in his left shoulder would prevent him from performing such tasks as loading and unloading freight as he did in his employment with respondents. Claimant also testified regarding the adverse affect that the residuals of his shoulder injury would have on other tasks that he performed in his employment with respondents:

Well, it'd be hard. I don't know if I could open the doors or not. You'd have to reach up and pull those back, or sometimes you'd get - if you had a trailer with an overhead door, you'd have to reach up to pull it down. I couldn't - I couldn't do that. I don't - I don't believe I could reach in - if I pulled it with my left hand, I couldn't unlatch it - the fifth-wheel. The dolly would be no problem to get down. The air hose would be no problem, but the bars that hold the fifth-wheel in would be - I don't know if I could do it or not. I don't believe I could. (T. 19-20).

The claimant is right hand dominate. Claimant explained the "LTL" means less than load, picking up different pieces of freight resulting in smaller than a load. Claimant asserts that LTL jobs were available at respondents. In distinguishing LTL jobs from his regular job,

claimant's testimony reflects:

They just go from, like, for example, they go from Jonesboro to Nashville, from Jonesboro to Memphis, from Jonesboro to Little Rock, and they might make a circle or they might go there and come back. You never knew what they'd do. You'd hook up your trailers and when you get to the other end, I've seen them unhook them and hook them up to the other trailers that they were bringing back. Where we would just - we would stay under the same trailer till it was unloaded, most of the time. Sometimes we'd swap trailers, but they'd do this every day - the guys that was working the LTL. (T. 20-21).

Claimant testified that LTL driver did not have to unload freight. Claimant explained the due to his injury, if offered a LTL job by respondent, he would be unable to sit for long periods of time noting that just holding the steering wheel causes his shoulder to hurting. (T. 21). Claimant asserts that he is physically unable to do any job that he is aware of that respondent has for truck driving.

Claimant concedes that he has been able to find a job driving a dump truck since September 2006, earning #350.00, per week. The claimant's earnings as a dump truck driver from September 2006, through December 2006, which are contained on a Form 1099, totaled \$5,885.00. (CX. #2).

In describing the difference in the physical demands of his job as a dump truck driver as opposed to his employment with respondents, claimant testified:

The only thing I do as a dump truck, I'm just reach around - there's a little switch about two inches long - I flip it, and pull a button, and when I'm unloaded, I reverse that, and then drive it back home. And for a load, I just sit there while they fill it up with a front-end loader or whatever they're loading it with. I don't do anything there. And when they get me loaded, I'll drive to wherever we're dumping at, and, like I say, flip that switch, and pull a button, and dump it, and reverse it, put it back down, and drive off. (T. 23).

In his employment as a dump truck driver, claimant estimates that the longest period of time that he drives is 20 minutes. Claimant noted that most of the time he is sitting and waiting either to be loaded or to unload.

Claimant has a shop building with “all kinds of tools in it - mechanic tools”. (T. 24).

Claimant testified that prior to his injury he performed mechanic work:

I done some. When I had my own trucks, I worked on them. I didn't do it - I don't have a shop for hire, so to speak. I somebody come out there and asked me to do something or help them to something, I'd do it. (T. 24-25).

Claimant maintains that since his injury he has been unable to work in his shop. Claimant offered, however, that if somebody wants to use his shop, he may tell them how to do something but he is physically unable to do anything.

The testimony of the claimant reflects that Mr. Barker has two dump trucks and that he alternates between the two. Both trucks have manual transmissions requiring him to shift the gears when driving. The trucks have power steering. While shifting the gears claimant drives with his left hand. Claimant testified that while there are automatic over-the-road tractors he has never driven one. Claimant acknowledged that the over-the-road tractors are power steering.

Claimant acknowledged that during his employment with respondent more than half of the customers that he delivered to would off-load the trailer. Claimant also testified that while a lumber services (someone you hire to unload the truck) was available in his employment with respondent individuals were not always there.

Claimant acknowledged that he did not return to respondent and apply for work following his surgery. Claimant maintains that respondent did not have automatic transmission trucks.

Claimant explained his reasoning for not returning to respondent and requesting employment with modifications in his assigned job tasks:

No, I didn't, because I knew they couldn't offer it to me. (T. 29).

In his present employment running a dump truck claimant maintains that he works from 8:00 a.m. until 5:00 p.m. Claimant has a current CDL. The claimant was acquainted with his current employer before his June 1, 2005, compensable injury. As a consequence of the afore, the claimant did not apply for work with any other trucking company. Claimant acknowledged that he has not been told by any of his physicians that he could not drive-the-road.

The testimony of the claimant reflects that as an employee of respondent he was aware of the company's concern that drivers drive safely when operating their vehicles. Claimant testified that in operating the 18-wheel vehicle he normally kept both hands on the steering wheel:

Most of the time you do. Especially, if you're driving in snow or rain, you know, in just about any kind of conditions, you've got to keep a little pressure on the steering wheel. (T. 32).

Mr. Gary Owens, who resides in Lake City and operates a insurance agency, has known the claimant approximately 40 years. Mr. Owens testified that over the past couple of years he has seen the claimant 10 to 12 times a month. Mr. Owens' testimony reflects his observations of the claimant both prior and subsequent to the June 1, 2005, left shoulder injury:

Well, before the injury, of course, knowing him that length of time, and the large number of years he drove a truck, he was consistent with his truck driving - I don't exactly how many years - probably 35, 38 years - his length of the service driving trucks.

* * *

Well, when he was off truck, of course, he worked in his shop quite often, and doing odd-man jobs, and he loved working in his shop,

so he did a lot of work doing that. After the shoulder injury, of course, he's not been able to do anything. Like I said, basically, if somebody come to the shop, he'll sit there and show them how to - tell them how to do stuff and everything - instruct them. But, outside of that, he's not able to do anything himself. (T. 33-34).

Mr. Jason Brooks, a Front Line Leader for respondent, testified that he has been working in the trucking industry for 14 years, four of which in the employment of respondent. In explaining the duties of a Front Line Leader the testimony of Mr. Brooks reflects:

I'm like a supervisor over the LTL side of Averitt. Averitt consists of - they have different type of companies. You have OTR, which is actually where the drivers go from customer to customer, unless there's not any in, they'll run some LTL every now and then, they'll show up late at night. Then you have the LTL side, which is - you've got city and shuttle. Shuttle runs the freight that the city drivers pick up during the day, and we route it to international, depending on where - the destination it's going, either Nashville or Memphis. Then, there's expedited - there's several different little companies within Averitt that I do - special services. (T. 37-38).

The testimony of Mr. Brooks reflects that he is familiar with the duties of both over-the-road truck drivers and less-than-load truck drivers. Mr. Brooks acknowledged that he did not directly supervise the claimant at any time. Mr. Brooks explained that a lumper service is a special service offered in certain places where the driver can actually pay individuals to help unload the truck and get reimbursed. Mr. Brook added that respondent reimbursed the driver for the service.

Mr. Brook testified that he is aware of other drivers of respondent that have had shoulder surgery. Mr. Brooks identified Billy Norris as a driver who has had shoulder surgery and is back at work as an over-the-road driver for respondent. Mr. Brook's testimony reflects that he does not have hiring or firing responsibilities as a part of his job duties.

The testimony of Mr. Brook reflects that he has two (2) years experience as a truck driver, noting that he went into the other side, as far as management. As a truck driver Mr. Brook was a LTL driver - shuttled trailers. From a safety standpoint, Mr. Brooks testified that he would probably put two hands on the steering wheel at all times. The testimony of Mr. Brooks reflects that respondent does have automatic transmission tractors.

The medical in the record reflects that the claimant was initially seen by Dr. Henry F. Stroope, a Jonesboro orthopedic physician, on August 23, 2005, relative to his left shoulder complaint pursuant to a referral from his primary care physician. The August 23, 2005, office note reflects, in pertinent part:

Mr. Gilley is a new patient to me today. He is a very pleasant 56 year old WM who presents with a CC of left shoulder pain. He doesn't really remember the exact date of the injury, but in the spring time he was getting out of his semi tractor trailer truck and had a hold of the grab bar with his left arm and his foot slipped causing him to hang from his left shoulder. He had acute onset of left shoulder pain which has been persistent every since. He can't raise his arm to shoulder height or above without significant pain. He has positive night time pain as well. He has had a recent MRI scan done of his left shoulder.

* * *

ASSESSMENT: Impingement syndrome of the left shoulder with possible rotator cuff tear.

* * *

My recommendation at this point is that of steroid injection into the left subacromial space with Depo-Medrol and Lidocaine and Marcaine to hopefully alleviate his pain and symptoms. In addition to that, we will place him on some yellow Tera-Band exercises and we will see him back here in three weeks, if he is no better, I would highly recommend arthroscopy with rotator cuff repair. (CX. #1, p. 4).

The claimant was seen in follow-up by Dr. Stroope on September 13, 2005, at which time Dr.

Stroope recommended arthroscopic inspection of the rotator cuff with subacromial decompression and rotator repair. (CX. #1, p. 6). On February 9, 2006, claimant underwent the surgical procedure in the form of a left shoulder arthroscopic rotator cuff repair with subacromial decompression under the care of Dr. Stroope. The post operative diagnosis was an acute complete tear of the rotator cuff. (CX. #1, p. 8-10). Claimant was seen in follow-up by Dr. Stroope on a monthly basis following the surgery. (CX. #1, p. 11-16).

On July 26, 2006, Dr. Stroope authored a release allowing the claimant to return to regular work duties. (CX. #1, p. 17). The claimant was again seen by Dr. Stroope on August 8, 2006. The chart note relative to the August 8, 2006, visit, reflects, in pertinent part:

Mr. Gilley is seen back in followup and is now five and a half months out from his rotator cuff repair of his left shoulder. He is doing reasonably well. Most of his pain is now gone. He has not gained back all of his range of motion and is probably unlikely to at this far postop. I have encouraged him in further stretching exercises, but his range of motion of his left shoulder is as follows: forward elevation 150 degrees, external rotation 45 degrees, internal rotation 40 degrees, adduction 40 degrees, abduction 120 degrees, extension 30 degrees.

PLAN

The plan is to encourage him in further stretching exercises to his left shoulder but at this point I believe he has reached maximum medical improvement and we'll dismiss him from the office. He will followup here as needed. (RX. #1, p. 1).

In an August 22, 2006, correspondence to the claimant's attorney Dr. Stroope relayed:

. . . According to the 4th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Mr. Gilley qualifies for an impairment rating of 10% to his upper extremity which is equivalent to 6% of the whole person. (CX. #1, p. 18).

On March 21, 2007, the claimant was evaluated by Dr. David N. Collins, a Little Rock orthopedic surgeon, pursuant to an agreement of the parties. The March 21, 2007, report of Dr.

Collins details the history of the claimant's compensable left shoulder injury and medical treatment received relative to same, to include the February 9, 2006, arthroscopic rotator cuff repair with subacromial decompression on the left. The report further reflects that the post surgical treatment provided by Dr. Stroope as well as 10% impairment to the upper extremity which equates to 6% to the body as a whole. The March 21, 2007, report of Dr. Collins relative to evaluation of the claimant concludes:

PHYSICAL EXAMINATION: He is 5'9", 220# and afebrile. Cervical spine shows physiologic alignment, strength, stability and ROM. Right shoulder shows normal alignment, strength, stability, ROM, translations and peripheral neurovascular status. Left shoulder shows well healed incision. I do not detect visible or palpable atrophy. Active forward elevation to 90 degrees, passive to 120. External rotation active assist to 30, internal rotation to L-5. At 90 of abduction external rotation to 60 and internal rotation to 60. The AC joint is nontender. Biceps tendon intact without provocative signs. Translations physiologic. Power is 5-/5 ER, 5-/5 supraspinatus, abdominal press 5/5 and deltoid 5/5. Peripheral sensory, motor exam is intact.

IMAGING STUDIES: Plain films of the shoulder were obtained. Post surgical changes are noted in the acromion process with conversion to a negative morphology. The humeral head does not ascend and the acromiohumeral interval is not narrowed.

IMPRESSION:

1. Occupation related injury, left shoulder.
2. Status post arthroscopic repair of full thickness rotator cuff tear.
3. Decreased range of motion, left shoulder.
4. Clinical and imaging evidence signifying integrity of the rotator cuff repair.

Mr. Gilley was advised regarding the findings of today's visit and the conclusions.

It would appear that he is well suited for his present occupation. I believe that he has reached maximum medical improvement. He has sustained permanent partial impairment as it relates to his work related injury and its treatment on the basis of anatomic alteration of the skin, subcutaneous tissue, deltoid muscle, acromion process, coracoacromial ligament, sub-

acromial bursa and the rotator cuff. Impairment is equal to 20 % to the upper extremity, equal to 12 % to the body as a whole.

I believe there has been alterations of coracoacromial archway that render his shoulder more weak in forward elevation than one might expect. I believe there is limited capacity to recover active forward elevation even with superb restoration of muscular strength. (RX. #1, p. 4).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 1, 2005, the relationship of employee-employer-carrier existed among the parties.
3. On June 1, 2005, the claimant earned wages sufficient to entitle him weekly compensation benefits of \$466.00/\$350.00, for total/permanent partial disability.
4. On June 1, 2005, the claimant sustained an injury to his left shoulder arising out of and in the course of his employment and for which he has been paid appropriated temporary total disability and medical benefits.
5. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of June 1, 2006.
6. The claimant's healing period ended on or about August 8, 2006, with a residual permanent physical impairment in the amount of 12% to the body as a whole, as a result of the June 1, 2005, compensable left shoulder injury.
7. In addition to his 12% anatomical impairment, when the claimant's age,

education, permanent limitations and restrictions are considered, the evidence preponderated that he has sustained a loss of hearing capacity in the amount of 20% over and above his physical impairment.

8. The respondents have controverted that the claimant's entitlement to permanent partial disability benefits in excess 6% to the body as a whole.

CONCLUSIONS

The compensability of the claimant's June 1, 2005, left shoulder injury is not disputed. Claimant asserts that as a result of the June 1, 2005, compensable left shoulder injury he has incurred a 12 % permanent physical impairment to the body as a whole in addition to wage loss disability in excess of the anatomical impairment. Respondents maintain that the extent of the claimant's anatomical impairment is 6 % to the body as a whole. Further, respondents deny that the claimant has sustained wage loss disability in excess of the 6 % anatomical impairment as a result of the June 1, 2005, compensable left shoulder injury.

The present claim is governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision.

EXTENT OF PHYSICAL IMPAIRMENT

The claimant sustained an injury to his left shoulder on June 1, 2005, when he slipped and fell on the side of the truck as he was getting out. After receiving initial medical treatment under the care of Dr. Joe Stallings and Dr. Scott M. Dickson, who diagnosed his complaint as a left rotator cuff tear, the claimant was ultimately referred to Dr. Henry F. Stroope, a Jonesboro orthopedic surgeon.

On February 9, 2006, the claimant underwent surgery under the care of Dr. Stroope in the form of left shoulder arthroscopic rotator cuff repair with subacromial decompression. The operative report of February 9, 2006, disclosed acute complete tear of the rotator cuff. The rotator cuff had previously been confirmed by diagnostic studies (x-rays and MRI scan) in addition to the history and physical examination.

On July 26, 2006, Dr. Stroope authored a release allowing the claimant to return to his regular duties. During a August 8, 2006, followup visit, Dr. Stroope concluded that the claimant had reached maximum medical improvement and dismissed him from his care. Dr. Stroope recorded the results of the physical examination of the claimant during the August 8, 2006, followup visit, to include measurements regarding forward elevation, external rotation, internal rotation, adduction, abduction and extension regarding the left shoulder. In a August 22, 2006, correspondence Dr. Stroope assessed the extent of the claimant's anatomical impairment relative to the left shoulder injury at 10 % to the upper extremity, which is equivalent to 6 % to the whole person, in accordance with the 4th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment.

The claimant was evaluated by Dr. David N. Collins, a Little Rock orthopedic surgeon, on March 21, 2007, per agreement of the parties. The March 21, 2007, report of Dr. Collins reflects that he had access to the claimant's prior pertinent medical records at the time of the evaluation. Following his physical examination of the claimant, which included measurements, and diagnostic studies, Dr. Collins concluded that the claimant's anatomical impairment as a result of the work-relate injury and its treatment on the basis of anatomic alteration of the skin, subcutaneous tissue, deltoid muscle, acromion process, coracoacromial ligament, subacromial

bursa and the rotator cuff was equal to 20 % to the upper extremity which equates to 12 % to the body as a whole.

Ark. Code Ann. §11-9-704 (c)(1)(B) (Repl. 2002), mandates that any determination fo the existence or extent of physical impairment shall be supported by objective measurable physical or mental findings. Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102 (16) (A) (i) (Supp. 2005). Further, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102 (4)(F)(ii) (a). Finally, “major cause” is defined as “more than fifty percent of the cause.” Ark. Code Ann. §11-9-102 (14)(A).

In the instant claim, the evidence preponderates that the extent of the claimant’s anatomical impairment growing out of the June 1, 2005, compensable left shoulder injury is 12% to the body as a whole. In his March 21, 2007, report, Dr. Collins more than adequately details the basis for the rating assigned. There is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings. *Singleton v. City of Pine Bluff*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 6, 2006). *Coleman v. Pro Transportation, Inc.*, ___ Ark. App. ___, ___ S.W.3d ___ (Feb. 7, 2007). Respondents have controverted the claimant’s entitlement to permanent disability in excess of those corresponding to a 6% anatomical impairment to the body as a whole.

WAGE LOSS/PERMANENT PARTIAL DISABILITY

With a date of birth of September 21, 1948, the claimant is a high school graduate who served two (2) years in the United States Army. Claimant has never undergone any vocational or technical school training. Indeed, the credible evidence reflects that at the time the claimant was

drafted in the Army in 1967, he was driving a truck and during his military service he drove a truck. Claimant was employed by respondent as a over-the-road truck driver from January 2005 through January 2006. Claimant did not return to the employment of respondent following his February 9, 2006, left shoulder surgery.

During the one month in 2006, January, that the claimant worked for respondents he earned \$5,400.00. Claimant's average weekly earnings in the employment of respondents was between \$1,000.00 and \$1,200.00. Claimant secured employment with Gary Barker of Barker Construction as a dump truck driver after his release by Dr. Stroope, which was July 26, 2006. A 1099 received by the claimant reflects his total earnings in 2006 during his employment with Barker Construction was \$5,885.00. The period encompassed by the afore covered late July 2006 through December 2006.

Ark. Code Ann. §11-9-522 (Repl. 2002), provides in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

(2) However, so long as an employee, subsequent to his or her injury, 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)(1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

The credible testimony of the claimant reflects that he is physically able to perform his present job as a dump truck driver, only because of a combination of factors to include the limited amount of time that he spends actually driving, that he is able to get out of the vehicle while it is being loaded and unloaded, and that he does not have to exert physical efforts in unload the load. The claimant is right hand dominate. Claimant noted that while he shift the gears with his right hand while operating/driving the dump truck and drive with his left hand, the majority of the times both hands are on the steering wheel. Claimant added that just having his left hand on the steering wheel over time causes pain in the left shoulder.

In his previous job as a long-haul/over-the-road driver for respondents, claimant was required at time to load and unload his load in addition to driving. The record reflect credible testimony regarding the physical demands of he claimant's job duties in the employment of respondent, which were not unlike those of any other long-haul/over-the-road trucking company or carrier. When the claimant's age, education, work experience, permanent restrictions and limitations are considered, the evidence preponderates that he sustained a lose of earning capacity or wage loss disability in the amount of 20% in addition to his 12% anatomical impairment as a result of the June 1, 2005, compensable left shoulder injury. Respondents have controverted the claimant's entitlement permanent disability benefits in excess to 6% to the body as a whole.

AWARD

Respondents are herein ordered and directed to pay to the claimant permanent partial disability benefits of 32% to the body as a whole, to correspond with the 12% anatomical impairment and 20% wage loss disability, at the weekly compensation benefits rate of \$350.00, as a result of the June 1, 2005, compensable left shoulder injury. Said sums accrued shall be paid

in lump without discount. Respondents may claim credit for sums heretofore paid toward the afore obligation.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses growing out of the June 1, 2005, compensable left shoulder injury of the claimant, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted portion of the indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE