

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508009

JOHN HALL, III, EMPLOYEE	CLAIMANT
SOUTHWEST STEEL PROCESSING, EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED MAY 30, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on April 27, 2007 at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. James A. McLarty, III, Attorney-at-Law, Newport, Arkansas.

Respondent #1 represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear.

STATEMENT OF THE CASE

A hearing was conducted April 27, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits, specifically, claimant's entitlement to permanent disability benefits.

This claim has been the subject of a prior hearing which was conducted on December 22, 2005. The primary issue presented for determination at the prior hearing concerned compensability. An Opinion was filed by this Administrative Law Judge on January 24, 2006, finding the claim compensable and awarding various benefits. Respondents appealed the decision of the Administrative Law Judge. In

an Opinion filed July 13, 2006, the Full Workers' Compensation Commission affirmed the finding of compensability. The Commission modified the Award of temporary total disability benefits, and the Award of reasonable and necessary medical treatment was affirmed in part, and vacated in part. The prior decisions in this claim are now final and the law of the case. Respondents #1 have paid the benefits previously awarded.

A prehearing conference was conducted in this claim on April 11, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the April 11, 2007, Prehearing Order, as amended by a subsequent stipulation concerning the applicable compensation rates.

It was stipulated that the claimant sustained a compensable, gradual onset left shoulder injury, culminating in his disability on February 2, 2005; that respondents #1 had paid appropriate temporary total disability at the rate of \$379.00 per week through April 25, 2005; that the claimant's healing period ended on said date; and that respondents #1 had controverted claimant's entitlement to permanent disability benefits. At the prehearing conference, respondent #2 had not completed its discovery and was unable to stipulate to the compensation rates. However, prior to the hearing, the Death and Permanent Total Disability Trust Fund agreed to the parties' previously stipulated compensation rates of \$379.00 per week for total disability and \$284.00 per week for permanent partial disability. The Prehearing

Order was introduced without objection as "Commission's Exhibit 1."

By agreement of the parties, the following issues were presented for determination:

1. Claimant's entitlement to permanent impairment benefits.
2. Claimant's entitlement to wage-loss disability.

Claimant contended, in summary, that he was entitled to a six percent (6%) whole body impairment as the result of his admitted injury; that, in addition, he was permanently totally disabled or, alternatively, had sustained substantial wage-loss disability in an amount to be determined by this Commission; and that a controverted attorney's fee should attach to any additional benefits awarded.

The respondents #1 contended that the six percent (6%) impairment rating was not warranted and that the major cause of the claimant's impairment and/or disability, if any, was degenerative in nature; and that, if the claimant did sustain any permanent impairment, he was not permanently totally disabled as alleged.

Respondent #2 deferred to the outcome of litigation on the extent of permanent disability. It waived its appearance at the April 27, 2007, hearing.

The claimant testified in his own behalf. The record is composed solely of the transcript of the April 27, 2007, hearing containing an eighteen (18) page documentary exhibit list consisting of several medical exhibits, as well as a vocational assessment performed by Bob White, and introduced as "Claimant's Exhibit A." The record of the prior hearing, as well as the Administrative Law Judge

Opinion filed January 26, 2006, and the Full Commission Opinion filed July 13, 2006, were incorporated by reference and made a part of the record herein.

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 claimant and to observe his 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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that he is permanently and totally disabled within the meaning of the Arkansas workers' compensation laws. Accordingly, respondent #2, the Death and Permanent Total Disability Trust Fund, has no liability in this claim.
4. The claimant has proven, by a preponderance of the evidence, that he sustained a six percent (6%) whole body impairment as the result of his admitted, compensable injury.
5. The claimant sustained a wage-loss disability in the amount of fifty percent (50%) to the body as a whole for an overall permanent partial disability of

fifty-six percent (56%) to the body as a whole resulting from his compensable injury.

6. The claimant has proven, by a preponderance of the credible evidence, that the major cause of his impairment and disability is his compensable left shoulder injury.
7. Claimant's attorney is entitled to the maximum statutory attorney's fee on any permanent disability benefits awarded.

DISCUSSION

_____The relevant facts in this claim are basically undisputed. This claim has been the subject of a prior hearing on the issue of compensability. This Commission has previously determined that the claimant proved that he sustained a gradual onset left shoulder injury which arose out of and during the course of his employment with Southwest Steel Processing, entitling him to appropriate workers' compensation benefits. In order to receive benefits, the claimant has previously satisfied each and every element necessary to establish compensability, including the requirement that the injury was the major cause of the claimant's disability and need for treatment. Respondents #1 now contend that the major cause of the claimant's impairment and/or disability, if any, is degenerative in nature rather than causally related to the admitted, compensable injury. Respondents' contention is simply not supported by either the facts or the law. The record as a whole confirms and supports the finding and conclusion that the major cause of the claimant's impairment and disability is

the compensable injury. The only legitimate dispute concerns the extent of claimant's permanent disability. Clearly, the major cause of the claimant's six percent (6%) permanent impairment rating is the left shoulder injury. In fact, the only cause of the impairment is the injury. Although the claimant may have had some pre-existing degenerative condition, it was not the source of any impairment or disability prior to the claimant's injury. As will be set out further below, aggravation of a pre-existing condition is capable of meeting the major cause requirement necessary to be awarded permanent disability benefits pursuant to Ark. Code Ann. §11-9-102(4)(F)(Repl. 2002).

Two issues were presented for determination. The first concerned claimant's entitlement to permanent impairment benefits. The second issue concerns claimant's entitlement to wage-loss disability. Again, compensability of claimant's injury is undisputed. The claimant's primary treating physician is Randy D. Roberts. Dr. Roberts has, at all times, treated the claimant conservatively. The medical opinion of record indicates that surgical repair might relieve some of the claimant's pain, but that surgery could not repair the injury and that claimant's anatomical impairment was permanent in nature. Dr. Roberts' July 25, 2005, report states:

In response to your letter of July 19, 2005, Mr. Hall has a rotator cuff tear of his left shoulder. A rotator cuff tear is caused by trauma such as lifting, which Mr. Hall was doing extensively in his work at the time he began to have symptoms of a rotator cuff tear. I think to a reasonable degree of medical certainty, that the lifting required by his job resulted in the rotator cuff tear. As a result of this tear, Mr. Hall is on medical leave and is disabled. Even if the tear was repaired surgically, his work is strenuous and he cannot tolerate doing this work without injuring the shoulder again. (Cl. Ex. A, p.7)

Subsequent to the prior hearing on compensability, the claimant was evaluated by Dr. David N. Collins, a shoulder specialist in Little Rock, Arkansas, with Arkansas Specialty Care Centers. Dr. Collins evaluated the claimant at the request of the claims case manager on March 15, 2006. In addition to the physical examination, Dr. Collins reviewed an arthrogram which revealed evidence of full thickness tearing. He report is set out, in part, below:

IMAGING STUDIES: I have reviewed his imaging reports and the arthrogram that shows evidence of full thickness tearing.

To specifically address the issues raised in correspondence from Timothy Villa; indications for operative treatment of the torn rotator cuff are intractable pain and dysfunction unresponsive to conservative care. Mr. Hall reports that he has not had a therapeutic exercise program. He has had an injection and medications. Therefore, it is impossible to say what his response to conservative care may be. If it could be determined that he was having intractable pain and dysfunction and had failed conservative care, he would be considered a candidate for operative treatment. In the absence of sufficient pain or dysfunction of activities of daily living, he would not be a candidate for surgery. The mere presence of a rotator cuff tear is not an indication for operative treatment.

Due to the chronicity of tearing, it is quite possible that the rotator cuff cannot be repaired in a manner that would render it durable nor sufficient to enable him to return to his previous employment in the same capacity.

If Mr. Hall's symptoms do not warrant operative treatment and he is satisfied that he can go day to day under the present circumstances (without the aggravation of his occupation), one could consider him at maximum medical improvement and render an impairment rating. This would be based upon anatomic changes within the rotator cuff. It is impossible to know the extent of rotator cuff tearing without visualizing the cuff directly by arthroscopy or by indirect imaging using MRI. The extent of tearing would determine the impairment rating. (Cl. Ex. A, p.9)

The claimant subsequently underwent a MRI of the left shoulder. In his November 20, 2006, supplemental report, Dr. Collins states:

Mr. Hall has completed MRI of the left shoulder without contrast on 10/16/06. Minimal partial articular surface of the [sic] distal supraspinatus could not be excluded. There was no evidence of full-thickness tearing.

I reviewed correspondence from James McCarty [sic], dated 7/18/06. On the basis of information obtained from his MRI dated 10/16/06, I would conclude that he has permanent partial impairment that is equal to 10% of the upper extremity, 6% to the body as a whole. This is based upon the anatomic changes within the rotator cuff as identified by objective imaging criteria. (Cl. Ex. A, p.12) (Emphasis supplied)

Ark. Code Ann. §11-9-102(4)(F)(ii)(Repl. 2002) provides:

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

The claimant has proven that the major cause of his six percent (6%) impairment was the left shoulder injury. Further, aggravation or a pre-existing condition is capable of meeting the major cause requirement so long as the work-related aggravation was the major cause of some anatomic impairment. See, *Pollard v. Meridian Aggregates*, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

It is herein concluded that the claimant has proven that he sustained a six percent (6%) whole body impairment as the result of his work-related injury. The only remaining issue concerns claimant's entitlement to wage-loss disability.

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. §11-9-522. Permanent disability

compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination concerning the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a living at that time, he is entitled to compensation for permanent and total disability. *Minor v. Poinsett Lumber & Manufacturing Company*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The claimant is fifty-two (52) years old. He has a high school education, having graduated in 1972. The record reflects that the claimant was a below average student, academically. He has no vocational training beyond his formal education. All of the claimant's work history has involved physically demanding

labor. The record reflects that the claimant had a strong work ethic prior to sustaining his left shoulder injury, culminating in his disability on February 2, 2005. The claimant has not returned to gainful employment since February 2, 2005. The record reflects that the claimant was earning \$14.20 per hour at the time of his injury. Admittedly, the claimant has not attempted to seek any work since the injury. The claimant has always performed jobs requiring manual labor. He is significantly restricted from returning to work because he is unskilled and only has the use of his right upper extremity. The claimant considers himself permanently and totally disabled. The claimant did not seek, and respondents did not offer, vocational assistance. The claimant did undergo a vocational assessment at his own expense. The claimant was evaluated by Bob White, a vocational specialist with White & Rowland, Limited, at the request of his attorney. The claimant was evaluated in his home by Mr. White on April 9, 2007. Rather than conduct an exhaustive analysis of Mr. White's evaluation, in summary, he opined that considering the claimant's education and work history performing unskilled labor, together with the injury to his left shoulder, the claimant could no longer engage in substantial gainful employment in any capacity. (Cl. Ex. A, pp.14-18)

Based upon Mr. White's vocational assessment, the claimant contends that he is permanent and totally disabled. Alternatively, claimant maintains that he has sustained substantial wage-loss disability in an amount to be determined by this Commission.

Under the law that existed prior to 1993, to the extent that an injured worker could only perform work that was so limited in quality, dependability, or quantity that a reasonable stable market for them did not exist could be classified as totally disabled because such workers fell within the former odd-lot category of disabled workers. However, Act 796 of 1993 amended the law. In considering a claim for permanent disability, the Commission and the Courts can no longer consider the odd-lot doctrine. See, Ark. Code Ann. §11-9-522(e).

In my opinion, the claimant is capable of returning to work in jobs that are not physically demanding, earning entry level or minimum wage. Accordingly, I find that the claimant has failed to prove that he is permanently and totally disabled within the meaning of the Arkansas workers' compensation laws. However, the claimant has clearly proven that he has sustained substantial wage-loss disability. After a full consideration of the claimant's age, education, and work experience, together with his physical impairment, together with other matters which may reasonably be expected to affect the claimant's future earning capacity, I find that the claimant has sustained a wage-loss disability of fifty percent (50%) to the body as a whole in addition to his six percent (6%) impairment, for an overall permanent partial disability of fifty-six percent (56%) to the body as a whole. Accordingly, I hereby make the following:

AWARD

Respondent #1, Liberty Mutual Fire Insurance Company, is hereby directed

and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$284.00 per week beginning April 26, 2005, and continuing for 252 weeks, representing a six percent (6%) whole body impairment, together with a fifty percent (50%) wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount.

Additionally, claimant's attorney, Mr. James A. McLarty, III, is hereby awarded the maximum statutory attorney's fee on this entire Award, one-half ($\frac{1}{2}$) to be paid by the respondents and one-half ($\frac{1}{2}$) to be deducted from the claimant's benefits pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge