

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F605297

RANDALL D. GARDNER, EMPLOYEE

CLAIMANT

**APEX REDI-MIXED CONCRETE CO.,
EMPLOYER**

RESPONDENT NO. 1

**FIRSTCOMP INSURANCE COMPANY,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JUNE 9, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Mr. William C. Frye, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 13, 2008, the above-styled claim came on for a hearing in Little Rock, Arkansas. A prehearing conference was held in this matter on November 15, 2007, and a Prehearing Order was filed on that same date. At the hearing, the parties agreed that the Prehearing Order filed November 15, 2007, would be made a part of the record herein as Commission Exhibit "1", subject to any modifications made at the full hearing. The Prehearing Order initially set the full hearing for February 12, 2008,

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however by agreement of the parties the hearing was moved to March 13, 2008.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including April 24, 2006.
- 3) The claimant's average weekly wage was \$535.50 per week which would entitle claimant to a temporary total disability rate of \$357.00 per week and a permanent partial disability rate of \$268.00 per week.
- 4) The claimant sustained a compensable left shoulder injury on April 24, 2006, for which the claimant was treated surgically and assigned a 7% permanent physical impairment rating by Dr. Charles Pearce. The 7% rating was accepted by Respondent No. 1.
- 5) Claimant reached maximum medical improvement for his compensable left shoulder injury on April 10, 2007.
- 6) The parties agreed to reserve all issues not outlined herein.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Whether claimant is entitled to wage loss disability benefits over and above his 7% permanent physical impairment rating.
- 2) Attorney's fees.
- 3) Second Injury Fund liability.

At the full hearing, the claimant contended that he sustained wage loss and is entitled to an attorney's fee.

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Respondent No. 1 contended at the full hearing that the claimant underwent a Functional Capacity Evaluation and it was noted that the claimant was having some problems because of his chronic low back pain that had been going on since 1988. That because of these chronic low back problems, it is Respondent No. 1's contention that the chronic low back problems cause the claimant the inability to do manual or physical heavy labor; however, the claimant's inability to do heavy labor is not due to the compensable injury but rather to his chronic low back problem. Respondent No. 1 contends that the claimant was released by Dr. Pearce on April 10, 2007, and given no restrictions and sent back to regular duty, which under the Act would not allow him to have any wage loss disability. Respondent No. 1 contends that claimant has quite a few other health problems, whether they are preexisting or subsequent to the compensable injury, that are actually causing the claimant's inability to work right now, but have nothing to do with this workers' compensation claim. Respondent No. 1 contends that they have paid \$8,442.00 worth of permanent impairment from April 10, 2007, through November 17, 2007. Respondent No. 1 contends in the alternative, that should the claimant be entitled to wage loss disability benefits it would be due to the claimant's preexisting chronic low back problems and the current compensable injury which would give rise to Second Injury Fund liability.

Respondent No. 2 contended at the full hearing that the claimant is not entitled

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to permanent partial disability benefits in excess of his anatomical impairment rating. Respondent No. 2 also contends that there was no combination of impairments or disabilities to prove Second Injury Fund liability pursuant to Mid-State Construction and A.C.A. § 11-9-525. Respondent No. 2 contends that to the extent claimant's preexisting back condition became symptomatic after the April 24, 2006, compensable shoulder injury, it is not a basis for a combination pursuant to Chamberlain Group v. Rios. Respondent No. 2 contends that claimant was diagnosed with several conditions subsequent to his April 24, 2006, compensable shoulder injury which were either unknown or latent at the time of his shoulder injury and are therefore, not a basis for combination to prove Second Injury Fund liability pursuant to A.C.A. § 11-9-525.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.

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- 3) The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in excess of his 7% whole body impairment rating in connection with his April 24, 2006, compensable left shoulder injury. Therefore, the other issues outlined herein are rendered moot.

DISCUSSION

The claimant, age 42, was employed by Apex Redi-Mixed Concrete Company as a driver on April 24, 2006. On that day, the claimant sustained an admittedly compensable left shoulder injury while performing his employment duties. The claimant testified as follows regarding the circumstances which led to his compensable left shoulder injury:

A I was hauling material in the truck for Milam, I guess contracted over to Milam, I – anyway, we was on a job site, and we had to back down a real steep hill, hauling material, and the brakes needed to set up on the truck. I called in for a mechanic. Nobody responded back. One of the other truck drivers come in. I got a wrench from him, because that's what we generally do. You set your own brakes up, if need be, on the road. And I set it on a – I thought it a flat ground surface; it was a parking lot. And I got in between the axles of the truck and started setting the brakes up, and the truck commenced to rolling. And it was either to get run over here, so I decided to jerk out and get out away from the tires, and that's when I sustained a shoulder surgery. (Sic) I ripped something loose then. I don't know how I did it; it happened so fast.

(T. p 22-23, lines 19-25 & 1-9).

The medical records indicate that the claimant saw Dr. Massanelli the day after the incident. Thereafter, the claimant returned to work under light duty restriction

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with the recommendation of wearing a sling on his left arm until further medical treatment. Ultimately, Dr. Massanelli got the claimant an MRI of the left shoulder which showed a SLAP tear, at which time Dr. Massanelli took the claimant off work. The claimant was then sent to a Dr. Charles Pearce who diagnosed the claimant with multiple tears in his left shoulder. Ultimately, Dr. Pearce diagnosed the claimant with the following: (1) Probable labral tear (SLAP lesion); (2) Impingement; (3) AC joint arthrosis; (4) Os acromiale (meso-type). (Claimant's Exhibit 1, page 14). On June 9, 2006, Dr. Pearce performed the following surgical procedures on the claimant's left shoulder: (1) Repair posterior labral tear with Arthrex knotless anchors x 2; (2) Debride superior and anterior labrum; (3) Subacromial decompression; (4) Distal clavicle resection; (5) Preoperative placement of interscalene block done by Anesthesia for postoperative pain control.

Following the claimant's June 9, 2006, surgery the claimant continued to treat with Dr. Charles Pearce, whereby Dr. Pearce allowed the claimant to work under several restrictions. Dr. Pearce also noted that the claimant was not at maximum medical improvement in his August 15, 2006, report found at Claimant's Exhibit 1, pages 23-25. Following the claimant's August 15, 2006, appointment with Dr. Pearce, the claimant underwent physical therapy for approximately four visits and then returned to Dr. Pearce on September 12, 2006. On September 12, 2006, Dr. Pearce

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noted that the claimant was still not at maximum medical improvement and still maintained that claimant work under several restrictions. At that time, Dr. Pearce also recommended that the claimant do a Functional Capacity Evaluation. Before the claimant received his Functional Capacity Evaluation, Dr. Pearce found the claimant at maximum medical improvement on October 10, 2006, and assigned the claimant with a 7% whole body impairment and returned the claimant to his regular duties with no restrictions.

On October 21, 2006, the claimant underwent a Functional Capacity Evaluation which found the claimant could do medium level work and also noted that the claimant gave reliable effort. Following the Functional Capacity Evaluation, the claimant saw Dr. Pearce again on October 26, 2006; at that time Dr. Pearce stated that due to the swelling that the claimant was still having after the Functional Capacity Evaluation and other reasons that the claimant was not at maximum medical improvement and recommended a second surgery for November 1, 2006. On November 1, 2006, the claimant underwent a second surgical procedure on his left shoulder. On November 1, 2006, Dr. Pearce performed the following surgical procedures on the claimant's left shoulder: (1) Open reduction and internal fixation of unstable os acromiale; (2) Left interscalene block done for postoperative pain control done by anesthesia. (Cl. Ex. 1, pp. 58-59). After the claimant's second surgery Dr.

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Pearce continued to treat the claimant and recommended more physical therapy. The medical reports show that Dr. Pearce kept the claimant on restricted work duties for the months of November and December 2006, January, February, and March 2007. Ultimately, on April 10, 2007, Dr. Pearce found the claimant again at maximum medical improvement with a 7% whole body impairment rating and stated that the claimant could return to regular duty on April 11, 2007, with no restrictions. (Cl. Ex. 1, pg. 73).

At the full hearing the claimant testified that although Dr. Pearce released him with no restrictions on April 10, 2007, that he is still severely limited in what he can do with his left shoulder. The claimant contends that he is entitled to wage loss disability benefits in excess of his 7% whole body anatomical impairment as a result of his April 24, 2006, compensable injury.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage loss disability benefits in excess of permanent physical impairment, a claimant must first prove by a preponderance of the evidence that he or she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). The Commission is charged with the duty of determining

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disability based upon a consideration of medical evidence and other matters affecting wage loss, such as claimant's age, education, and work experience.

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence, and other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961).

The issue of wage loss is a close call because the claimant and his wife were both credible witnesses. However, the medical records contained herein are void of any work restrictions after April 10, 2007. I recognize that Dr. Pearce got it wrong on October 10, 2006, when he released the claimant to full duty with no restrictions. However, after the Functional Capacity Evaluation and follow-up visits with Dr. Pearce, Dr. Pearce was quick to change his assessment of the claimant and ordered another surgery on the claimant's left shoulder. Further, the medical records indicate that Dr. Pearce has not been afraid to keep the claimant off work or to put work restrictions on the claimant for nearly a year after his compensable left shoulder injury. Medical evidence is a key factor when determining the issue of wage loss disability benefits. The medical evidence contained in the record herein shows that

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several months after the claimant's second surgery Dr. Pearce found the claimant at maximum medical improvement and placed no restrictions on his future work duties regarding the claimant's shoulder injury. It must be noted that Dr. Pearce did not immediately return the claimant to regular duty after his second left shoulder surgery; but rather, gradually lifted certain work restrictions he had placed on the claimant during the four month period between the second surgery (11/1/06) and Dr. Pearce's ultimate full duty release (4/10/07).

It is also important to note that the claimant's Functional Capacity Evaluation was done before his second surgery. It is true that the Functional Capacity Evaluation found that claimant could only do medium level work. However, another Functional Capacity Evaluation was never performed after the claimant's second surgery. The medical records simply show that after the claimant's last surgery on his left shoulder he was found at maximum medical improvement with no work restrictions on April 10, 2007. There are no medical records in the file which indicate the claimant could not return to doing what he did at the time of his compensable left shoulder injury.

Based upon a consideration of all factors, including but not limited to, medical evidence, claimant's age, claimant's education, and claimant's work experience, I find that the claimant has failed to prove by a preponderance of the evidence that he is

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entitled to wage loss disability benefits in excess of his 7% whole body anatomical impairment rating. Since the claimant has failed to meet his burden of proof with regard to wage loss disability benefits in excess of his permanent impairment rating, the other issues outlined herein are rendered moot.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in excess of his 7% whole body impairment rating; therefore, this claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb