

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E806691/E912648/E912649

AARON JONES,  
EMPLOYEE

CLAIMANT

MEEKS LUMBER COMPANY/  
SEDGWICK JAMES,  
EMPLOYER/TPA

RESPONDENT NO. 1

MEEKS LUMBER COMPANY/  
FIREMAN'S FUND,  
INSURANCE CARRIER

RESPONDENT NO. 2

OPINION FILED AUGUST 8, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE FREDERICK SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondent No. 1 represented by HONORABLE CHRIS MITCHELL,  
Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by HONORABLE CONSTANCE CLARK,  
Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondent No. 1 appeals an opinion and order filed by  
the Administrative Law Judge on November 26, 2002. In that  
opinion and order, the Administrative Law Judge found that  
the claimant experienced recurrences of his May 26, 1998  
shoulder injury, and not aggravations of that injury, on  
April 1, 1999 and on October 30, 1999. Therefore, the  
Administrative Law Judge also found that the carrier on the  
risk on May 26, 1998 (Respondent No. 1) remains liable for



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posterior labrum with a bursectomy of the subacromial bursa.

The medical records indicate that the claimant has experienced residual symptoms including crepitation, painful popping, and limited abduction. However, the claimant returned to work performing loading, unloading, and delivery for a period for Meeks Lumber Company until he was terminated by the company on October 30, 1999. Shortly thereafter, the claimant began seasonal employment in a company engaged in mixing concrete.

**Aggravation Versus Recurrence**

The first issue on appeal involves the exacerbations of the claimant's shoulder symptoms that the claimant experienced at work on April 1, 1999 and again on October 30, 1999, shortly before his termination. In this regard, the respondent employer changed insurance carriers after May 26, 1998. Sedgwick James, the carrier at the time of the May 26, 1998 injury asserts that the exacerbations in April and October of 1999 were aggravations and not recurrences of the claimant's May 26, 1998 shoulder injury, so that the carrier on the risk during these later period (Respondent No. 2) should be liable for any additional benefits awarded to the claimant.







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combined rating of 18% to the upper extremity. Using Table 3 on page 20, the claimant's 18% rating to the upper extremity converts to an 11% rating to the body as a whole.

Since our calculations applying the Guides to the objective medical indicators of permanent impairment in the record exceed the rating awarded by the Administrative Law Judge, and since the claimant did not cross-appeal his 10% award, the Administrative Law Judge's award of a 10% rating is affirmed, and clarified to make clear that the 10% rating is to the body as a whole.

#### **Wage Loss**

Pursuant to Ark. Code Ann. § 11-9-522, permanent disability compensation is paid where the permanent disability effects of a work-related injury incapacitates the worker from earning the wages which he was receiving at the time of injury. In determining 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 the 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); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d (1984); Curry v. Franklin Electric, 168, 798 S.W.2d 130 (1990). 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 livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In the present case, the claimant was 33 years old at the time of the hearing. The claimant completed the 10<sup>th</sup> grade, but later achieved a G.E.D. In addition to his limited education, the claimant has only limited work experience in manual labor working for a drilling operation, working in lumber delivery for the respondent, and working for a concrete mixing company after being terminated by the respondents after his October 30, 1999 shoulder exacerbations.

We note that the claimant's seasonal wage per hour working in concrete mixing at the time of the hearing was

actually higher than his hourly wage while working for the respondent, although total wages are less due to a lack of overtime and due to the seasonal nature of concrete work. In light of the seasonal nature of the concrete work, combined with the claimant's higher hourly wage, the respondents assert that the claimant has not experienced any impairment to his permanent wage-earning capacity as a result of his shoulder injury and surgeries. However, as discussed above, the medical evidence indicates that the claimant has residual shoulder symptoms including crepitation, painful popping, and very limited abduction to only 10 degrees above horizontal arm extension. Therefore, the claimant has in fact experienced persistent documented physical limitations in his shoulder consistent with his hearing testimony, and we find that these limitations in overhead work and shoulder use will have a permanent negative effect in the claimant's ability to work in manual labor. After considering the claimant's relatively young age, his limited education and limited work experience in only manual labor, the nature and extent of his shoulder injury, his surgeries, and his documented limitations, we find that the claimant has experienced a 10% impairment to

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his wage-earning capacity in excess of the 10% permanent physical impairment awarded by the Administrative Law Judge.

Therefore, after conducting a de novo review of the entire record, and for the reasons discussed herein, we find that the Administrative Law Judge's decision must be, and hereby is, affirmed.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority's opinion awarding a 10% permanent impairment rating, as well

as a 10% loss in wage-earning capacity. I find that the claimant has failed to meet his burden of proof.

Regardless of whether the claimant sustained a recurrence or an aggravation of his May 26, 1998, shoulder injury, there is no basis in the record to support an award of permanent disability benefits, either for anatomical impairment or for wage loss. The claimant's treating physician has stated that the claimant has no permanent impairment. The two doctors who performed independent medical evaluations declared that the claimant does have a permanent impairment of his right upper extremity, but neither of these doctors outlined the objective basis for these findings that would support a rating. Further, neither of these doctors' ratings is stated in accordance with the AMA Guides to the Evaluation of Permanent Impairment. Further, even if there is an anatomical impairment rating found to be appropriate, it can only be attributed to the original May 26, 1998, injury. It is clear from the medical records that there are no new physical findings relative to either the April 1, 1999, or October 30, 1999, occurrence.

With respect to the award for the loss in wage-earning capacity, the evidence demonstrates that the

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claimant was physically able to perform his job duties for the respondent-employer after each of his injuries. The claimant presumably would still be working there today had he not been terminated for misconduct. In fact, the claimant is now earning a higher wage working for M & M Concrete than he earned working for the respondent-employer.

The medical records support a finding that the claimant is able to perform manual labor type jobs and that the claimant has voluntarily chosen to maintain seasonable employment. Further, the claimant completed an unemployment application form on November 1, 1999, and in response to the question, "Do you have any disabilities which limit your ability to work?", he responded, "No".

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's award of permanent impairment benefits, as well as wage-loss disability benefits.

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JOE E. YATES, Commissioner