

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211782

JAMES BRADLEY, EMPLOYEE	CLAIMANT
STANDARD REGISTER COMPANY, EMPLOYER	RESPONDENT
THE TRAVELERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 11, 2005

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

Claimant represented by HONORABLE JASON WATSON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE ROBERT MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

This case comes to us on remand from the Court of Appeals. In a decision filed on March 9, 2005, the court remanded this matter for reconsideration of claimant's wage-loss award:

Noting Bradley's receipt of long-term disability benefits, his application for social security disability benefits, and his failure to look for work, the Commission found that he had not exhibited interest in re-education or rehabilitation. The Commission did not acknowledge, however, that Bradley's treating physician ordered a functional capacity evaluation on the date that Bradley came in earlier than scheduled, reporting that workers' compensation had stopped the occupational therapy he had been attending. There was no evidence

that, after Bradley took the results of the functional capacity evaluation to the company and was told that there was no job for him within the limitations of his evaluation, Bradley was offered rehabilitation or job-placement assistance. We hold that there was no substantial evidence to support the Commission's finding that Bradley exhibited no interest in rehabilitation to make himself more competitive in the sedentary labor market.

We hold that Bradley's failure to request a program of rehabilitation or pursue one on his own does not constitute substantial evidence that he waived entitlement to permanent disability benefits in excess of his permanent impairment rating. We hold that the completion of two-and-a-half years of college- when viewed in the context of Bradley's subsequent thirty years' employment at manual labor, his age, his physical limitations, and other pertinent factors-does not constitute substantial evidence that he had the capacity to earn a college degree. Thus, we hold that substantial evidence does not support the Commission's finding that Bradley exhibited no interest in re-education or rehabilitation.

In sum, much of the Commission's decision is based upon findings that are unsupported by substantial evidence, and we hold that reasonable minds could not conclude that Bradley's wage-loss disability was only fifteen percent. Therefore the decision is reversed and remanded. We instruct the Commission to consider all evidence previously presented at the hearing regarding Bradley's age, education, medical condition, work experience, attitude in seeking employment, and other matters that reasonably affect his future earning capacity.

Based on our de novo review of the record, we find that claimant has incurred a substantial amount of wage-loss. Therefore, we find that the decision of the Administrative Law Judge finding that claimant has proven a 60% decrease in his wage earning capacity must be affirmed.

The evidence before the Commission consists of Bradley's testimony, his medical records, and the results of a functional capacity evaluation. Claimant, age 55 at the time of the hearing, testified that he graduated from high school, attended college for two years but earned no degree or diploma, joined the marine corps, and went to work for respondent, Standard Register, when he received his honorable discharge in 1971. Claimant's worked as a forms packer, then as a collator, and finally, at the time of his injury, as a press operator. As a press operator, claimant was required to place rolls of paper in position to go onto the press, prep the press, clean the press, and remove the finished rolls, sometimes stacking the rolls onto a tray. The jumbo rolls that claimant worked with would sometimes weigh in excess of 1600 pounds. While working as a press operator, he was required to reach, pull, and push the rolls into position. Claimant testified that working as a press operator was more difficult mentally than his previous jobs, which were physically harder, and that he had worked his way up to the easiest position available.

Claimant injured his right shoulder in August of 2000 while moving rolls of paper during his work as a press operator. He underwent surgery in September of 2000 and was released to full duty, but his shoulder problems continued when he returned to work. Because of inability to use his right upper extremity, he overcompensated by use of his left arm and subsequently developed tennis elbow syndrome of the left arm. Claimant continued to have problems with the right shoulder despite a second surgery on September 27, 2002, by orthopedist Dr. Mark Powell. Claimant testified that even after the second surgery he has persistent shoulder pain and regularly takes Florifene and Darvocet. Due to his persistent pain, he testified that he has difficulty sleeping and has been "off and on" a variety of anti-inflammatories, nerve pills, and sleeping pills since his first operation.

On March 4, 2003, after undergoing surgery to his right shoulder and conservative treatment on his left elbow, claimant was found to have reached maximum medical improvement and was assigned a 15% permanent impairment rating to the body as a whole. Respondents accepted the 15% impairment rating.

Also on March 4, 2003, claimant underwent a Functional Capacity Evaluation. The FCE report concludes that Claimant, who is right hand dominant, is restricted to

working in sedentary positions and, while engaging in sedentary activity, is significantly limited in using his upper extremities:

Recommended work level: **Sedentary**
 (Dept. of Labor) 2 lb. occasionally lifted bilaterally
 1 lb. or less frequently lifted bilaterally
 1 lb. occasionally lifted unilaterally
 less than 1 lb. frequently lifted unilaterally

Modifications of the recommendations should be made on an as needed basis.

Additional Recommendations:

<u>Activity</u>	<u>Limitation</u>
Sitting	no restriction
Walking	no restriction
Standing	no restriction
Reaching	no use right shoulder infrequent left UE
Reaching Overhead	no use right shoulder infrequent, non-resistive left UE
Twisting	no restriction
Operate a Motor Vehicle	no restriction

<u>Repetitive Movement</u>	<u>Limitation</u>
Fingers	5 minute limit right no use left
Wrist	5 minute limit right no use left
Elbow	5 minute limit right no use left
Shoulder	no right shoulder non-resistive left

Weight Dependent

<u>Activities</u>	<u>Limitation</u>	<u>Weight</u>
Push	Right occasional	7 lb. (force)
	frequent	3 lb. (force)
	Left occasional	3 lb. (force)
	frequent	1 lb. (force)

Pull	Right	occasional	7 lb. (force)
		frequent	3 lb. (force)
	Left	no use left	
Lift	Right	occasional	1 lb. max
		frequent	less than 1 lb.
	Left	occasional	1 lb. max
		frequent	less than 1 lb.
	Bilateral	2 lb. max occasional with elbows at side, palms up 1 lb. frequent with elbows at side, palms up	

(Claimant's Ex. 1, pp. 52-53).

The FCE also includes the following recommendations regarding claimant's ability to work in his post-injury condition:

I recommend that he returns to a permanent job where he can use his right arm at his side, where right arm reaching and overhead reaching are not required, and where 1 pound or less is routinely handled by the right arm. In regard to the use of his left arm, I recommend that he routinely handle 1 pound or less with his palm up during job tasks and that he not be required to perform gripping activities using his left arm. In terms of constant use of his arms, I believe he should seek a position where he does not use his right shoulder or left wrist and hand for repetitive activities.

(Id. at 51).

Claimant testified that he took the FCE results to Tom Kristoffersen of Standard Register. Claimant stated that the company tried to find a job for him, but "it was just something that was over my limitation ... something I

couldn't perform." He testified that Kristoffersen told him that "there wasn't anything out there" that he could do. Claimant stated at the hearing that he did not seek other employment outside of Standard Register after he had received the results of his functional capacity evaluation and was told that the company could not return him to work. Claimant gave undisputed testimony that Standard Register has office facilities in the plant and personnel that perform office duties, but that none of those jobs were offered to him.

Regarding his ability to work in a clerical position, claimant stated that he did not know how or try to operate a computer and would have to receive training to do an office job. He further stated that when he writes, he has to take breaks. While he testified that he thought he could operate a calculator, he explained that "physically I probably could not for a sustained period of time."

Claimant testified that since leaving employment with Respondent, he has not considered retraining or going back to college because he has been trying to get better physically. Claimant acknowledged that his son at one time had a sports recruiting business and that claimant had indicated to his doctor that he might try to work in the office of his son's business. However, claimant explained that he thought his son was just trying to help him out by

offering a job to him and that he would not actually be doing any work.

Claimant also testified that he had planned to work until the age of sixty-five and to retire in 2013, and that he would still be working were it not for his shoulder and elbow. Claimant is currently drawing long-term disability benefits from the respondent, which is off-set by his workers' compensation benefits, and he has applied for social security disability benefits. Claimant also rolled his retirement money into another account until he would be old enough to draw it without penalty.

On remand from the Court of Appeals, we are instructed to consider "all evidence previously presented at the hearing regarding Bradley's age, education, medical condition, work experience, attitude in seeking employment, and other matters that reasonably affect his future earning capacity." The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any 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); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

We find that claimant has incurred a substantial amount of wage-loss as a result of his compensable injuries and, accordingly, affirm the decision of the Administrative Law Judge awarding claimant 60% wage-loss disability benefits.

We find that as a result of claimant's compensable injuries, he is limited to pursuing sedentary positions that only require minimal use of his arms. Specifically, the Functional Capacity Evaluation states, in addition to recommending that claimant only work in sedentary positions, that the use of his upper extremities are limited when reaching, performing repetitive movements with his fingers, wrists, elbows, and right shoulder, and when pushing, pulling, and lifting as described in the above-quoted excerpt of the evaluation. In sum, we find that in addition to being limited to sedentary work positions, claimant, who is right hand dominant, can only use his upper extremities in a very limited capacity as a result of his compensable injuries to his right shoulder and left elbow.

As for claimant's transferable work experience, we find that claimant, who has worked in exclusively manual labor positions since beginning employment with respondent in 1971, has very little marketable job skills. It is undisputed that claimant is no longer employed by respondent because the company does not have a position available for claimant within his restrictions even though they do employ office personnel. Though claimant worked his way up to a less physically strenuous position during his employment with respondent, that position still required claimant to push and pull jumbo rolls weighing in excess of 1600 pounds and clearly exceeds his current physical restrictions. Claimant also testified that he does not have computer or clerical skills. We find that even if claimant did have, or acquired, these skills, his ability to obtain a sedentary computer-based or clerical job is significantly limited by his inability to perform repetitive tasks with his wrist, elbow, and fingers on his left side and inability to perform repetitive tasks for more than five minutes with the fingers, wrist and elbow on his right side, which is his dominant hand. Further, there is no evidence that claimant has ever worked in a sedentary position or in a position in which he was able to keep his right arm at his side and work with his left palm up as it is recommended that he do now. In short, we find that there is no evidence that claimant

has any significant transferable job skills in light of the fact that he is now limited to working in sedentary positions with minimal use of his upper extremities.

We further find that claimant's educational level impairs his ability to procure sedentary employment within his current physical limitations. Claimant completed two years of college before joining the Marine Corps and later beginning employment with Standard Register in 1971. We find that claimant's ability to return to college, some 30 plus years after he began his degree, is significantly limited. For example, his testimony and the results of the FCE establish that claimant would likely not be able to carry or lift the books the he would need for classes, would be significantly limited in his ability to take notes during class and would be inhibited in typing and performing computer tasks necessary in today's educational environment. When we consider that claimant has worked for over thirty years in manual labor positions, his age, his physical limitations, and other pertinent factors, we find that there is no persuasive evidence that he has the capacity to earn a college degree or that he substantially benefits from the college courses he completed years ago.

Respondents argue that claimant has shown a lack of interest in pursuing employment. The Full Commission previously held that "claimant's motivation to return to

work and his lack of interest in pursuing employment impedes this Commission's full assessment of the claimant's loss of earning capacity." The Court of Appeals clearly rejected this analysis. We find that claimant has exhibited motivation to work through his testimony that, but for his physical limitations resulting from his compensable injuries, he would still be working for respondent. The record shows that claimant continued to work for respondent following his initial right arm surgery and until his most recent left arm injury. Claimant attempted to find another position with respondent and it is undisputed that the company cannot employ claimant within his permanent physical limitations. Additionally, there is no evidence that claimant was ever offered vocational rehabilitation or assistance.

In sum, after we consider claimant's permanent physical restrictions limiting his future employment to sedentary positions requiring only minimal use of his arms, his lack of transferable job skills, his lack of marketable education, the impediment that his physical limitations create in pursuing further education, his age, ongoing pain he experiences related to his compensable arm injuries, and all other relevant factors, we find that the Administrative Law Judge's decision awarding 60% wage-loss disability benefits should be affirmed. Accordingly, for those reasons

stated herein, we find that the decision of the Administrative Law Judge should be 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).

Since claimant's injury occurred after July 1, 2001, claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.