

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009923

DEXTER A. FLENORY, EMPLOYEE	CLAIMANT
KLIPSCH, LLC, EMPLOYER	RESPONDENT
WAUSAU BUSINESS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JULY 22, 2005

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

Claimant represented by HONORABLE NELSON SHAW, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed November 30, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on March 26, 1999 at which time the claimant sustained a compensable neck injury at a compensation rate of \$228.00/\$171.00. Medical expenses, temporary total disability benefits and a 10% rating have been paid.

2. The claimant has failed to prove by a preponderance of the credible evidence of record that the compensable injury is the major cause of any disability.

3. The respondents have paid all appropriate benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The claimant sustained an admittedly compensable injury to his left shoulder and neck on March 26, 1999. On September 5, 2002, the Full Commission issued a decision finding that the claimant was entitled to receive an anatomical rating of 10%. The respondent paid benefits on the anatomical rating and the claimant subsequently requested wage loss benefits. On November 30, 2004, the Administrative Law Judge issued a decision denying additional wage loss benefits, in excess of the previously agreed on 10% impairment rating. The claimant is now appealing that decision. I find that the Administrative Law Judge should be reversed and that the claimant should receive additional wage loss benefits in the amount of 15%. As such, when combined with his previously paid 10% rating, would total 25% in permanent partial disability benefits. For these reasons, I respectfully dissent.

The claimant worked for the employer for approximately 23 years. The claimant worked as an inspector and repairman. His job required him to stack damaged

speakers. The speakers weighed from five to 115 pounds. In March 1999 the claimant was attempting to move a speaker and injured his left shoulder and neck. The claimant complained of right and left shoulder pain. The doctor noted the existence of muscle spasms and diagnosed the claimant with a muscle strain. He was released to return to work but was prescribed a muscle relaxer.

On August 2, 2000, an MRI revealed that the claimant had, "BULGING ANTERIORLY AT THE C4-5 AND C5-6 LEVEL." On October 2, 2000, Dr. Giles noted that the claimant's MRI scan showed, "discogenic displacement, greatest at C4-5, midline and left, which does extend toward the left foramen. He also shows a mild bulge at 5-6." On November 6, 2000, Dr Giles noted that the claimant suffered from, "Cervical spondylosis with radiculitis, C4-5 and 5-6." He recommended that the claimant consider having a diskectomy and indicated that the claimant would be unable to work for a period of at least six weeks, at which time he should be able to return to work without restriction. On November 17, 2000, the claimant underwent an anterior cervical diskectomy and arthrodesis at levels C4-5 and 5-6.

The claimant continued to complain of neck pain and tingling and burning in his left arm and leg. However, Dr. Giles, as of February 19, 2001, indicated that he believed the claimant's fusion had been successful and was unable to determine why the claimant continued to have problems. On February 26, 2001, Dr. Giles indicated that he believed the claimant had reached maximum medical improvement but recommended that he consider seeing a rheumatologist for his ongoing symptoms. On April 17, 2001, Dr. Giles composed a, "Medical Summary" and noted that on February 28, 2001, the claimant had an office visit and, "Feels like there is a lump in his neck at the scar." Dr. Giles summarized that he could not explain the symptoms in the claimant's leg but that the claimant's development of pain in his right shoulder and neck after the surgery were, "relatively normal post surgical symptoms that may continue." Dr. Giles also noted, "These symptoms may prevent his return to heavy lifting or strenuous prolonged activity".

The claimant continued to have pain in his neck and shoulders. The claimant complained the pain was accompanied by numbness and weakness in his arms and legs.

The claimant was subsequently diagnosed with spinal myoclonus and was prescribed medication for seizures.

The claimant was eventually discharged from work. As of August 20, 2004, the date of the last hearing, the claimant testified that he was unable to work. Specifically the claimant testified that he is able to stand around an hour or two and that he suffers from weakness from his neck down to his left side and back. The claimant testified that due to his neck pain he also has headaches and that when he walks, it sometimes causes pain. The claimant also said that he is unable to lift more than five or 10 pounds due to the problems associated with his left side. He also said that when he tilts his neck it sometimes "locks" and that he has weakness and pain down his left side. As of the time of the hearing, the claimant was taking blood pressure medication, Paxil for depression, Clonazepam for seizures, and Darvocet for his neck pain. The claimant testified that the pain medication made him drowsy and therefore interferes with his ability to drive.

The sole issue being appealed by the claimant is whether he is entitled to receive additional wage loss benefits pursuant to his admittedly compensable neck injury.

In the previous decision issued by the Commission, it was determined that any problems the claimant suffered with regards to his back or extremities were not related to the compensable injury.

The Majority, in affirming and adopting the decision of the Administrative Law Judge erroneously determines that the claimant lacked motivation to return to work and that because he was able to pursue hobbies and was not under any type of work restriction he should not be entitled to wage loss benefits. The Administrative Law Judge found that any disability the claimant has is related to his back or extremity problems rather than due to his neck injury, for which the respondents accepted a 10% anatomical rating. I find that the claimant does not lack motivation to return to work and instead possesses a desire to work. I further find that while the claimant does have ongoing difficulties due to an unrelated injury, he also has permanent problems associated with the admittedly compensable injury and those problems serve as an impediment for him to be able to return to work. As such, I find that the claimant should be entitled to additional wage loss benefits in the amount of 15%; which when combined with the

claimant's previously accepted 10% impairment rating would equal a permanent partial disability rating of 25%.

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).

The Administrative Law Judge's decision relies heavily on the erroneous conclusion that the claimant lacks motivation to return to work. To support that finding, the Administrative Law Judge notes that the claimant did not request additional training or vocational rehabilitation

services and that he has not attempted to locate another job. I find that the claimant has ongoing problems which prevent him from returning to work as a manual laborer as he had in the past. As such, his failure to look for work in that area is not indicative of a lack of desire to return to work.

With regard to the Majority's finding that the claimant's failure to request rehabilitative services or vocational training is indicative that the claimant lacks the desire to return to work, I note that the Court has previously found that such failure does not equate to a lack of motivation to return to work. See James Bradley v. Standard Register Company, ___ Ark. App. ___, ___ S.W. 3d ___ (March 9, 2005); See also, Second Injury Fund v. Stephens, 62 Ark. App. 255, 970 S.W. 2d 331 (1998); See also Second Injury Fund v. Furman, 60 Ark. App. 237, 961 S.W. 2d 787 (1998).

I further note that while the claimant's doctor had indicated he was able to return to work and that while the claimant said that he had not pursued employment, there is also evidence that the claimant did attempt to return to work but was unsuccessful. The claimant returned to work

after his initial injury and returned to work after his surgery in 2000. However, due to his medical condition, he was unable to perform his job and was discharged. As the claimant returned to work and suffered through pain associated with his compensable injury, I find that the claimant does not lack a desire to return to work.

The respondent and the Administrative Law Judge note that the claimant is not currently under any type of work restriction and reason that because of that, the claimant's failure to look for work is indicative of a lack of motivation to return to work. I find that the claimant still suffers from symptoms associated with his compensable injury and that his failure to return to work is reasonable given his symptoms and inability to perform work similar to that he performed in the past. On April 17, 2001, Dr. Giles opined,

This patient developed chronic neck pain and subsequently had surgical repair. He developed symptoms of pain in the right shoulder and neck after surgery. I feel these symptoms are relatively normal post surgical symptoms that may continue. These symptoms may prevent his return to heavy lifting or strenuous prolonged activity.

On the same date Dr. Giles indicated that he had referred the claimant for treatment with physical therapy, a treatment that the Commission later determined to be at least, in part, needed due to the claimant's admittedly compensable injury. The statement from Dr. Giles indicating that the claimant's neck pain and shoulder pain were "relatively normal" and that they might be ongoing and therefore prevent his ability to return to heavy lifting or strenuous prolonged activity emphasize the fact that the claimant, due to his compensable injury, has ongoing difficulty in seeking employment. It also exemplifies that even if the claimant's subsequent doctors did not specifically restrict the claimant from performing any work, it does not exclude the possibility that the claimant still suffers from neck pain that would make it difficult for him to be gainfully employed.

While the Administrative Law Judge noted the claimant's ability to pursue the hobby of light carpentry, it is unclear how much time the claimant spends pursuing this hobby, nor does his participation in such activity indicate that he will be able to substantially replace his

income. In fact the claimant's testimony indicates that this hobby is not one that he frequently enjoyed. He testified,

Q And you have used those tools to build tables, gun cabinets, shelves and clocks?

A Yes sir.

Q And occasionally even now you are able to perform that work, correct?

A Every now and then.

This testimony is consistent with the claimant's testimony that his pain will, "come and go" and is indicative that while the claimant is able to work to some extent, his condition does hinder his ability to work to at least some extent.

Further, the claimant testified that he currently takes muscle relaxers and pain medication for his neck and that the medication makes him drowsy, indicating that the medication in itself would hinder his ability to become employed again.

Lastly, the claimant, at the time of the hearing was 48 years old, and had worked for the listed employer for over 20 years without difficulty, indicating that he does in fact, possess a desire to work. The claimant has a twelfth

grade education, however, he has no work experience outside of manual labor, which would make it difficult for him to gain employment in a new field or to replace his income if he found such a replacement.

While the claimant does suffer from a numbness in his extremity and suffers from tremors that the Commission has previously determined not related to his compensable injury, I find that the claimant should still be entitled to wage loss benefits due to his admittedly compensable neck injury. The claimant worked for the employer for over 20 years and even returned to work after his injury during the time before his surgery. Only after having a neck fusion, a surgery which resulted in what has previously been determined to be a 10% disability to the claimant as a whole, did the claimant stop working. At that point he was simply unable to work due, in part due to pain in his neck. The claimant is a middle-aged man who has relatively limited education and has no experience performing any work other than manual labor. While he is able to perform some work, I find that his compensable injury, when considered in light of his age, educational background, and work experience, should entitle him to additional wage loss benefits in the

amount of 15%, which when considered in conjunction with with his previously accepted 10% impairment rating would, in essence, make him entitled to 25% in permanent partial disability benefits. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner