

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304405

ALBERT JUNGE, EMPLOYEE	CLAIMANT
TEMPLE INLAND PAPERBOARD, EMPLOYER	RESPONDENT NO. 1
ESIS, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 29, 2005

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross appeals an opinion and order of the Administrative Law Judge filed January 31, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 7, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
3. On February 7, 2003, the claimant earned wages sufficient to entitle him to the maximum weekly compensation benefit in effect at that time (i.e., \$440.00 for total disability and \$330.00 for permanent partial disability).
4. On February 7, 2003, the claimant sustained a compensable injury to his right shoulder.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services at the respondents expense.
6. There is no dispute, at the present time, over the payment of temporary disability benefits, and all such benefits accruing to date has been paid.
7. The claimant's healing period from the effects of his compensable injury ended on or about January 20, 2004.
8. The claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled as a result of the effects of his compensable injury.
9. The greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent physical impairment or permanent disability at the time of his compensable injury on February 7, 2003. Thus A.C.A. § 11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability in this case.
10. The claimant has experienced a permanent partial disability of 45%

to the body as a whole, solely as a result of the effects of his compensable injury of February 7, 2003. This includes permanent partial disability attributable to permanent physical impairment in the amount of 17% to the body as a whole and permanent partial disability attributable to permanent functional disability or loss of wage earning capacity in the amount of 28% to the body as a whole.

11. The respondent employer and carrier have controverted the claimant's entitlement to any permanent disability benefits in excess of a permanent partial disability of 17% to the body as a whole.

12. The respondent, Second Injury Fund, has controverted the claimant's entitlement to any benefits from said Fund.

13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all controverted permanent partial disability benefits herein awarded.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 31, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion as the decision of the Full Commission on appeal.

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 the claimant's injury occurred after July 1, 2001, the 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 in part 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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's decision which found that Respondent No. 2, the Second Injury Fund, had no liability in this claim but that the claimant had sustained anatomical impairment in an amount equal to 17% to the body as a whole and wage loss disability benefits in an amount equal to 28% of the body as a whole, for a total disability rating of 45% to the whole body. After a de novo review of the record, I concur in the Majority's affirmance as to the liability of the Second Injury Fund and the award of benefits based upon the claimant's anatomical impairment. I also concur in the claimant's award of wage loss disability benefits in that I agree he is entitled to at least that amount. However, I dissent from the Majority's denial of awarding permanent and total disability benefits. I, therefore, cannot entirely concur with the Majority's decision.

There is no doubt that the claimant suffered from three debilitating conditions prior to his injury. Specifically, he had been diagnosed with Type II Diabetes, hypertension, and Parkinson's Disease. While Parkinson's Disease was clearly the most serious of

those conditions, all of those problems have been controlled by some combination of diet and medication. Nonetheless, all of those conditions, whether considered singularly or as a whole, clearly limit the claimant's employability. However, I find that the correct way to determine whether the claimant is permanently and totally disabled is to consider how much the claimant's compensable shoulder injury has reduced the degree of employability which remained after the effects of his pre-existing conditions are considered.

In the present case, the claimant has a strong work record consisting of a military career in which he was a jet pilot and various other management and semi-management positions he obtained after leaving the Air Force. The claimant testified that he was not always successful in relying upon his past management ability in finding employment. Most notably, the claimant's employment at the time of his injury was factory production work, a job which did not require any administrative duties. The claimant testified that he was working in this capacity because he was unable to find higher paying jobs. The claimant also stated that, given his health problems, he would have much preferred some type of job in management or which was more sedentary. However, the factory work he found with the employer was the only job he could obtain.

There is little doubt that the claimant's shoulder injury has precluded him from continuing in this type of employment. The claimant has undergone multiple surgeries on his shoulder and his impairment rating has been found to be 17% to the body as a whole. In this regard, I note that the claimant's treating physician has opined that the claimant is subject to repeated tears in his rotator cuff because of his "attenuated tissue." This weakening of the claimant's tissue severely limits his ability to use his right arm in any type of manual labor capacity. The claimant testified without contradiction that his job with the respondent required a considerable amount of heavy lifting and various physical activities. His testimony was that he frequently lifted weights up to 50 pounds and did an extensive amount of reaching and grabbing, occasionally overhead. Even the Administrative Law Judge did not contest this point, and found that the claimant was entitled to a significant amount of wage loss disability.

My only disagreement is that I fail to see what other types of jobs the claimant would be able to obtain, given his age and other health problems. As the claimant pointed out in his testimony, very few employers would be willing to hire a 62 year old man, suffering from Parkinson's Disease, hypertension, and

diabetes, who has no college degree, limited computer skills, and no specialized training other than in administrative jobs in the military and some semi-management employments in the civilian world. Nonetheless, the claimant had been able to find a job working in a factory prior to his accident. Factory work is now a type of employment his compensable injury precludes him from doing.

In finding that the claimant is not permanently and totally disabled, the Majority is presumably adopting the Administrative Law Judge's conclusion that the claimant appeared highly intelligent and personable at the hearing. While this is probably true, such positive qualities do not always equate to employability. Obviously, had the claimant been able to find such a job as is envisioned for him by the Majority, he would have done so. However, the claimant testified that he made numerous attempts to obtain such employment because they were both easier and higher paying than the factory job which he was able to obtain. However, the types of manual labor jobs the claimant could have performed prior to his injury are now foreclosed to him.

In conclusion, I believe that, when the claimant's age, general health, and other factors are combined with the disabling aspects of his shoulder

injury, he has clearly been rendered permanently and totally disabled. For that reason, I respectfully dissent from the Majority's denial of benefits based upon the claimant's permanent and total disability.

SHELBY W. TURNER, COMMISSIONER

Commissioner McKinney dissents, in part, and concurs, in part.

Dissenting and Concurring Opinion

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he sustained an anatomical impairment of 17% to the body as a whole and wage loss disability benefits in an amount equal to 28%, for a total disability rating of 45% whole body. However, I concur with the majority finding that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable injury. I further concur that the Second Injury Fund has no liability in this claim.

Karen H. McKinney, Commissioner