

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309568

ROY D. YANCEY, EMPLOYEE	CLAIMANT
B & R CONSTRUCTION CO., EMPLOYER	RESPONDENT NO. 1
ARKANSAS HOME BUILDERS ASSOCIATION, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 21, 2005

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

Claimant represented by HONORABLE W.H. "DUB" ARNOLD,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE BETTY J. DEMORY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,
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 February 15, 2005.

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

1. There was a compensable injury on August 5, 2003.
2. The compensation rates are \$279/209.
3. Respondent No. 1 accepted the claim as compensable and has accepted a 7% body as a whole impairment rating.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a diminished wage earning capacity.

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

_____I respectfully dissent from the majority opinion affirming the Administrative Law Judge's October 10, 2005 decision, in which, it was found that "Claimant had failed to prove by a preponderance of the evidence that he sustained a diminished wage earning capacity."

_____Based upon my de novo review, it is my opinion that the claimant has met his burden of proving by a preponderance of the evidence that he has sustained wage-loss disability benefits. For that reason, I would reverse the Administrative Law Judge and enter an Order finding that the claimant is entitled to 10% in wage-loss benefits and

appropriate attorney's fees, which should be the responsibility of Respondent No. 1, B & R Construction Company.

The claimant was hit by the bucket of a backhoe and knocked into a metal fence post causing injury to his left shoulder in the course of his employment with B & R Construction on August 5, 2003. He was 58 years old at that time. Diagnostic testing revealed a complete tear of the supraspinatus tendon, and the claimant underwent arthroscopic repair of his rotator cuff tear on September 4, 2003. The claimant experienced fever following the surgery and was placed on antibiotics. The claimant's fever was reduced as a result of the medication. On his September 15, 2003 visit, Dr. Hudson, who performed the claimant's surgery, noted no redness or erythema at the incision site.

In November of 2003, the claimant developed an infection at the incision site. On December 4, 2003, Dr. Hudson performed an irrigation and debridement of the infected operative site including skin, subcutaneous tissue and muscle. Dr. Hudson opined that the claimant had reached

maximum medical improvement on March 18, 2004, and assigned a seven percent (7%) anatomical impairment rating as a result of the claimant's compensable injury and surgery. Dr. Hudson further recommended that the claimant avoid overhead activity and lift no more than 10 to 20 pounds with his left arm. Dr. Hudson continued to follow the claimant until Mr. Yancey moved to Alabama in the spring of 2004.

The claimant began treating with Dr. John Young at the North Alabama Bone & Joint Clinic upon his relocation to Florence, Alabama. Dr. Young ordered an MRI of the claimant's left shoulder which revealed post operative changes but no recurrent rotator cuff tear. Dr. Young has opined that surgical intervention does not need to be considered at this point but it is possible that more aggressive intervention including surgery might need to be considered at some point in the future.

The claimant testified at the January 18, 2005 hearing that he has periodic pain in his shoulder. He stated that his left arm will cramp when he tries to do menial tasks around the house like mowing the yard or weed eating.

He also testified to having restricted strength in his left arm. As an example, the claimant stated: "Like to climb a ladder and reach up and change a light bulb, I can't do that with my left hand because I can't get it up and have it stable enough to work over my head." The claimant sees Dr. Young on an as needed basis.

The claimant has had some vocational school training in electronics. He went to work for Reynolds in 1972. In later years, Reynolds was bought by Alcoa. The claimant worked for Reynolds/Alcoa for 31 years and 3 months. During his years at Reynolds/Alcoa, the claimant held various positions. The claimant began with Reynolds as a computer programmer/systems analyst. He then became the data processing manager. As the data processing manager, he supervised three (3) employees.

The claimant has also been a senior accountant and an acting plant comptroller. He was the acting plant comptroller after a plant closed. His duties included being in charge of demolition, disposal of assets, storing within the plant facility, and reporting that activity to

headquarters. During his time as senior accountant and acting plant comptroller, the claimant did not supervise any employees. His other titles with Reynolds/Alcoa included traffic, payroll, and support service coordination.

After the claimant retired from Reynolds/Alcoa, he began working for the respondent employer in March of 2003 driving trucks and operating heavy equipment. The claimant's hourly wage while working for the respondent employer was approximately \$9.47. The claimant has always been active and was a former football player, so doing hard physical work was the type of work he chose to do for the remainder of his life. Since the claimant's compensable injury, he is no longer able to return to this type of work.

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 benefit 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 a 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 disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' 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). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

There is no dispute that the claimant has proven by a preponderance of the evidence that he sustained permanent physical impairment as a result of his compensable left shoulder injury.

At the time of the hearing, the claimant was 60 years old. He had retired after working for 31 years at Reynolds/Alcoa. Although he was drawing retirement benefits, the claimant obtained his CDL license and returned to the workforce with the respondent employer driving trucks and heavy equipment. The claimant's medical evidence shows that there were complications with his treatment in the form of incision site infection. The claimant was given permanent restrictions for the use of his left arm.

After the claimant reached maximum medical improvement, he inquired with the respondent employer about

the possibility of returning to work; but there were no positions available with his restrictions. The claimant then relocated to Alabama. While in Alabama, the claimant did apply for a position as a bus driver with the University of Alabama, but as of the time of the hearing he had not had a reply.

The claimant met with a vocation rehabilitation specialist, who identified some positions the claimant would be capable of performing under his restrictions. Most of the positions were for part-time employment and were similar but not exactly the type of job tasks the claimant had performed with Reynolds/Alcoa. Although it is true that the claimant can physically perform positions identified by the vocational specialist, there is no indication in the record that he has any experience in customer service or cashiering. It is also very unlikely that these position would be filled by a person of the claimant's age and limited experience in these areas. Also, of note is that the hourly rate of the positions identified had a range from \$6.00 to \$10.00 an hour based mainly on experience. From the

evidence in the record, the claimant does not have the experience to place him in the upper level of this wage range.

In addition, Ark. Code Ann. §11-9-102 (4) (F) (ii) (Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. §11-9-102(14) (Repl. 2002).

Further, "disability" is defined as an "incapacity because of a compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. §11-9-102(8) (Supp. 1999).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. §11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In my opinion, the evidence in the record clearly indicates that the claimant's compensable left shoulder injury is the "major cause" of his "disability". It is true that the claimant has had previous surgeries on his knees and shoulders, but these surgeries did not limit his ability to perform his job duties. It was not until after his compensable left shoulder injury and subsequent treatment that the claimant was put on permanent restrictions and was unable to perform his job duties.

In my opinion, the claimant has proven by a preponderance of the evidence that he is entitled to 10% in wage loss benefits.

For the above reasons, I must respectfully dissent from the majority opinion. I would therefore reverse the Administrative Law Judge and enter an Order finding that the claimant is entitled to a total of 17% to the body as a whole in permanent partial disability benefits (10% for wage loss combined with his 7% anatomical impairment) and appropriate attorney's fees which would be payable by respondents No. 1.

SHELBY W. TURNER, Commissioner