

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E407881

RICK McDANIEL, EMPLOYEE	CLAIMANT
GEORGIA PACIFIC CORPORATION, EMPLOYER	RESPONDENT
SEDGWICK JAMES CLAIMS MANAGEMENT, TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED SEPTEMBER 7, 2006

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

Claimant represented by HONORABLE MIKE HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondent No. 1 represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

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

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

Decision of Administrative Law Judge: Affirmed, in part and reversed, in part.

OPINION AND ORDER

Respondent No. 2, the Second Injury Fund, appeals, and the claimant cross-appeals a decision of the Administrative Law Judge filed on January 13, 2006, finding, in relevant part, that the provisions of Ark. Code Ann.

§11-9-525 are applicable to this claim; specifically in that the claimant had pre-existing impairment or disability at the time of his compensable shoulder injury of February 22, 1994, and that the claimant's compensable shoulder injury resulted in additional impairment and disability for which the claimant is entitled to compensation under the Act. The Administrative Law Judge further found that the "combined" disabilities and impairments from the claimant's two compensable injuries exceed the disability and impairment from the claimant's compensable shoulder injury, considered alone and of itself. Therefore, the Administrative Law Judge found that the respondent employer's liability for the claimant's compensable shoulder injury, considered alone, is the actual anatomical impairment resulting from that injury, which is 18% to the body as a whole. The Administrative Law Judge further found that the degree or percentage of impairment or disability attributable to all injuries or conditions existing at the time of the claimant's February 1994, compensable shoulder injury is 7% as the result of a previous compensable leg injury. Finally, the Administrative

Law Judge found that the degree or percentage of disability or impairment which existed prior to the compensable shoulder injury of February 1994 (7%), combined with or added to the disability or impairment resulting from the claimant's compensable shoulder injury (18%), is 50% to the claimant's body as a whole when wage loss is added. "Thus," concluded the Administrative Law Judge, "the Second Injury Fund is liable for compensation for the 'balance' of 32% to the body as a whole."

In addition to the above, the claimant cross-appeals that portion of the Administrative Law Judge's Opinion wherein he found that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled, either as a result of the effects of his compensable shoulder injury, or as a result of the effects of the combined disabilities and impairments resulting from the compensable shoulder injury together with all disabilities or impairments in existence at the time of that injury.

Respondents No.'s 1 and 3 do not appeal the findings of the Administrative Law Judge.

Our carefully conducted de novo review of this claim in its entirety reveals that the decision of the Administrative Law Judge should be affirmed in part, and reversed in part. First, the preponderance of the evidence clearly demonstrates that the claimant is not permanently and totally disabled as the result of his compensable injury, or of that injury combined with any pre-existing disability or condition. The credible evidence, particularly the medical evidence, demonstrates that if the claimant is currently totally and permanently incapacitated to engage in gainful employment, this disability is the result of unrelated medical conditions which have occurred since the claimant's compensable shoulder injury. Therefore, that portion of the Administrative Law Judge's Opinion wherein he found that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled is hereby affirmed.

Second, the preponderance of the evidence fails to demonstrate that the claimant's pre-existing disabilities and impairments have combined with the disability and impairment from the claimant's compensable shoulder injury, to create a greater disability than from the shoulder injury alone and of itself. Therefore, we find that the Administrative Law Judge erred in assigning liability to the Second Injury Fund pursuant to Ark. Code Ann. §11-9-525. Even if the Second Injury Fund was found to have liability in this claim, a finding which we do not make, the preponderance of the evidence fails to support a finding that the claimant is entitled to a 50% impairment rating to the body as a whole. Furthermore, the Administrative Law Judge miscalculated the percent of liability for which the Second Injury Fund would have been liable. More specifically, the 7% previous impairment plus the 18% impairment for the claimant's shoulder injury equals 25% permanent physical or anatomical impairment. According to the Administrative Law Judge's total award of 50% impairment to the body as a whole, the Second Injury Fund would be

liable for the 25% balance, or wage loss benefits, rather than 32%. However, a review of the record reveals that the claimant has not sustained 25% wage loss above and beyond his anatomical impairment as result of his shoulder injury standing alone, or his combined compensable injuries. Therefore, the decision of the Administrative Law Judge should be and hereby is reversed in this regard.

We find that the claimant has failed to prove that he is permanently and totally disabled as a result of his compensable injury, or of that injury combined with any pre-existing disability or condition. Permanent and total disability is defined as the inability because of a compensable injury or occupational disease, to earn meaningful wages in the same or other employment. Whitlatch v. Southland Land and Dev., 84 Ark. App. 339, 141 S.W.3d 916 (2004); Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 501 (1962) (citing, Ark. Code Ann. §11-9-519(e) (1)). When an injured worker's condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. Id. Further, wage-loss 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); Eckhardt v. Wills Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998). To be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained a permanent physical impairment as a result of the compensable injury. Ark. Code Ann. §11-9- 102(F) (ii) (a); see, also, Smith v. Gerber Prods., 54 Ark. App. 57, 922 S.W.2d 365 (1996); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998); Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor, supra. 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. Such other matters can

also include 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 his employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Id.

The record demonstrates that the claimant's shoulder injury, either standing alone or in conjunction with his knee injury, has not acted to render the claimant permanently and totally disabled.

The record reflects that the claimant sustained a compensable twisting-type injury to his *left* knee in early September of 1976. On September 16, 1976, the claimant underwent a meniscectomy to repair that injury. The claimant agreed that he was placed on no permanent restrictions following that injury. Aside from complaints of occasional stiffness and soreness, the claimant's testimony establishes that he worked for approximately 28 years following his knee

surgery without major complications or additional medical treatment for that injury. Therefore, in the absence of evidence indicating otherwise, it is reasonable to conclude that the claimant's 1976 left knee injury did not limit his ability to engage in gainful employment.

In February of 1994, the claimant injured his left shoulder when he fell off of a ladder at work. After years of conservative treatment under the direction of his orthopedic physician, Dr. Greg Jones, the claimant ultimately underwent a total shoulder replacement procedure on May 27, 2004. In August of 2004, Dr. Jones assigned the claimant with an 18% impairment rating for his compensable shoulder injury, and permanently restricted him from lifting more than 5 pounds. In addition, Dr. Jones recommended that the claimant avoid strenuous activity and perform only sedentary work activities. On January 12, 2005, Dr. Jones reported that the claimant was at maximum medical improvement, and he released him from his care. At that time, Dr. Jones did not change or alter the claimant's impairment rating, permanent restrictions, or employment

recommendations. With regard to the claimant's shoulder injury, therefore, the preponderance of the evidence, particularly the medical evidence, fails to establish that the claimant is unable to work in a light to sedentary position due to that injury.

Further, three of the claimant's treating physicians have indicated that the claimant is permanently disabled from performing regular employment. However, none of these physicians have stated that the claimant's current level of disability is due to his compensable injuries or a combination of those injuries. To illustrate, the claimant's orthopaedic physician, Dr. Greg Jones, indicates in his February 24, 2005, report that the claimant is "medically disabled". Yet, Dr. Jones has further indicated that the claimant's pre-existing knee and subsequent shoulder injuries, considered alone, would not combine to create total disability. Rather, according to Dr. Jones, these combined injuries act only to limit the claimant to sedentary work. Likewise, numerous medical reports from the claimant's general physician, Dr. Steve Edmondson, and his

cardiologist, Dr. A.N. Adjei, reflect that the claimant's current level of disability is the result of *all* of the conditions from which he now suffers. For example, in addition to the numerous health issues that the claimant had prior to his compensable shoulder injury, the medical records reveal that the claimant has experienced several severe and debilitating physical problems subsequent to his compensable shoulder injury. These subsequent problems include vertigo and impaired hearing; two heart attacks and related heart problems; Bells Palsy; and, *right* knee problems, which are caused by degeneration and obesity, and which required surgery.

Taking other factors into consideration, the claimant, who was 49 years old at the time of the hearing, testified that he graduated from high school and completed one semester of college courses. The claimant also admitted that he assists his wife with household chores such as vacuuming and cooking. The claimant admitted that he has not actively sought employment since leaving his job with the respondent employer, and he stated that he would be willing

to retrain for a sedentary position. In fact, the claimant confessed that he "would be willing to do anything" in order to find employment within his current restrictions. The claimant's testimony establishes that he believes himself capable of working and earning meaningful wages, at least in a sedentary capacity. Therefore, the preponderance of the evidence demonstrates that the claimant does not consider himself permanently and totally disabled, which is confirmed by his current level of physical activity. Moreover, the claimant has failed to fully investigate employment opportunities that might be available to him within his current restrictions. Therefore, it is impossible for the Commission to fully assess the claimant's true level of functional ability as it relates to his employability in a light or sedentary position.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. Therefore, the decision of the Administrative Law Judge

denying the claimant permanent and total disability benefits should be and hereby is affirmed.

With regard to the claimant's claim for wage loss disability, we find that the claimant has failed to prove by preponderance of the evidence that his compensable shoulder injury is the major cause of his alleged disability. Ark. Code Ann. §11-9-102(4)(F)(ii). In relevant part, Ark. Code Ann. §11-9-102(4)(F)(ii), provides that if any compensable injury combines with a pre-existing 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 (more than 50%) of the permanent disability or need for treatment. See, also, Ark. Code Ann. §11-9-102(14)(A). Here, as previously discussed, the claimant's testimony and medical records demonstrate that the majority of the claimant's current disability stems from a variety of nonwork-related conditions: some of which existed prior to the claimant's compensable shoulder injury and have worsened with time, and some of which occurred

after the claimant's compensable shoulder injury. For example, the claimant began treating for high blood pressure in as early as 1982. Further, the claimant has suffered two myocardial infarctions since his compensable shoulder injury: the first in 1996 and the second in 2003. The claimant currently takes several daily medications for his heart condition, hypertension, cholesterol, hyperthyroidism, and depression. The claimant admitted that a number of his current physical restrictions are due to his heart condition and the chest pain he experiences from physical exertion. In addition to his heart condition, the claimant has medically documented health problems as a result of varicose veins, obesity, and depression. The claimant testified that he continues to have pain and swelling (lymphadema) in his right leg due to a right leg varicose stripping procedure that he underwent in March of 1991. Moreover, the claimant developed problems with his right knee after, but not related to his compensable shoulder injury, which required surgery on July 6, 2005. Finally, there is no medical basis, in the form of a medical opinion or otherwise, to support a finding

that the claimant's compensable shoulder injury is the major cause of his current level of disability. Based upon the above and foregoing, the claimant has failed to prove by a preponderance of the evidence that his compensable shoulder injury is the major cause of his alleged disability.

Finally, the underlying purpose of the Second Injury Fund statute is to limit the employer's liability to the amount of disability or impairment suffered by the employee during his employment with that employer, and to thereby encourage hiring of the handicapped. Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1,746 S.W.2d 539 (1988); see, also, Ark. Code Ann. §11-9-525. When it is determined that through the combination of a pre-existing condition and a current compensable injury the claimant has sustained a disability greater than would have resulted from either of them alone, the statute provides that the claimant shall be fully compensated for his current disability. Weaver v. Tyson Foods, 31 Ark. App. 147, 790 S.W.2d 442 (1990); see, also, Ark. Code Ann. §11-9-525. The employee is thus fully protected in that the Second Injury

Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. Mid-State, supra. But the statute does not provide that the Second Injury Fund shall compensate the claimant for his pre-existing condition, for which there are several obvious reasons. Id. First, if the pre-existing condition was the result of a compensable injury, the claimant has presumably already been fully compensated for it. Id. But if the pre-existing condition was from a nonwork-related injury, a congenital defect, or disease process, it is not covered by workers' compensation law and neither the employer nor the Second Injury Fund is liable. Id. To hold otherwise would make workers' compensation general disability insurance. Id. Further, this would tend to increase premiums to be paid by insurance carriers and self-insured employers, and discourage the hiring of handicapped workers. Id.

The liability of the Second Injury Fund comes into question after three hurdles have been overcome. Weaver v. Tyson Foods, 31 Ark. App. 147, 790 S.W.2d 442 (1990); citing,

Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1,746 S.W.2d 539 (1988); see, also, Chamberlain Group v. Rios, 45 Ark. App. 144, 871 S.W.2d 595 (1994). These three hurdles are as follows:

(1) First, the employee must have suffered a compensable injury at his present place of employment.

_____ (2) Second, prior to that injury, the employee must have had a permanent partial disability or impairment.

(3) Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

In addressing Second Injury Fund liability, the determination of whether an employee suffered a pre-existing impairment in addition to any disability which resulted from a work-related injury is a factual one to be made by the Commission. Chamberlain Group v. Rios, supra.

In the present claim, it is well established that the claimant sustained a compensable shoulder injury in February of 1994, while working for the respondent employer. This injury resulted in an 18% anatomical impairment to the

claimant's body as a whole. Therefore, the first hurdle set forth in Mid-State, supra, is satisfied in this claim. Second, it is undisputed that the claimant sustained a permanent impairment prior to the 1994 compensable shoulder injury, as the result of a work related injury in 1976. More specifically, the claimant testified that he injured his left knee in 1976 when he slipped while mopping floors at the Dixie Cup. This injury eventually culminated in the surgical repair of the claimant's left meniscus, and a permanent physical impairment rating of 10%, which was reduced by the Administrative Law Judge to 7%. Therefore, the second hurdle delineated in Mid-State, supra, has been satisfied. However, for reasons previously discussed, the claimant has failed to prove by a preponderance of the evidence that his impairments have combined to produce his current disability status. Rather, the preponderance of the evidence demonstrates that the claimant's current disability status is the product of a plethora of nonwork-related health conditions which developed after his compensable injury, but which are not related to his compensable injury.

Moreover, although the claimant has been placed on permanent lifting restrictions due to his total shoulder replacement, he has not been permanently restricted from seeking suitable employment within his restrictions due to this condition. Based on the above and foregoing, we find that the requirements set forth in Mid-State, supra, have not been met. Therefore, we find that the decision of the Administrative Law Judge assigning liability to the Second Injury Fund should be and hereby is reversed.

Based on the above and foregoing, we find that the Administrative Law Judge's finding that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled is hereby affirmed; and the findings that the claimant sustained a wage loss disability for which the Second Injury Fund is liable are hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant is not entitled to wage loss benefits and that the Second Injury Fund would not bear liability if they had awarded such benefits.

In 1976 the claimant sustained a compensable injury to his left knee. The injury was in the form of a tear of the lateral meniscus and required surgery. As a result of the surgery, the claimant was assigned a 10% impairment rating by his treating physician. Despite this injury, the claimant was able to return to work for the respondent; however, on occasion, he suffered from pain and swelling in his knee.

The claimant also had multiple prior injuries sustained before his compensable shoulder injury in 1994. The most significant of these injuries was superficial thrombophlebitis with varicosities which presented around the end of 1984. Ultimately, the claimant's leg condition required him to have surgery in the form of vein stripping

and subfascial ligation of perforating veins in 1991. The claimant was not assigned an impairment rating due to the surgery but had ongoing problems and symptoms associated with his condition even after having surgery. At the time of the hearing, the claimant testified that he still suffered from swelling in his legs when he walked.

The claimant's admittedly compensable shoulder injury occurred on February 22, 1994, when he was knocked off an 18 to 20 foot ladder and forced to try to grab and climb the ladder by using only his left arm. As a result of the injury, the claimant ultimately had to undergo three surgeries to his shoulder. The first occurred on June 17, 1994. At that time the claimant underwent arthroscopic surgery and was diagnosed with a Bankart lesion, glenoid and humeral arthrosis, and chondromalacia. A second surgery was performed on October 26, 1994, which consisted of a subacromial decompression. After having the surgery the claimant was able to return to work but was restricted from lifting more than 40 pounds.

Subsequent to returning to work, the claimant suffered from a myriad of other health complications. In

1996 the claimant was diagnosed with hearing loss. The claimant also had a heart attack on September 30, 1996. The claimant was able to return to work but continued to suffer from cardiovascular problems. In November 2003 the claimant had another heart attack, but was once again able to return to work.

After having the second surgery on his shoulder, the claimant was able to return to work but continued to receive sporadic treatment for pain associated with the injury. Ultimately, the claimant underwent a third surgery to the shoulder. The surgery was performed on May 27, 2004, and consisted of a total shoulder replacement. At the time of the surgery the claimant was 48 years old. On June 30, 2004, Dr. Greg T. Jones, the claimant's surgeon, indicated that the claimant would be restricted from lifting more than five pounds and that he would be unable to perform any repetitive job that involved his left shoulder. Dr. Jones opined that the restrictions would be permanent.

On August 23, 2004, the claimant returned to Dr. Jones for treatment. The note from that date provides that the claimant continued to suffer from a "catch and

pinch", and that the problem appeared to be related to his biceps tendon. Dr. Jones indicated,

I remain fairly adamant that at his size with his body hiatus and with work demands that would likely be imposed; unless a five pound weight limit can be fairly adhered to and that strenuous use of the arm be avoided he not be returned to his previous position as it has been explained to me. These restrictions are indeed permanent in nature.

Another note, dated January 12, 2005, provides that the claimant had permanent restrictions of, "5 pound weight limit, no repetitive or strenuous use of the arm, no overhead work." The doctor further indicated that due to the necessity of trying to make the shoulder prosthesis last longer, he was adamant about imposing lifelong restrictions on the claimant. On February 24, 2005, Dr. Jones reiterated the claimant's restrictions and indicated that he believed that based on the claimant's previous education level and his shoulder condition, he was medically disabled. On the same date, Dr. Jones authored another report indicating that unless the claimant limited his activity to that of a sedentary nature, his replacement would not last.

On March 1, 2005, Dr. A.N. Adjir, examined the claimant and indicated that he could not climb, kneel, or bend. He noted the claimant could occasionally balance, stoop, or reach. He further indicated that the claimant could stand for one hour and sit for approximately 15 minutes at a time.

On April 14, 2005, Dr. Steve Edmonson examined the claimant. He noted that the claimant suffered from ongoing cardiovascular difficulty and, "chronic venous insufficiency of his lower extremities with chronic swelling and discoloration of his right lower extremity greater than the left." He further noted the claimant's shoulder injury and the permanent restrictions that had been imposed due to the injury. He further indicated that the claimant could lift less than 10 pounds on an occasional basis, and could never climb, kneel, or crouch.

At the time of the hearing the claimant testified that he had worked for the respondent for around 30 years. He said he had a high school diploma and one semester of college. He related that his last job had been in preventive maintenance and was held for 10 to 12 years. The job

required the claimant to upkeep machines and to climb, lift, and pull to perform job tasks. The claimant testified that he has been unable to return to work since May of 2004. He indicated that he asked the respondent if they had a job that would meet his restrictions but was told they did not.

The claimant testified that he has ongoing problems with regard to his legs swelling and having pain in his knees. Specifically, he said that when he walks his left knee swells and that it will even swell when he is sitting. He said the pain in his knees has worsened since his shoulder injury and indicated that his legs sometimes swell to the point that he is unable to wear certain types of pants. He also related that he has pain in his shoulder, indicating that his pain is so severe that it wakes him up on occasion. Finally, he related that his physician believes that he will eventually have to have another shoulder replacement.

I find that the decision of the Administrative Law Judge should have been affirmed in part and modified in part. Specifically, I would have affirmed the portion of the decision finding that the Second Injury Fund bears

liability. However, I would have modified the decision of the Administrative Law Judge and awarded the claimant permanent and total disability benefits rather than 50%.

I will first address the issue of the claimant's entitlement to wage loss. In my opinion, the Majority errs in failing to award the claimant any wage loss benefits. There is no dispute that the claimant sustained a compensable injury for which the respondents accepted and paid an 18% rating. Likewise, the medical records show that the claimant was given a permanent restriction from lifting in excess of five pounds, from working overhead, or from repetitive use of his shoulder. As the claimant's only job experience required him to lift, to climb, and to repeatedly use his shoulder and arm, I find there is absolutely no doubt that his shoulder injury negatively impacted his ability to return to work or to replace his wages. As such, I find that the claimant should be awarded permanent and total disability benefits, or that a minimum, he be entitled to receive permanent partial disability benefits in excess of his accepted impairment rating.

I find that after considering the claimant's age, education, past work experience, and all other relevant factors, the claimant is permanently and totally disabled. The claimant's only work experience was in manual labor and performing tasks that would require him to climb, lift, and pull to perform his job. The claimant testified that he still suffers from severe shoulder pain that wakes him at night. In addition he suffers from knee pain and leg swelling which limit his ability to stand or walk. The medical records also show that the claimant can no longer lift anything weighing in excess of five pounds or perform repetitive activities requiring the use of his left shoulder. Likewise, the claimant is limited in regard to his ability to sit, stand, pull, climb, kneel, or crouch, to perform other activities that would be associated with requirements needed to perform a sedentary job.

Additionally, the claimant's treating physician, Dr. Jones, has specifically indicated that the claimant is medically disabled as a direct result of his admittedly compensable shoulder injury. While the other two physicians (Dr. Adjir and Dr. Edmonson) apparently assessed the

claimant's disability by looking at his medical condition as a whole, it appears that Dr. Jones only considered the claimant's shoulder in assessing his ability to return to work.

On February 24, 2005, Dr. Jones indicated the claimant was "medically disabled." On the same date, Dr. Jones, indicated that the claimant would be unable to return to his prior work and that only through "sedentary activity" would his shoulder replacement last. In my opinion, this opinion clearly indicates that the claimant is unable to return to his past work. I note the respondents' argument that the language used by Dr. Jones seems to indicate that the claimant could engage in employment of a sedentary nature. However, in my opinion, Dr. Jones' opinion does not make such an assertion. Rather, in my opinion, Dr. Jones was simply asserting that the claimant needed to use his shoulder as little as possible in order to make sure it lasted as long as possible. In making this conclusion, I note that Dr. Jones never indicates that the claimant would be able to return to work and repeatedly indicates that given the claimant's age and education he is disabled.

Next, I address the argument that the claimant's shoulder injury was not the major cause for the wage-loss benefits that were awarded. As the claimant was able to work prior to having his last shoulder surgery, I find that his shoulder injury was the primary reason for his subsequent inability to work. Additionally, in my opinion, the medical records, specifically, those of Dr. Jones, show that the claimant's shoulder injury was the primary reason for his inability to work.

While the claimant no doubt suffers from a cardiovascular problem and other medical complaints that have developed since the time he sustained his admittedly compensable injury, the evidence indicates that the primary reason for his inability to return to work was due to his shoulder injury. The claimant was able to work until March 2004, which was a short time before having his last shoulder surgery. Additionally, it was only after the claimant had the shoulder replacement that his limitations were increased to the point that he could no longer perform his last job. Likewise, the claimant testified that his shoulder was the primary reason for his inability to return to work. Finally,

I note that Dr. Jones, the claimant's treating physician, opined that in assessing the claimant's condition, he was only considering the claimant's shoulder condition. On February 24, 2005, Dr. Jones indicated, "Given his previous educational level and his current level of disability from the shoulder replacement for posttraumatic arthritis, it is my opinion that he is medically disabled." Accordingly, I find that the claimant's shoulder injury was the major cause for his entitlement to wage loss disability benefits.

The Majority contends that the claimant lacked motivation to return to work and that as a result, they were unable to properly assess his ability to replace his wages. I find that this argument is misplaced, particularly since there was no evidence to refute the claimant's testimony that he attempted to return to work and the employer said they had none available meeting his restrictions. Furthermore, even if the claimant were not motivated to return to work (a finding which I do not make), it is clear that he would likely have difficulty replacing his income since he had no other work experience and had such great physical limitations placed upon him due to his shoulder.

Furthermore, even if one finds that the claimant was not motivated to return to work, this does not bar him from receiving wage loss benefits. The Courts and this Commission have consistently held that even in situations where a claimant is not motivated to return to work, they are still entitled to receive wage loss benefits in excess of their anatomical ratings. See, Douglas Tobacco Products, Co. v. Gerrald, 68 Ark. App. 304 (1999); Johnson v. Latex Construction Co., (Claim No. F301922) Full Commission Opinion Filed August 16, 2005; McKinney v. Plastics Research & Development, (Claim No. E901881) Full Commission Opinion Filed Nov. 10, 2004; Cumbie v. Bost Human Development Services, (Claim No. E913515) Full Commission Opinion Filed July 19, 2004; Weber v. Best Western of Arkadelphia; (Claim No. F100472) Full Commission Opinion Filed Nov. 20, 2003.

In my opinion, the present case is strikingly similar to the case of Bobby Johnson v. R & G Masonry and Northwestern National Casualty Co., ___ Ark. App. ___, S.W.3d ___ (January 4, 2006). In Johnson, the claimant the claimant was 48-years old and had a high school education. He had worked for 12 years as a general laborer and his job

included laying block, stone, and brick. The claimant testified that all his past jobs had been labor intensive. The claimant sustained an admittedly compensable injury in the form of a herniated a disc in his back. He underwent a hemilaminectomy and a subsequent, "foraminal decompressive nueroplasty" as a result of his condition.

The claimant testified that he remained in pain and had difficulty walking more than one half a mile, which hindered his ability to return to work. A vocational rehabilitational specialist met with the claimant and asked him to contact schools and employers. The claimant never enrolled in class or obtained work. There was contradictory evidence regarding the claimant's ability to return to work. One doctor recommended the claimant be retrained for light duty work and that he would be unable to return to his past job. Another doctor indicated the claimant would be unable to return to work without restrictions and limited him to light to medium duty work with no bending, stooping, crawling, twisting, or lifting in excess of 40 pounds. The claimant underwent an IME and the doctor performing it indicated that the claimant would be able to return to his

past job or other jobs. The claimant also underwent a functional capacity examination which indicated that the claimant would be able to return to a light or medium duty job but could not return to his last job. Id.

The respondents accepted and paid a 7% impairment rating for the injury. The claimant brought a claim for additional medical benefits in the form of a dorsal stimulator and permanent and total disability benefits. The Commission found that the claimant had an 8% impairment rating, denied medical treatment, and wage loss benefits in excess of the 8% impairment rating. Id.

On appeal, the claimant argued that he was entitled to receive permanent and total disability benefits or partial disability benefits in excess of his anatomical rating. The Court found that though the claimant was not entitled to permanent and total disability benefits, he was entitled to partial disability benefits. In making this finding they opined,

Moreover, the Commission specifically found that Mr. Johnson established that he most likely cannot return to heavy labor, but that he is capable of working at the light to medium capacity. Based

on this finding, it was incumbent on the Commission to award some percentage of permanent partial wage loss, regardless of whether Mr. Johnson's motivation to return to work was lacking. Mr. Johnson was earning \$15 per hour and working full-duty for R & G Masonry before the compensable accident. He can no longer perform this job, and it is evident that he is entitled to some permanent wage loss in addition to the eight percent permanent impairment found by the Commission.

Id.

The claimant in the present case was 49 years old at the time of the hearing and only had experience working as a manual laborer. He testified that his past work required him to upkeep machines and to climb, lift, and pull to perform his work. Just as in Johnson, these restrictions were directly due to his admittedly compensable injury and precluded him from returning to his past job without significant accommodations. In fact, whereas in Johnson, the evidence was contradictory regarding whether the claimant could return to his past job, in the present case, all doctor's appeared to agree that the claimant would be unable to return to his past job. Most of his doctors indicated he would be totally disabled and only one doctor indicated he

would even be able to work at a sedentary job. Likewise, considering the restrictions on the claimant's shoulder, he undoubtedly suffered from an inability to return to work requiring use of his shoulder or requiring him to lift. As such, this precluded him from returning to almost any conceivable manual labor position.

I note in the present case the claimant suffered from other non-work related injuries. However, the restrictions to his shoulder were not impacted by these conditions. Therefore, even if one finds that the Second Injury Fund bears no liability and that the claimant's current level of disability was not solely due to his shoulder, it is evident that the claimant's inability to return to work was greatly impacted by the restrictions to his shoulder. Accordingly, I find that as held in Johnson, even if the claimant in the present case lacked motivation to return to work and is not entitled to permanent and total disability benefits, the Majority errs in failing to assess at least some wage loss in excess of his accepted impairment rating.

I also find that the Second Injury Fund should have been found liable in this case. The medical evidence and the claimant's testimony indicate that the claimant sustained a previous compensable injury to his knee prior to sustaining the shoulder injury in question. There is no dispute that he received an impairment rating for that injury. Likewise, the claimant testified that he still suffered from pain before and after the accident and a medical record from Dr. Jones indicates that the claimant's knee injury caused greater disability than the shoulder alone. Furthermore, there is no dispute that the claimant also suffers from swelling in his legs, which limits his ability to work. As this condition was present prior to the claimant sustaining his compensable shoulder injury and since it was ratable pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993), I find that the claimant's past injuries combined with his shoulder injury to produce a greater disability. Accordingly, the Second Injury Fund bears liability.

While the claimant was able to return to work and his wages were not diminished as a result of his 1976 knee

injury, there is no dispute that the claimant did sustain an injury at that time and that he received a permanent impairment from that injury. As noted by the Second Injury Fund in their brief, the medical records also indicate that the claimant complained of occasional stiffness and soreness in his left knee during weather changes. Additionally, the claimant credibly testified that despite being able to return to work after the 1976 injury, he still suffered from pain and swelling in his knee, limiting his ability to work in certain capacities.

I also note that the claimant suffered from an injury due to having varicose veins and having surgery to correct that condition. At the time of the hearing, he was still suffering from the effects of that injury. Pursuant to Arkansas Workers' Compensation Law, the employer takes the employee as he finds him. See, Parker v. Atlantic Research Corp., 87 Ark. App. 145 (2004), 145 S.W.3d 383, citing, Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). In this instance it is clear that the claimant's chronic leg swelling and other problems associated with having varicose veins existed well in

advance of his sustaining his admittedly compensable shoulder injury. Furthermore, the medical records and the testimony of the claimant show that he had ongoing difficulties and limitations associated with this condition both before and after he sustained his admittedly compensable shoulder injury. Accordingly, I find that this condition is yet another condition that gives rise to Second Injury Fund liability.

Finally, I note that despite the claimant's ability to return to work after having his knee surgery in 1976, and despite his ability to work with leg swelling, the claimant's treating physician opined that the claimant's leg and knee conditions would produce greater limitations and disability than his shoulder injury alone.

On June 16, 2005, Dr. Jones opined that the claimant's combined leg and shoulder injury pattern, "logically do combine to produce the claimant's "overall" level of disability." He further indicated, "...yes that a person with myocardial insufficiency due to prior myocardial infarction and the chronic leg swelling likely to be present with previous vein stripping in the leg are additional

pathology patterns that do increase the level of disability beyond that of the shoulder and knee residuals." Finally, he indicated, "...it would be fair to say that a person as you have stated with 18% upper extremity and 10% left knee rating issues has more "physical restrictions" but I have made no attempt as is implied in statement to combine these two impairments." As Dr. Jones, the claimant's treating physician has indicated that the injuries the claimant had at the time of his injury increased his disability, I find that the criteria set forth in Mid-State has been met and that the Second Injury Fund does bear liability.

In conclusion, I find that the claimant suffered from a pre-existing injury to his knee for which he received an impairment and continued to have restrictions. He also suffered from swelling associated with that injury and due to having varicose veins. These injuries combined with the claimant's admittedly compensable shoulder injury to produce a greater disability, indicating that the Second Injury Fund is liable. Additionally, the claimant is unable to return to work as a result of a combination of these injuries. Given his limited work experience and considerable physical

limitations, he should be entitled to permanent and total disability benefits or at a minimum, to partial disability benefits since the effects of his shoulder injury prevented him from returning to his past job. Accordingly, I must respectfully dissent from the Majority opinion.

SHELBY W. TURNER, Commissioner