

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E407881

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

OPINION FILED SEPTEMBER 10, 2007

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.

OPINION AND ORDER

This case comes before the Commission on remand from the Court of Appeals. On June 6, 2007, the Court of Appeals issued a decision finding that the Commission had erred in denying the claimant wage-loss benefits in

association with an admittedly compensable shoulder injury. The Court of Appeals instructed the Commission to reconsider the issue of wage-loss benefits, including the issue of whether the claimant was entitled to permanent and total disability benefits. The Court further directed the Commission to issue a decision with regard to whether the Second Injury Fund would bear any liability for payment of any awarded wage-loss benefits.

After a de novo review of the record, we find the claimant is entitled to wage-loss disability benefits in the amount of 50%, and that the Second Injury Fund bears liability for payment of those benefits. Specifically, we find that the claimant suffered from a pre-existing knee impairment and chronic venous insufficiency which combined with his admittedly compensable shoulder injury to produce a greater disability. Furthermore, when considering the claimant's pre-existing conditions in conjunction with his compensable shoulder injury, we find the claimant is entitled to wage-loss benefits in the amount of 50%.

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 other injuries which he 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.

We will first address the issue of whether the Second Injury Fund bears liability. 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 said that his knee swells even when he is sitting down.

Additionally, 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), we find that the claimant's past injuries combined with his shoulder injury to produce a greater disability.

Accordingly, the Second Injury Fund bears liability.

Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988) sets forth the requirements that must be met in order for the Second Injury Fund to have liability. These are as follows:

First, the employee must have suffered a compensable injury at the present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the

disability or impairment must have combined with the recent compensable injury to produce the current disability status.

The last injury "combines" when it, considered with the previous injury, causes a greater disability than the disability produced by the last injury considered alone. See Hawkins Constr. v. Maxell, 52 Ark. App. 116, 915 S.W.2d 302 (1996), *rev'd on other grounds*, 325 Ark. 133, 924 S.W.2d 789 (1996). In other words, if the more recent injury alone would have caused the claimant's current disability status, the Second Injury Fund has no liability. In addition, "where there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of [Second Injury Fund's] liability." POM, Inc. v. Taylor, 325 Ark. 334, 337, 925 S.W.2d 790, 791 (1996). Further, an employee's ability to return to the same work following a prior injury is not determinative of the Second Injury Fund's liability. Id.

The Second Injury Fund argues that they bear no liability because the claimant's knee injury from 1976 did not limit his ability to find gainful employment. In supporting this argument, they note the claimant's ability

to work after the 1976 injury and his ability to carry on in his daily activities. Respondent No. 1 rejects this argument, contending that the Second Injury Fund bears liability.

In our opinion, the record shows that the Second Injury Fund bears liability in the present claim. 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.

We 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. 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, we find that this condition is yet another condition that gives rise to Second Injury Fund liability.

Finally, we 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, we find that the criteria set forth in Mid-State has been met and that the Second Injury Fund does bear liability.

We further find that the claimant is entitled to receive wage-loss benefits in the amount of 50%. The record clearly demonstrates that the claimant's pre-existing vein insufficiency, knee surgery, and shoulder injury have rendered him unable to return to his former work. The claimant has only worked in one job, and despite his efforts to return to employment with the respondent, they have no work for him due to his condition. Furthermore, given the claimant's chronic leg swelling, inability to stand for more than extremely limited periods of time, and inability to perform virtually any work with his left shoulder or extremity, it is apparent that the claimant will have difficulty in returning to the workforce. However, we note

the medical records indicate the claimant would be able to return to sedentary work and the claimant's testimony that he would be willing to do so. As such, we find the claimant is not permanently and totally disabled.

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.

We find that after considering the claimant's age, education, past work experience, and all other relevant factors, the claimant's ability to work has been significantly damaged. 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. There is no dispute that the claimant is now unable to lift more than five pounds due to his shoulder injury. Additionally, he is unable to climb, kneel or bend, further evidencing the severity of his pre-existing conditions. Finally, Dr. Adjir indicated the claimant could not sit for more than 15 minutes or stand for more than one hour. Finally, when considering the claimant's testimony that he still suffers from severe shoulder pain that wakes him at night, it is even more apparent that his condition is so severe that he

will have difficulty returning to work.

Additionally, the claimant's treating physician, Dr. Jones, has specifically indicated that the claimant would only be able to engage in sedentary work as a 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." However, on multiple other occasions, he indicated the claimant would need to limit his activities to sedentary type work. Certainly when considering the opinion of Dr. Jones, it is apparent he believed the claimant would be unable to return his prior workforce as a direct result of his shoulder injury. Furthermore, when considering the other limitations imposed on the claimant due to his pre-existing leg swelling and knee condition, it is even more apparent the claimant is unable to return to manual work.

Given the claimant's various limitations due to his pre-existing conditions, his shoulder injury, his lack of experience in anything other than manual labor, the fact

that he has only worked for one employer, and has never worked in any sedentary capacity, we find that the claimant's disability is such that he will only be able to perform sedentary work.

The respondents argue that the claimant believed he was able to return to work, indicating that he is not permanently and totally disabled or entitled to wage loss. We find this argument to be unpersuasive. Certainly, the claimant should not be penalized because of his willingness to at least admit he was willing to try to work. However, the fact remains that the claimant's physicians believe he is unable to work except in a sedentary capacity, and despite his attempts to return to work, the claimant has been unsuccessful. The claimant said that he had contacted the respondents for work, but that they had none available that would accommodate his medical limitations. We find that this testimony shows the claimant is motivated and that if he was capable, he would return to his prior place of work.

Finally, we address the argument that the claimant's disability is caused by conditions that were sustained subsequent to the compensable injury he sustained. While the claimant no doubt suffers from a cardiovascular

problem and other medical conditions 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 and his inability to sit or stand. These are all conditions that existed at the time of his injury, and therefore are the basis for his entitlement to wage loss benefits.

Specifically, we note 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, we 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."

Given the claimant's prior work history, his inability to lift more than five pounds or to use his arm in a repetitive fashion is a devastating blow in regard to his ability to return to work. Additionally, the claimant is no longer able to stand for more than one hour or sit for more than one hour due to his leg swelling. These limitations are directly related to the claimant's pre-existing knee condition and pre-existing vein insufficiency. As with the claimant's shoulder impairments, these limitations also severely impede the claimant's ability to return to work.

In conclusion, we 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 anything but sedentary work as a result of a combination of these injuries. Given his limited work experience and considerable physical limitations, he is entitled to wage loss benefits in the amount of 50%.

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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 Commission, the claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 as provided by Ark. Code Ann. § 11-9-715 (b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. 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. The claimant's orthopaedic physician, Dr. Greg Jones, indicated in his February 24, 2005, that the claimant was "medically disabled". Dr. Jones has further indicated that the claimant's preexisting knee and subsequent shoulder injuries, considered alone, would not combine to create total disability. 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.

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. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). 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).

Taking wage-loss 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 assisted 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 believed himself capable of working and earning meaningful wages, at least in a sedentary capacity. However, the claimant has failed to fully investigate employment opportunities that might be available to him within his current restrictions.

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 which existed prior to the claimant's compensable shoulder injury and have worsened with time, and some which occurred after the claimant's compensable shoulder injury. 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 his compensable shoulder injury, which required surgery on July 6, 2005.

After consideration of the claimant's age, education, work experience, medical evidence, as well as other matters which may reasonably be expected to affect his wage earning capacity, I find that the claimant has sustained some wage loss disability as a result of his compensable injury; however, I must respectfully disagree with the majority's finding of a 50% wage loss disability. In my opinion this finding must impermissively take into consideration the claimant's post injury medical conditions.

McDaniel - E407881

24

Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner