

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410668

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| JIMMY L. PERREN, EMPLOYEE | CLAIMANT |
| PILGRIM'S PRIDE CORPORATION, EMPLOYER | RESPONDENT NO. 1 |
| GALLAGHER BASSETT SERVICES, TPA | RESPONDENT NO. 1 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 2 |

OPINION FILED SEPTEMBER 27, 2007

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

Claimant represented by the HONORABLE PHILLIP WELLS,
Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL R.
MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY W.
RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of
the Administrative Law Judge filed December 29, 2006.
In said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on October 3, 2003 and at all other relevant times.
3. Claimant sustained a compensable injury to his right shoulder and left wrist on October 3, 2003.
4. Claimant's healing period ended on June 21, 2004.
5. Claimant's permanent partial disability rate is \$320.00.
6. Respondent #1 accepted and made payments toward a 10% permanent impairment rating to Claimant's right shoulder.
7. Claimant could not have been permanently and totally disabled before January 9, 2005.
8. Respondent #1 controverts any additional benefits over those benefits due for Claimant's 10% permanent impairment rating.
9. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits. In the course of securing unemployment compensation benefits, he represented that he is able and available for work, although he is disabled. There is no indication in the record that Claimant cannot perform work at least at the sedentary level.
10. Claimant is motivated to seek further employment and has a positive attitude in looking for work. Claimant credibly testified about his continuing efforts to find work; his former boss considers Claimant a "good worker" worthy of retention.

11. Respondent #1 did not sustain its burden of proving that Claimant received a bona fide and reasonably obtainable offer of employment. Claimant credibly testified that he physically could not drive a standard-shift truck safely, due to his right shoulder condition. Claimant's boss did not dispute the Claimant's view of his physical limitations and agreed that it would not be safe for Claimant to shift with his left hand while driving with his left hand. Given Claimant's work ethic, it is difficult to believe that he rejected a truck driving job that he could have performed.
12. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to forty per cent (40%) to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. He could perform his job prior to his compensable injury; since then, the medical evidence, Claimant's testimony, and McDougald's testimony all prove that Claimant cannot perform the extent of physical labor that he could beforehand.
13. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715, to be paid by Respondent #1.

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 December 29, 2006, 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 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a 40% wage loss disability. Based upon my de novo review of the entire record, without given the benefit of the doubt to either party, I find that the respondents sustained their burden of proving by a preponderance of the evidence that they extended a bona fide and reasonably obtainable offer of employment at equal to or greater wages than the claimant was earning at the time of his compensable injury which the claimant declined. Accordingly, I find that the claimant is barred from receiving benefits in excess of his physical impairment rating. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

It is undisputed that the claimant sustained a compensable right shoulder injury on October 3, 2003, in

the nature of a torn rotator cuff. The claimant continued to work with this injury until he underwent surgery to repair his shoulder on November 18, 2003. The claimant experienced a post surgical wound infection from surgery and had to return to the hospital for a debridement and draining of the seroma. After being discharged on November 23, 2003, the claimant returned to work in a light duty capacity.

The claimant continued with his follow-up care and underwent physical therapy while working light duty for respondent employer. The claimant developed adhesive capsulitis and had to undergo closed manipulation of the right shoulder under general anesthesia on February 24, 2004. Under anesthesia, claimant's treating physician, Dr. Jeffery Angel, noted, "The patient had good full range of motion, 180 degrees of active range of motion and forward flexion and good 45 degrees external rotation, internal rotation." On June 21, 2004, Dr. Angel assessed the claimant as having "healing right shoulder with some residual disability." At that time, Dr. Angel noted that the claimant "lacks flexion above 90 degrees. Abduction above 80 degrees. He is neurovascularly intact. He does not have much pain." Dr. Angel released the claimant to return to full duty with a permanent restriction of "No overhead

lifting permanent." In addition, Dr. Angel assigned the claimant a 10% whole body permanent impairment rating.

Upon being released to full duty, the claimant was advised that his position as a mechanic was being eliminated for economic reasons; however, the claimant was offered a full time driving position. In this regard, Richard McDougald, the Feed Mill Manager, testified:

We found him another job, a driving job. He had a valid CDL, which is something that's very - - a valid CDL, and he could drive, which is something that's very, very hard to find in Independence County, and then somebody that's dependable and will come to work. It's very hard to get.

We wanted to retain Mr. Perrin in hopes that, if he would try this job, this driving job that we offered him, in hopes that maybe somewhere in our facility another job that we could put him back in and that's what we were trying to do in offering that job.

After assessing the claimant's permanent restriction of no overhead lifting, Mr. McDougald determined that driving a truck was a job which the claimant could perform within his permanent restrictions. Mr. McDougald described the physical requirements of the driving job as follows:

Well, we've got nine Mack trucks. They're bulk-type trailers. They've all got roll-type tarps on the top, and you do have to roll the tarp back.

The truck is hydraulic driven, as Jim stated earlier. All the - - bottom four augers and the uprights and everything are all run by hydraulics, plus we have cab controls where you don't even have to get out of the truck now to run the hydraulics. You can run them from the truck.

The only thing you do have to do is get out, open your feed bin lid, which can be done with either hand, and then you have to open you bottom slides on your truck doors, which some trucks now we have ratchets, and some have a bar that's about that long (indicating) made out of lightweight aluminum that just clicks down like this. And basically that's it.

Mr. McDougald testified that all of the physical requirements of the driving job that he described could be done with one hand and did not require any overhead lifting.

The claimant declined the job offer without even attempting to see if he could physically perform it. According to the claimant he could not drive the truck because they all had automatic transmissions and he stated that he could not shift gears with his right arm. In this regard, the claimant testified that he had

an automatic Chevy truck that he drove back and forth to work while on light duty that he had to shift with his left hand. Although the only restriction placed upon the claimant by Dr. Angel was no overhead lifting, the claimant testified that he should have been restricted from no climbing and no heavy pulling with his arm as well.

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining wage loss disability, the Commission may take into consideration the 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 his employer and negative

attitude in looking for work are impediments to our full assessment of wage loss.

Arkansas Code Annotated § 11-9-522 states in pertinent part:

(b) (1) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

(c) (2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which in fact, no longer exists, or exists because of discharge for misconduct, in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

The record is devoid of any evidence that the claimant is, or has been determined to be, currently totally unable to work. On the contrary, when the claimant was released to full duty by Dr. Angel, the

only permanent restriction placed upon the claimant by Dr. Angel was "no overhead lifting." Dr. Angel was aware of the fact that the claimant continued to work for respondent employer performing light duty while within his healing period. Both the claimant and Mr. McDougald testified that the company worked with and around the claimant's restrictions while he was on light duty. However, a review of the medical records introduced into evidence reveals that the only restrictions placed upon the claimant while he was in his healing period were of "restricted work status for the next week where he doesn't use his right arm" which was placed upon the claimant by Dr. Ron Bates, the company physician, on the day of the claimant's injury. Although the claimant received follow-up care from Dr. Angel after his surgery and he actively participated in physical therapy while under Dr. Angel's care, the record is void of any restrictions placed upon the claimant by Dr. Angel while the claimant was working light duty. Thus, it is conceivable that the restrictions the claimant thought he had of no climbing and no heavy pulling were only temporary restrictions verbally relayed to the claimant by Dr. Angel. However, in order to find that the claimant had any restrictions after he was released to return to work at maximum

medical improvement other than the one specific restriction placed upon the claimant of "no overhead lifting permanent" would require speculation and conjecture. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Given the only restriction placed upon the claimant, I find that the respondents extended a bona fide and reasonable obtainable offer of employment to the claimant making wages equal to or greater than that which he was earning at the time of his compensable injury. I further find that the claimant's refusal of the driving position was not justified. There is no evidence whatsoever that this position required any overhead lifting. The claimant testified that he had driven his truck with an automatic transmission to work while he was still within his healing period. Although the record is devoid of any written restrictions placed upon the claimant during his healing period, it would have been reasonable for the claimant to refrain from using his right arm. However, once the claimant was released and found to have attained maximum medical

improvement, it would no longer have been reasonable for the claimant to not use his right arm. In fact, Dr. Angel noted that while the claimant had some popping in his arm at the very top, "once activated, he can keep it up there" indicating that the claimant had use of this arm. Moreover, while not at 100%, Dr. Angel noted the claimant's range of motion in his June 21, 2004, report in which he rated the claimant with a 10% whole body impairment. Accordingly, at the time of his release and subsequent refusal of employment, the medical evidence reveals that the claimant, in fact, had use of and movement in, his right shoulder. This is further supported by the claimant's wife's testimony in which she confided that the claimant continues to ride his motorcycle; however, she attempted to mitigate this testimony by adding that the claimant cannot ride without the cruise on if he is going very far. Nevertheless, in order to even ride a motorcycle at all, both of the claimant's upper extremities must be fully extended to operate the clutch with his left hand, and the throttle and right front brake with his right. After getting up to cruising speed, the claimant may have been able to eliminate the full time extension of his right arm by engaging the cruise control, but that does not diminish the fact that operation of a

motorcycle requires an effort of both upper extremities to not only steer, but to also control the speed and brakes. In my opinion, operation of a motorcycle requires even more shoulder movement and extension than merely shifting gears in an automatic truck. At least when driving the truck, the shifting does not put a continuous strain and extension on the shoulder joint as the right arm can be relaxed and rested after the truck is shifted into the right gear.

In finding that the claimant was not justified in refusing the offer of employment as a driver, I acknowledge the subsequent restriction placed upon the claimant by Dr. Angel on January 19, 2005, which states, "I think he cannot do manual labor/construction." In my opinion, this restriction is overly vague. Moreover, it fails to differentiate between the different levels of physical requirements in manual labor jobs. Furthermore, as described by Mr. McDougald, the driving position offered the claimant fall more within a sedentary type position and not a manual labor job. Therefore, I do not find that this restriction placed upon the claimant after he refused to the driving job, in any way, affects the claimant's ability to perform that job.

I also note that the claimant was referred to Dr. Bruce Safman and continued to obtain medical treatment after he reached maximum medical improvement. In addition to right shoulder pain, Dr. Safman also treated the claimant's lower back pain. Dr. Safman administered trigger point injections to address the claimant's pain which provided the claimant with some relief. With regard to the claimant's shoulder pain, Dr. Safman opined that the claimant tried to compensate for his pain by increasing his scapular rotation. After only two months of treatment, Dr. Safman noted that the claimant no longer had tenderness and that his pain had improved. Absent from any of Dr. Safman's records, however, is a finding that the claimant could not use his right shoulder or upper extremity. Thus, while the claimant continued to receive treatment to address his pain complaints, there is nothing in the record to indicate that the claimant's physical condition or his pain, in and of itself, prevented the claimant from working within his permanent restriction of no overhead lifting.

The Administrative Law Judge found the claimant to be a credible witness. I do not dispute this finding. However, I must disagree with the finding that the claimant was motivated to seek further

employment and had a positive attitude in looking for work. Admittedly, the claimant applied for various positions while he was drawing unemployment benefits as he was legally obligated to do. This does speak well of the claimant's credibility. However, there is no evidence that the claimant actually put in applications with employers that were actively seeking new employees. The claimant was described by Mr. McDougald as a good worker whom he tried to retain even after the compensable injury and downsizing at the mill. Rather than attempt the job as a driver and try to stay on with the mill until another job came open, the claimant simply flat-out refused the offer. Thus, with regard to finding whether the claimant was actually motivated to seek further employment and whether he, in fact, possessed a positive attitude in looking for work, the record is equivocal, at best. Accordingly, I find that pursuant to A.C.A. § 11-9-522(b)(2), the claimant is barred from receiving any permanent partial disability benefits in excess of his physical impairment rating.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner