

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507263

GEORGE JOHNSON, EMPLOYEE	CLAIMANT
CENTRAL MOLONEY, INC., EMPLOYER	RESPONDENT NO. 1
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 18, 2008

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed August 20, 2007.

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

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-

carrier existed on January 13, 2004 at which time the claimant sustained a compensable shoulder injury at a compensation rate of \$377.00/\$283.00. Medical expenses, temporary total disability benefits and a 4% impairment rating to the body as a whole have been paid.

2. The claimant's physician released the claimant to full duty with no work restrictions.

3. The claimant voluntarily left the respondent's employ and is not entitled to any additional permanent partial disability benefits.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

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

CONCURRING & DISSENTING OPINION

_____ I must respectfully concur, in part, and dissent, in part, from the majority opinion. The majority, by affirming and adopting the opinion of the Administrative Law Judge, finds that the claimant did not meet his burden of proving by a preponderance of the evidence his entitlement to any wage-loss disability. After a de novo review of the record, I find that the claimant established an entitlement to wage-loss disability benefits in an amount equal to 15% to the body as a whole, and therefore, I must respectfully dissent on this issue. However, I concur in the majority's

determination that the Second Injury Fund has no liability for any wage-loss award.

The claimant sustained an admittedly compensable injury to his right shoulder on January 13, 2004. The respondent provided the claimant appropriate benefits, including shoulder surgery and disability benefits based upon a 4% anatomical impairment to the claimant's body as a whole. Prior to his injury, the claimant had a long and varied working career. His jobs generally were in the construction or welding fields and usually required him to engage in heavy manual labor. The claimant did have two episodes where he attempted to earn a living by selling insurance, but was unsuccessful in both of those attempts. The claimant attributed these failures to his lack of education and his propensity to "tell people the truth" when selling insurance. The claimant was also a maintenance supervisor for a period of time at the Holiday Inn in Pine Bluff. However, the claimant left that job because he was unable to perform many of the paperwork functions such as

budgeting and similar duties, difficulties which he attributed to his poor education.

The claimant's educational level is limited. He testified that he quit school when he was in the 9th grade, but obtained a GED in 1985. He has not undergone any vocational or other business training other than a week-long class to obtain a license to sell insurance. However, the claimant testified that he needed two attempts to pass the licensing examination. While the claimant apparently obtained some in-house certification with the respondent employer to weld and perform other tasks, he does not appear to have any specialized training or other industry-wide certification or licensures.

The claimant has a number of health problems in addition to his compensable shoulder injury. The claimant's testimony and medical records indicate that he sustained a broken wrist in the early 1990's which necessitated surgical treatment; two neck injuries, one playing high school football and one in a motor vehicle accident, the combined effect of which eventually caused him to undergo a cervical

discectomy and fusion performed in November 2004; a congenital hearing loss in his left ear for which he also underwent two surgical procedures; a heart problem necessitating a pacemaker in 2005; and a diagnosis of diabetes, also in 2005.

The presence of the above conditions were the basis for the respondent to make the Second Injury Fund a party to these proceedings. They contended that because of the varied nature of these injuries, any wage-loss disability the claimant sustained would have been the responsibility of the Fund. However, the Administrative Law Judge found no evidence in the record showing any of the above conditions caused any disability prior to the claimant's compensable injury. In this regard, it should be noted the claimant held numerous jobs requiring heavy lifting and other vigorous manual labor prior to his compensable shoulder injury. The claimant testified none of his pre-existing conditions had ever prevented him from working, or performing any particular job or any task associated with any job.

I find, as does the majority, that there is no potential liability on the part of the Fund. The claimant's testimony was that, except for his two unsuccessful attempts in the insurance sales business, all of his jobs involved heavy manual labor and required him to frequently lift heavy weights. He stated that, other than the period of time in which he was recovering from his broken wrist, he did not miss any work because of these injuries nor did they prevent him from performing any of his required job duties. However, I disagree with the Fund's contention that the claimant's diabetic condition and the effects of his cervical fusion cannot be considered pre-existing conditions. The Fund makes that argument because the diabetes was not diagnosed until 2005, and the surgery was performed in 2004, both dates being after the claimant's compensable shoulder injury. I believe both of those conditions pre-existed the claimant's compensable injury. I do not attach any great significance to the fact they had not been properly treated or diagnosed until after the claimant sought additional treatment for his shoulder injury.

However, I strongly disagree with the majority's conclusion the claimant did not establish any wage-loss disability based upon his shoulder injury. In determining the extent of a claimant's wage loss, this Commission must consider the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S. W.2d 886 (1996). In determining wage loss disability, the Commission should take into consideration the claimant's age, education, work experience, medical evidence, and similar matters which effect the claimant's future earning power. See Glass v. Edens, 233 Ark. 786, 346 S. W. 2d 685 (1961) and City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S. W. 2d 946 (1984).

In denying the wage-loss claim, the majority, by affirming and adopting the Administrative Law Judge, appears to be relying primarily upon the failure of the claimant's physician to prescribe any particular restrictions on the claimant's job-related activities. In this regard, I note in Dr. Charles Pierce's August 1, 2006

report, he states the claimant was released: "To regular duties as it pertains to his shoulder without restriction." However, Dr. Pierce also notes that the claimant had subacromial crepitation and pain.

While medical restrictions are clearly a consideration in determining how a claimant's injury affects future job performance, I do not believe an inquiry as to the vocationally debilitating aspects of an injury can end there. It is the duty of this Commission to determine the extent of a claimant's disability, not his treating physician's. While Dr. Pierce did not see fit to recommend any specific restrictions on the claimant, there is no question he opined that the claimant's surgery resulted in a 4% impairment to his body as a whole. Without doubt, this impairment rating signifies that the claimant has lost a considerable amount of function as it relates to his use of his right shoulder and arm. I find it surprising the doctor does not place any restrictions on the claimant returning to work since his former job duties required him to swing a heavy hammer, the event which precipitated his admittedly

compensable injury. Obviously, having undergone an extensive shoulder surgery which resulted in his impairment, the claimant should not be returning to that same type of job.

The claimant testified he did attempt to return to employment at the respondent employer at jobs which were considered to be somewhat lighter. However, these jobs involved repetitive motion and some heavy lifting. The claimant testified, that in attempting to return these jobs, his shoulder caused him considerable pain. He described this pain as being a sharp pain which radiated from the top of his shoulder down into his arm. He described the onset of this pain being anytime that he tried to "do a little more than what I am supposed to. . . ."

The claimant also testified extensively about the jobs he had performed for the respondent-employer. All of them involved frequent lifting and repetitive use of his hands and arms. Many of the jobs required him to weld parts together and all of the jobs required him to exert considerable force with his hands and arms in order to carry

out his job duties. The claimant specifically testified that even the jobs that appeared to be lighter, still required repetitive, physically demanding work which called upon him to extensively use his arm and shoulder. The claimant did not believe that he was capable of performing those types of tasks.

The respondent does not appear to be disputing this point. The claimant's testimony regarding his inability to perform the jobs available with the respondent-employer was substantially corroborated by the respondent's own witnesses, Rex Hart. Mr. Hart, who testified he was the Personnel Manager for the respondent-employer, stated he sent the claimant a letter in March 2006, advising him the short-term disability benefits he had been receiving would soon run out and he needed to contact him because the respondent employer's policy was that if an employee could not return after 26 weeks, they would be terminated.

The claimant contacted Mr. Hart regarding the letter and, according to Mr. Hart's testimony, they discussed the claimant's possible return to work. Mr. Hart

stated every job in the respondent's plant would have required the use of the claimant's shoulder. Mr. Hart also agreed it would have been superfluous for the claimant to attempt to return to work if he could not perform that type of repetitive work. Lastly, Mr. Hart also acknowledged that he made no attempt to offer the claimant a return to work or made any serious attempt to accommodate his injury or otherwise offer vocational retraining or rehabilitation.

Interestingly, during the hearing, the Administrative Law Judge discussed her prior direction to the parties to explore vocational rehabilitation. Respondent's counsel stated that they did not believe that a vocational evaluation was appropriate.

In reviewing the evidence presented herein, I attach great significance to the claimant's credible testimony that he could not return to his former job with the respondent-employer because of the pain associated with extensive use of his shoulder. The claimant's testimony regarding the types of jobs available with this employer are clearly those which would be very difficult for him to

perform with a 4% impairment to his whole body. Mr. Hart's testimony corroborates the claimant's statements regarding the repetitive nature involved in the jobs available to him with this employer. I also attach considerable importance to the failure of the respondent-employer to make any attempt to return the claimant to work. If the respondent was sincere in their belief that the claimant's shoulder injury did not cause him to lose any of his work ability, I see no reason they would not have at least offered him a return to work. However, that apparently was not something they ever intended to do.

Given that his employer has no interest in offering the claimant a return to work and the claimant's own estimation that he lacks the ability to perform the jobs available with the employer, I find that the claimant has met his burden of establishing by the preponderance of the evidence his entitlement to wage-loss disability. While these types of cases are usually accompanied by vocational reports and functional capacity evaluations, I do not believe that either would be helpful in this case. The

testimony of the claimant and Mr. Hart clearly establishes that the employer simply did not have any jobs within their facility which the claimant would have been capable of doing. I also note that the claimant's past job history reflects that his former employments required him to perform repetitive tasks or those involving vigorous physical activity, including heavy lifting. While the respondent points to the claimant's attempt to find employment in the insurance industry as his indication of his ability to return to work, I think the most reliable conclusion that can be drawn from those brief episodes of employment is the claimant is incapable of earning a living without performing manual labor.

The claimant testified he was earning approximately \$14.00 per hour at the time of his injury. Considering his own employer would not even consider returning him to work, I believe that it is extremely unlikely that the claimant would be able to find a comparable job paying a similar wage, given the claimant's inability to perform heavy manual labor. In considering his

age, past job experience, education level, and related vocational factors, I find that the claimant should be awarded wage-loss disability in an amount equal to 15% to the body as whole.

For the aforementioned reasons I must respectfully concur, in part, and dissent, in part.

PHILIP A. HOOD, Commissioner