

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605297

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| RANDALL D. GARDNER, EMPLOYEE           | CLAIMANT         |
| APEX REDI-MIXED CONCRETE CO., EMPLOYER | RESPONDENT NO. 1 |
| FIRST COMP INSURANCE COMPANY, TPA      | RESPONDENT NO. 1 |
| SECOND INJURY FUND                     | RESPONDENT NO. 2 |

**OPINION FILED MAY 4, 2009**

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

Claimant represented by HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, 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 June 9, 2008.

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

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.

3) The claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability benefits in excess of his 7% whole body impairment rating in connection with his April 24, 2006, compensable left shoulder injury. Therefore, the other issues outlined herein are rendered moot.

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.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After a de novo review of the record, I must respectfully dissent from the majority opinion. I find that the claimant proved that he is entitled to wage loss disability benefits in excess of his 7% whole body impairment rating in connection with his April 24, 2006, compensable left shoulder injury. I would award wage loss disability in the amount of seventy-five percent (75%). I do not find that the Second Injury Fund has any liability in this claim.

**PERMANENT DISABILITY BENEFITS**

Arkansas Workers' Compensation law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). 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). In order 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 permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278 (1998). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14).

The claimant suffered a twelve percent (12%) permanent anatomical impairment rating to his left upper extremity, which translates to a seven percent (7%) rating to the body as a whole, meeting the first requirement for wage loss. The majority, in affirming and adopting the opinion of the Administrative Law Judge, found the claimant and his wife to be credible witnesses, but also found that the absence of medical evidence supporting the existence of limitations on the claimant's ability to work was terminal to his claim. I disagree. Taking into account his permanent anatomical impairment rating, his general health, age, education, work experience, attitude, interest in returning to work, degree of pain, and other matters reasonably expected to affect his future earning capacity, I find that

he sustained wage loss disability in the amount of seventy-five percent, caused by his shoulder injury.

The claimant has a eighth grade education. He worked in heavy manual labor his entire life. At the time of the hearing, he was forty-two years old. He had attempted to obtain his GED, but his inability to use a computer prevented him from successfully obtaining that goal. The claimant's attitude was evidenced in the medical records reflecting the claimant's hopes to be released to return to work as quickly as possible. Likewise, his consistent and reliable effort on the functional capacity evaluation also speaks to his positive attitude. The claimant credibly testified that he looked for work but was unable to get hired. Not only did he look for work at other companies, he attempted to return to Apex Redi-Mix and Milam Construction but was told he was not wanted.

The claimant, his wife and his cousin both testified that the claimant was very active, hunting, fishing, sports, and engaging in mechanical, household and yard work, prior to his shoulder injury, but that since that time, he is unable to engage in any of those activities. It is true that the claimant has lower back problems which also interfere with his ability to engage in these activities, but the claimant credibly testified that his shoulder alone

prevented him from engaging in any of those activities. The claimant and his wife also credibly testified to the existence of swelling in his shoulder, the truth of which was also borne out by the observations of his physical therapists.

The claimant testified that he never had a job that did not require physical labor. Before his April 24, 2006 injury, he had no physical restrictions which interfered with the performance of his job duties.

The claimant testified that his employment with respondent required lifting and overhead work which he could not do after his injury to his shoulder. Each job he had held required lifting, overhead work, or using his left arm to operate a steering wheel. His injury prevented him from overhead work and operating the steering wheel, and limited his ability to lift.

Dr. Pearce's opinion that the claimant could return to work full duty is of diminished value for several reasons. First, he had previously opined that the claimant could return to work, but then discovered that the claimant had further damage to his shoulder requiring a second surgery. Second, the claimant credibly testified to his limitations, which were corroborated by his wife and cousin, but also by the physical therapist's observations of

swelling and limited range of motion. Third, Dr. Pearce wrote that he had given the claimant an injection, which both the claimant and the claimant's wife, who was unaware of her husband's testimony, denied credibly. They explained, independently, that Dr. Pearce had unsuccessfully attempted to draw fluid off of his shoulder with a needle, but that he had never given the claimant an injection. Last, Dr. Pearce did observe crepitation and swelling, even on his last visit.

The claimant does have other physical problems. In particular, his lower back pain limits his activities. However, the claimant testified that his shoulder pain, locking and popping were what limited his ability to lift and prevented him from overhead work and from driving a truck. These activities were the primary activities required in all the jobs he had ever held. The question to address here is whether the shoulder injury caused the majority of his permanent disability. Obviously, the shoulder injury was the only cause of the 12% impairment to his upper arm. The claimant is not seeking permanent and total disability benefits, although he has sought social security benefits due to the combined impact of all of his medical issues. Based upon his testimony, I find that the claimant has suffered wage loss, caused solely by his compensable

shoulder injury, in the amount of 75%. He credibly testified that he would be unable to return to any of the jobs he held prior to his injury, due to his shoulder injury.

Interestingly, the claimant also related the problems in his back to his inactivity caused by the shoulder injury. He had not sustained a new injury to his back, but his long-term back pain had remained manageable as long as he stayed active. Once his shoulder injury rendered him unable to engage in his hobbies or his job, all very physical, his back pain increased in tandem with his inactivity. This further limited his ability to work.

In Exxon Tiger Mart, the claimant had two ratings to her back, for 17.5% and 13%. She was fifty-seven years old at the hearing and had a GED. She had worked as a cashier, factory worker, waitress, housekeeper, cook, and day-care aide. After her second injury, she experienced periodic falls caused by her legs giving way and pain in her back and legs to such an extent that she felt unable to work. She had pain when she lifted, bent, stooped, stood or sat. She was awarded thirty-seven percent wage loss, despite the FCE placing her in the Medium work category. In Douglas Tobacco Prods. Co. v. Gerrald, 68 Ark. App. 304, 8 S.W.3d 39 (1999), the Court found that substantial evidence supported the award of 50% wage loss disability. The claimant had

twenty years of experience in sales, and several suitable jobs were identified, which she failed to pursue. However, her activities were limited by pain, and her condition had worsened so that on some days she was immobile.

In the current claim, the claimant's entire employment history was confined to work which he could no longer perform, and he remained plagued by pain and swelling in his shoulder, as well as locking and popping in his shoulder. His shoulder injury prevented him from doing any overhead work and limited his ability to lift and otherwise use his left arm. I would award wage loss in the amount of seventy-five percent.

#### SECOND INJURY FUND LIABILITY

The majority did not need to address Second Injury Fund liability, as their findings rendered the issue moot. As I have found that the claimant is entitled to wage loss benefits, the issue must be addressed. The test for Second Injury Fund liability is three-pronged:

First, the employee must have suffered a compensable injury at his 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.

Douglas Tobacco Prods. Co. v. Gerrald, 68 Ark. App. 304, 8 S.W.3d 39 (1999), citing Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). The claimant suffered a compensable injury resulting in an impairment rating of 12% to the upper extremity. The question is whether the claimant's had a prior permanent partial disability or impairment which combined with the compensable injury to produce the current disability. The statute, Ark. Code Ann. Sec. 11-9-525, specifically states that latent conditions are not considered prior disabilities or impairments. The claimant credibly testified that, of all of his current health issues, he was only aware of low back pain prior to the injury, and that he attributed that pain to hard work. His low back pain worsened after his shoulder injury limited his activities. It was only after his shoulder injury that he discovered the extent of his low back problems. The claimant did not have a pre-existing disability or impairment, and therefore Second Injury Fund liability is not triggered in this claim.

#### CONCLUSION

I find that the claimant has proven that he has suffered wage loss disability in the amount of is permanently and totally disabled. I further find that the claimant should have been assigned a seven percent

impairment rating and paid permanent partial disability benefits at that rate. Lastly, I find that the Second Injury Fund does not have liability in this claim. This claim was controverted, and the claimant's attorney is entitled to fees on the indemnity benefits awarded, as well as for his work on appeal. For the aforementioned reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner