

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. G707404 & H104321

CARLOS PERRY,
EMPLOYEE CLAIMANT

WEST FRASER, INC.,
EMPLOYER RESPONDENT

TRUMBALL INS. CO. / THE HARTFORD
INSURANCE CARRIER/TPA RESPONDENT

OPINION FILED DECEMBER 20, 2022

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

Claimant represented by the HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE LAURA J. PEARCE, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal a decision of the Administrative Law Judge filed on June 15, 2022. The Administrative Law Judge found that the claimant has met his burden of proof by a preponderance of the evidence that he sustained a compensable injury to his right shoulder; that the claimant is entitled to temporary total disability benefits from April 12, 2021 through August 13, 2021; and the claimant has met his burden of proof that he is entitled to wage loss

disability benefits in the amount of (3%) three percent. After our *de novo* review of the entire record, the Full Commission finds that the claimant has proven by a preponderance of the evidence that he sustained a compensable right shoulder injury, that he is entitled to temporary total disability benefits beginning on April 12, 2021 and continuing through August 13, 2021, that he is entitled to a six percent (6%) permanent anatomical impairment rating to the body as a whole, and that he is entitled to a ten percent (10%) wage-loss benefit in excess of his 6% permanent impairment rating to the body as a whole.

I. HISTORY

The claimant, now 46 years old, was involved in a workplace accident on April 9, 2021. The claimant offered the following testimony as to how the accident occurred:

Q You've alleged this injury to your right shoulder, April 9, 2021. Take us back in time to that day and tell us what happened. ...

So there's a piece of machinery called a board flipper that's supposed to do something?

A Yeah. Whatever board you see that needed to be flipped, you would hit a button and it would flip the board, but that particular day, it wasn't operating properly, and we needed to go, you know, run production, so I was helping Adam flip – I was manually flipping the boards, which I was going probably like --

- Q So these boards, first of all, describe for me the size of the boards.
- A ... You're talking like two by tens, two by eights, two by sixes and two by fours. Well, no, two by fours don't go over there. Mainly, it's two by tens and two by eights.
- Q All right. Because the board flipper is not working, you're manually having to flip these boards?
- A Yeah. I was manually flipping the boards, and the boards probably – They're wet because they're coming straight off the logs. The boards are probably about fifty – at least fifty pounds.
- Q All right. You're having to flip boards. Give us some estimation of how many boards were you and Jerome flipping or how many boards are coming across there as you're doing this job?
- A Around about – I was probably doing about ten boards per minute. Adam May was the one that was operating it. It's so we can keep the mill going. We don't want to stop, so I'm trying to flip, you know, make sure they're right by the time they get to him.
- Q Describe the process of flipping the board. Are you flipping with both hands, with one hand, are the boards in front of you, are they behind you? Give us an understanding of how that's happening.
- A Well, the boards are in front of me, but being that I'm right-handed, I would just use my left hand to like guide the board, but then I was taking my right hand and

flipping it over like that. I would sit back, and I would hold the board, and then I would take my right hand and flip them over.

Q So you're demonstrating you would hold the board in both hands and guide it with your left hand and then flip it with your right?

A Yes. I was taking my left hand and guide it like and then I would flip it with my right.

The claimant visited his primary care physician, Dr. Robert Watson, on April 12, 2021, with complaints of right shoulder pain. Dr. Watson referred the claimant to Dr. Dwayne Daniels.

The claimant saw Dr. Daniels on April 19, 2021, with complaints of "right shoulder pain x 1 week". The examination of the claimant's right shoulder revealed the following:

Inspection: There is no deformity, swelling, ecchymosis or atrophy present.

Palpation: There is no tenderness, mass, or crepitus with direct palpation.

Range of Motion: Range of motion is limited by pain.

Strength: Strength testing is 5/5 in all muscle groups tested.

Sensation: Sensation to light touch is intact and equal to the opposite side in all dermatomal areas tested.

Special Tests: Impingement sign is positive at 120° of forward flexion.

Dr. Daniels diagnosed the claimant with right shoulder impingement syndrome and ordered an MRI.

The claimant underwent a right shoulder MRI on April 21, 2021, that revealed the following:

FINDINGS:

Examination quality is partially degraded by excessive image noise.

No acute fracture or aggressive marrow replacing processes identified. Partial red marrow conversion is incidentally noted.

Visible neurovascular structures are unremarkable. There is minimal fatty atrophy of the infraspinatus muscle. The remainder of the rotator cuff muscles are normal in bulk and signal intensity.

There is a full-thickness, partial width tear involving the posterior most fibers of the supraspinatus tendon and the anterior fibers of the infraspinatus tendon at the insertion. There are chronic tears with tendinosis of the infraspinatus tendon involving the remaining fibers. Bulky heterotopic ossification is noted at the infraspinatus tendon insertion at the greater tuberosity.

The teres minor, subscapularis, and long of the bicep's tendons are intact.

Glenohumeral positioning is normal. No focal high-grade cartilage defect is identified. There is a small effusion, likely reactive. No loose body is seen.

The labrum is unremarkable for examination technique. The glenohumeral ligaments are intact.

There are severe degenerative changes of the acromioclavicular joint. There is capsular hypertrophy with a small joint effusion, likely

reactive. There are bulky inferior projecting osteophytes causing mass effect on the underlying supraspinatus muscle and tendon.

There is trace fluid within the subacromial/subdeltoid bursa.

CONCLUSION:

1. Full-thickness, partial width tear involving the posterior most fibers of the supraspinatus tendon in the anterior most fibers of the infraspinatus tendon near the insertion. Overall, this appearance is similar to prior.
2. Tendinosis of the remainder infraspinatus tendon with chronic tear along the insertion with bulky heterotopic ossification.
3. Severe degenerative changes of the acromioclavicular joint with resultant subacromial encroachment and mass effect on the underlying supraspinatus muscle and tendon.

On May 26, 2021, the claimant underwent a right shoulder arthroscopy, distal clavicle excision, and extensive debridement. The postoperative diagnosis was noted as “right shoulder impingement syndrome with partial-thickness rotator cuff tear”. In his June 4, 2021, medical record, Dr. Daniels noted:

Doing well after right shoulder arthroscopy. He did not in fact have a full-thickness rotator cuff tear when it was exam index surgery [sic].

In the History section of his August 25, 2021, medical record, Dr. Daniels noted, “There has been no changes in the current symptoms. He states that he went back to work last week and could not do his job.”

Dr. Daniels created a work status report, placing the following work restrictions on the claimant: “No lifting over 20 lbs.”; “No repetitive motion”; and “No overhead work (above shoulder)”.

On September 23, 2021, Dr. Daniels assigned the claimant an impairment rating. Dr. Daniels noted the following:

Based on table 27 page 61 from the ‘guides to the evaluation of permanent impairment’ 4th edition published by the AMA he has a 10% permanent partial impairment to the right upper extremity as [a] result of his distal clavicle resection.

Dr. Daniels authored a letter dated January 31, 2022, wherein he opined, “Based on my experience treating Mr. Perry and his right shoulder difficulties over a number of years, I can conclude that the injury he sustained April 9, 2021, is work-related within a reasonable degree of medical certainty.”

The claimant testified that he suffered a compensable injury to his right shoulder in 2016. At that time, the claimant came under the care of Dr. Daniels. As a result of this injury, the claimant underwent a right shoulder arthroscopy with labral and rotator cuff debridement, distal clavicle resection and subacromial decompression on November 23, 2016. The claimant testified that after this surgery, he didn’t have any additional problems with his right shoulder until 2020. According to the claimant, in

2020 he went to Dr. Daniels and “got a shot”, after which his right shoulder was fine until his April 9, 2021, workplace incident.

An Amended Pre-hearing Order was filed on February 25, 2022. “The claimant contends he sustained a compensable injury to his right shoulder on or about April 9, 2021. The claimant contends the medical treatment he has had on his right shoulder since April 9, 2021, has been related to, and reasonably necessary for, treatment of his injury and, therefore, the respondents should be ordered to pay for such treatment. He contends he is entitled to TTD benefits from on or about April 12, 2021, through on or about August 13, 2021, the date his treating physician deemed him to have reached maximum medical improvement (MMI). The claimant contends he is entitled to PPD benefits, based on his treating physician’s, Dr. Dwayne Daniels’, assignment of a 10% permanent anatomical impairment rating to the claimants right upper extremity, which translates to a six percent (6%) permanent anatomical rating to the body-as-a-whole (BAW) based on the statutorily-applicable American Medical Association (AMA) guidelines. The claimant further contends he is entitled to wage loss disability benefits in excess of Dr. Daniels’ 6% BAW impairment rating in an amount to be determined at trial. Finally, the claimant contends the respondents should be ordered to pay his attorney a fee for controversion as provided by law. The claimant specifically reserves any and all other issues for future litigation and/or determination.”

“The respondents contend the claimant’s alleged right shoulder injury of April 9, 2021, does not meet the Act’s definition of a ‘compensable injury’; therefore, the claimant cannot meet his statutory burden of proof. The respondents further contend the claimant failed to notify them of any work-related injury he alleges occurred on April 9, 2021; and that the claimant was under the care and treatment of Dr. Daniels prior to the alleged injury date of April 9, 2021. The respondents specifically reserve any and all other issues for future litigation and/or determination.”

The parties agreed to litigate the following issues:

1. Whether, on April 9, 2021, the claimant sustained a ‘compensable injury’ within the meaning of the Arkansas Workers’ Compensation Act (the Act) to his right shoulder in the form of either a new injury, or the aggravation of a preexisting condition.
2. If the claimant’s alleged April 9, 2021, right shoulder injury (Claim No. H104321) is deemed ‘compensable’, the extent to which the claimant is entitled to medical[,] TTD, and PPD benefits for permanent anatomical impairment.
3. Whether, and if so to what extent, the claimant has sustained wage loss disability in excess of his permanent anatomical impairment as a result on his alleged April 9, 2021, right shoulder injury.
4. Whether the claimant’s attorney is entitled to a controverted fee on these facts.

5. The parties specifically reserve any and all other issues for future litigation and/or determination.

After a hearing, an Administrative Law Judge filed an opinion on June 15, 2022. The Administrative Law Judge found that, *inter alia*:

- (1) The claimant has met his burden of proof by a preponderance of the evidence that he sustained a “compensable” injury to his right shoulder on April 9, 2021;
- (2) The claimant has met his burden of proof in demonstrating he is entitled to TTD benefits from the date he last worked following the April 9, 2021, compensable injury to his right shoulder – or from April 12, 2021 – through the date Dr. Daniels assigned him the 6% BAW impairment rating and released him to return to work without restrictions on August 13, 2021; and
- (3) The claimant has met his burden of proof he is entitled to wage loss disability benefits in the amount of three percent.

II. ADJUDICATION

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2012), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required

medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4)(D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on April 9, 2021. The claimant sustained a right shoulder injury while performing employment services. The claimant testified that on April 9, 2021, he was manually flipping large fifty-pound boards when he injured his right shoulder. The claimant's testimony that he was injured while performing employment services was corroborated by the history noted in Dr. Daniel's April 19, 2021, medical record. Dr. Daniels noted in the history section of the medical record, "He reports that after doing a different type of job at work his shoulder became sore".

There were objective findings of the injury in the form of a right shoulder partial-thickness rotator cuff tear as seen during the May 26, 2021, surgical procedures. In addition, this injury required medical treatment in the form of a right shoulder arthroscopy, distal clavicle excision, and extensive debridement.

Although the claimant suffered a prior injury to his right shoulder, we find that the acute partial-thickness rotator cuff tear was causally related to the April 9, 2021, injury and was not the result of a prior injury or pre-existing condition.

Based on the aforementioned, the Full Commission finds that the claimant proved by a preponderance of the evidence that his right shoulder injury is a compensable injury. We further find that the claimant is entitled to reasonable and necessary medical treatment related to the right shoulder injury.

B. Temporary Total Disability Benefits

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. *Ark. State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. *Breshears, supra*; *J.A. Riggs Tractor Co. v. Etkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

“‘Healing period’ means that period for healing of an injury resulting from an accident.” Ark. Code Ann. §11-9-102(12). The healing

period has not ended so long as treatment is administered for the healing and alleviation of the condition. *J.A. Riggs Tractor Co. v. Etkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990); *Mad Butcher Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

“‘Disability’ means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” Ark. Code Ann. §11-9-102(8).

Dr. Daniels completed an Initial Report of Disability on April 22, 2021, wherein he indicated that the claimant was “Continually Totally Disabled from 4/12/21 to 4/26/21 next f/u appt.”. When the claimant returned to Dr. Daniels on April 26, 2021, treatment options were discussed, and a plan was derived for the claimant to undergo surgery. The claimant was not returned to work by Dr. Daniels at that time. A Status/Progress Report of Illness/Injury was completed by Dr. Daniels on May 10, 2021, which noted that the claimant could return to full activity on August 9, 2021. The Report also noted, “PT WILL BE OFF WORK APPROX 12 WEEKS POST-OP”. The claimant underwent surgery on May 26, 2021.

Based on the foregoing, the Full Commission finds that the claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits starting on April 12, 2021, and continuing

until August 13, 2021, when Dr. Daniels released him to return to full-duty work without restrictions.

C. Permanent Anatomical Impairment Rating

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Crow v. Weyerhaeuser Co.*, 46 Ark. App. 295, 880 S.W.2d 320 (1994).

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2012) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Objective findings are defined as: “those findings which cannot come under the voluntary control of the patient.” Ark. Code Ann. § 11-9-102(16) (Repl. 2012). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. *Id.*

Dr. Daniels assigned the claimant a 10% impairment rating to his right upper extremity, which translates to a 6% body as a whole impairment rating. Dr. Daniels’ rating was given based on the claimant’s

distal clavicle resection as outlined in the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition, Table 27, page 61.

Based on the aforementioned, the Full Commission finds that the claimant established by a preponderance of the evidence that he is entitled to an 6% permanent impairment rating to the body as a whole.

D. Wage Loss

To determine a wage-loss award, the Commission considers, in addition to the evidence of permanent anatomical impairment, a claimant's age, education, work experience, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. § 11-9-522(b)(1) (Supp. 2012); *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 682 (1961); *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).

As indicated previously, Dr. Daniels assessed the claimant with a 6% body as a whole permanent impairment rating based on his right shoulder injury. At the time of the hearing, the claimant was forty-five years old. The claimant's education consists of completion of the 10th grade and a GED. The claimant worked for the respondent-employer as the lead person at the planer mill. Prior to working as the planer mill lead person, the claimant worked for the respondent-employer as a utility guy, forklift driver, and lead person over clean-up.

After the workplace accident the claimant underwent a right shoulder arthroscopy, distal clavicle excision, and extensive debridement. On August 13, 2021, Dr. Daniels released the claimant at MMI and returned him to work without restrictions. The claimant returned to work but was unable to perform his job duties. Thereafter, Dr. Daniels assigned the claimant a twenty (20) pound weight restriction. After receiving this restriction, the claimant returned to his workplace and informed his supervisor of this limitation. However, the respondent-employer was unable to accommodate the claimant's lifting restriction and sent the claimant home. Based on the aforementioned, we find that the claimant made a meaningful effort to return to work for the respondent-employer.

Additionally, the claimant demonstrated his motivation to return to work by securing a new position as a sanitation worker for the City of Little Rock. The claimant testified that his new job pays significantly less than his previous position. The claimant was earning approximately \$26.00 per hour when he worked for the respondent-employer. His wages working for the City of Little Rock are \$18.64 per hour.

In light of the facts that the respondents did not meet their burden of showing that the claimant failed to make a meaningful effort to return to work and that the claimant's future earning capacity has been significantly affected by his compensable injury (as evidenced by his

significant reduction in wages in his current position), the Full Commission finds that the claimant is entitled to a ten percent (10%) wage loss benefit.

III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by the preponderance of the evidence that he sustained a compensable right shoulder injury; that he is entitled to temporary total disability benefits starting on April 12, 2021 and continuing until August 13, 2021; that he is entitled to a six percent (6%) permanent anatomical impairment rating to the body as a whole; and that he is entitled to a ten percent (10%) wage-loss benefit in excess of his 6% permanent impairment rating to the body as a whole. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2012).

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents

DISSENTING OPINION

I respectfully dissent from the majority Opinion. While I agree that the claimant sustained a compensable injury and should be entitled to TTD benefits, I cannot agree that a ten percent (10%) wage loss award is appropriate in this matter. It is true that while the Commission is tasked with considering a claimant's age, education, work experience, and any other matters that may be reasonably expected to affect his future earning capacity, it may also use its own knowledge of industrial demands, limitations, and requirements to determine whether and to what extent a claimant is entitled to wage loss disability. Ark. Code Ann. §11-9-522(b)(1); *Henson v. General Electric*, 99 Ark. App. 247; 257 S.W.3d 908 (Ark. App. 2007). It is also relevant whether a claimant shows an interest in returning to work either with his own or any other employer. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W. 3d 258 (Ark. App. 2005).

Here, the claimant generally shows interest only in returning to West Fraser, referring to it as his “home,” and in fact stated that he would be willing to return there immediately if he were able. (T-80; 83). The claimant goes on to state that after leaving West Fraser and moving to Little Rock with his wife to be closer to family, he accepted the first job available to him—driving a school bus for \$18.00 an hour. (T-39). While he indicates that he has moved on to working for the City of Little Rock for \$18.64 an hour, he does not provide specifics of any jobs he is currently or has recently applied for, except to state that he is doing so. *Id.*

The claimant is a CDL class B certified driver with nine years of experience working in the lumber field. His primary desire appears to be returning to his home in Huttig where he expresses on numerous occasions, he wishes he could return. The claimant’s position appears to be that because he is now making thirty percent less than he was making at the time of the injury, he should surely be entitled to thirty percent wage loss resulting from a six percent total impairment. There is no indication in the record whether the claimant has taken strides to search for jobs paying over \$18.64 an hour, nor is it entirely clear from the record whether the claimant could return to his job (or any job) at West Fraser. Further, the respondents contend that the claimant has not been denied any jobs due to this injury.

It is my position that the Administrative Law Judge correctly assigned three percent wage-loss disability in excess of the six percent impairment rating. Accordingly, I respectfully dissent.

CHRISTOPHER L. PALMER, Commissioner