

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G802256

DAVID MEREDITH, Employee	CLAIMANT
MCKEE FOODS, Employer	RESPONDENT
CCMSI, Carrier/TPA	RESPONDENT

OPINION FILED JUNE 22, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney at Law, Springdale, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On April 6, 2021, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 3, 2021, and a Pre-hearing Order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury on November 21, 2017 to his left shoulder.
4. The claimant's weekly compensation rates are \$661.00 for temporary total disability benefits and \$496.00 for permanent partial disability benefits.
5. The claimant has a 2% impairment to the body as a whole regarding his left shoulder which has been paid by respondents.

By agreement of the parties the issues to litigate are limited to the following:

1. Wage loss disability.
2. Attorney's fee.

Claimant's contentions are:

“Claimant sustained a compensable injury while working for respondent on or about 11/21/17. At that time, claimant was in the course and scope of his employment with respondent when claimant was unloading a truck and suffered a left shoulder injury resulting in a torn left rotator cuff. Dr. Andrew Heinzelmann issued a whole person 2% impairment rating on November 27, 2018. The respondents failed to offer claimant a return to work as a result of the permanent restrictions he sustained from the work related injury.”

Respondents' contentions are:

”The respondents contend the claimant is not entitled to any wage loss benefits based on the present medical evidence.”

The claimant in this matter is a 66-year-old male who sustained a compensable injury to his left shoulder on November 21, 2017. The claimant was employed by the respondent as a truck driver. He drove as a team with two other employees. The claimant would drive weekly routes that would take three to five days to complete. Along the way the claimant would make stops and unload product from the respondent to their customers' warehouses. The claimant testified that the truck would be loaded from top to bottom with snack products and the process of unloading required overhead lifting with some products in cases weighing up to 40 pounds. The parties stipulated that the claimant has 2% impairment to the body as a whole regarding his compensable left shoulder injury. That rating had at the time of the hearing been paid by the respondent. The claimant has asked the Commission to determine his entitlement to wage loss disability.

The claimant testified on direct examination about the incident, his reporting, and initial treatment when he suffered the November 21, 2017 compensable left shoulder injury as follows:

Q Okay. And what happened that caused you to need this second Surgery from an incident on November 21, 2017?

A We were unloading in Alpine, Texas and we had finished

the warehouse and we had some displays to go into it. And my partner was the one unloading out of the truck and he slid two of them back and I took them inside and when he slid the third one back, it was a bigger, heavier box. And when he pushed it off the back to me, I wasn't expecting it to be that heavy and I lost my grip and I re-grabbed it and when I did, it felt like it tore my shoulder out again.

Q Okay. And this time did you report it again to McKee?

A Yes, I did.

Q And did McKee accept this injury with what you just described?

A Yes, sir.

Q Okay. And who sent you to Dr. Heinzelmann?

A Jackie Cooper.

Q Who is that?

A Well, it is who CCMSI sent to me as a representative for me.

Q So McKee Foods or their workers' comp carrier sent you to Dr. Heinzelmann?

A Right.

The claimant testified and medical records confirm that the claimant was sent to treat with Dr. Andrew Heinzelmann. On May 11, 2018 the claimant underwent surgical intervention at the hands of Dr. Heinzelmann. Following is a portion of that operative report found at Respondent's Exhibit 1, page 23:

PREOP DIAGNOSES:

1. Recurrent left shoulder rotator cuff tear.
2. Impingement, left shoulder.

POSTOP DIAGNOSES: Same.

PROCEDURES:

1. Left shoulder arthroscopic rotator cuff revision repair.
2. Left shoulder arthroscopic subacromial decompression with coplaning of the distal clavicle.

I note that the claimant testified that he had previously undergone left shoulder surgery in “late ’15, early ’16.” Although that case was never brought before the Commission, the claimant alleges that his injury occurred while working for the respondent but acknowledges that he did not pursue a claim.

The claimant continued to treat with Dr. Heinzelmann after his surgical intervention with conservative care including physical therapy recommended by Dr. Heinzelmann. On January 13, 2018 the claimant was sent for an FCE at Functional Testing Centers, Inc. in Mountain Home, Arkansas. The report from that test indicates that the claimant “performed with determined, consistent and reliable effort as he passed 55 of 55 consistency measures.” Following is a portion of that FCE report authored by Stuart Jones, PT, DPT, CDA, CFE found at Respondent’s Exhibit 1, page 31:

Based on results obtained the client is able to perform work at the HEAVY physical work demand level as he exhibited the ability to perform an Occasional bi-manual lift/carry of up to 75 lbs. and up to 50 lbs. on a Frequent basis and up to 20 lbs. on a Constant basis. He also demonstrated limitations with unilateral lifting as he exhibited a maximum RUE lift of 45 lbs. as compared to 35 lbs. with the LUE when lifting unilaterally from floor to shoulder level.

From a non-material handling standpoint, Mr. Meredith demonstrated decreased tolerance to Reaching with a 5 Lb. Weight with his LUE as he completed this task at the Occasional level when taking into account a normal workday.

The claimant was again seen by Dr. Heinzelmann on November 27, 2018. In that clinic note, Dr. Heinzelmann indicated that the claimant could perform at the “... heavy classification of work. This is with regard to his left shoulder.” The claimant was also rated at the stipulated whole body impairment of 2% regarding his left shoulder at that time. Dr. Heinzelmann also issued a clinic note on January 8, 2019 regarding the claimant and specifically discussed the claimant’s permanent restrictions. This clinic note is found at Claimant’s Exhibit 1, page 41 and states in part as follows:

Per discussion with the patient, as well as his FCE results and the injury, it is within my medical opinion within a reasonable degree of medical certainty that he cannot manipulate boxes over his head greater than 10 pounds in weight. My restriction

for him will be no overhead work over 10 pounds and he can lift up to 60 pounds below shoulder level. These need to be permanent restrictions, in my opinion.

The claimant requested and was granted a one-time change of physician from Dr. Heinzelmann to Dr. Christopher Arnold on February 26, 2019. The claimant was seen by Dr. Arnold on March 12, 2019. Following is a portion of that medical record found at Claimant's Exhibit 1, page 47:

HISTORY: David Meredith had a prior left rotator cuff repair in 2016 in Fort Smith, which did very well. He had an injury at McKee Foods when he was lifting a box about 80 pounds. He developed sharp pain in his left shoulder. He tore his biceps. He saw Dr. Coker, Dr. Heinzelmann, and subsequently had it scoped and was noted to have a recurrent tear of the supraspinatus. He states his biggest complaint is persistent weakness of his left shoulder. The last surgery was done in May 2018.

IMPRESSION: Left shoulder weakness after a prior rotator cuff repair, work related.

PLAN: He has profound weakness with a positive drop arm. He has significant dyskinesia with range of motion of his shoulder. I told him that the weakness may be just postsurgical, in which event there is nothing we can do, however, I cannot rule out a recurrent cuff tear. I would recommend a repeat MRI. He will continue with the current work restrictions outlined by the FCE, which he has had and once the MRI is obtained, we will see him after that. He agrees with this plan.

The claimant underwent an MRI of his left shoulder on April 2, 2019 as directed by Dr. Arnold. On April 11, 2019 the claimant was again seen by Dr. Arnold. Following is a portion of that medical record found at Claimant's Exhibit 1, pages 52 – 55:

History of Present Illness:

1. Shoulder Pain

Onset on 05/11/2018. Severity level is 4. It occurs constantly and is stable. Location: left shoulder. There is no radiation. The pain is aching, dull and throbbing. Context: there is no injury. The pain is aggravated by bending, lifting, movement and pushing.

The pain is relieved by rest. Associated symptoms include decreased mobility, difficulty initiating sleep, joint instability, joint tenderness, nocturnal pain, popping and weakness. Pertinent negatives include bruising, crepitus, limping, locking, nocturnal awakening, numbness, spasms, swelling, tingling in the arms and tingling in the legs. Additional information: pt presents MRI follow up recheck of Left Shoulder s/p left scope RTC and subacromial decompression with coplaning of the distal clavicle 5/11/18. Pt states pain is constant and localized. Pt states pain just with lifting arm to drive, pt notes pain is throbbing and aches. ADLs were reviewed.

Assessment/Plan

1. Assessment Pain in left shoulder (M25.512)
Impression: 1) MRI review, shows high grade partial cuff tear
2) S/p left scope RTC and subacromial decompression with copulating of the distal clavicle 5/11/18
Patient Plan Options discussed today:
- Continue to observe.
- Cortisone injection.
- Left shoulder revision rotator cuff tear.
Patient elects for injection today.
Tolerated well.

On May 14, 2019 the claimant again saw Dr. Arnold with continued left shoulder pain. Dr. Arnold noted some improvement from a cortisone injection in the claimant's left shoulder, and determined the claimant should continue conservative care. The claimant was given work restrictions of "no lifting, pushing, pulling greater than 25 pounds. No repetitive overhead work."

On June 25, 2019 the claimant was again seen by Dr. Arnold. Following is a portion of that medical record found at Claimant's Exhibit 1, page 66:

HISTORY: David Meredith had a rotator cuff repair by Dr. Andrew Heinzemann a year ago, work related. He had persistent pain and weakness. I injected his shoulders, it offered some relief, but he is still quite painful and has weakness. MRI revealed a high-grade partial tear of the

supraspinatus.

IMPRESSION: Left shoulder pain after rotator cuff repair likely secondary to recurrent tear.

PLAN: He has failed therapy, anti-inflammatories, and corticosteroid injections. I think the next step would be a revision cuff repair. He will consider his options. Until then, no left-handed duty.

The claimant underwent a “left shoulder revision, rotator cuff repair using a double-row technique” at the hands of Dr. Arnold on August 23, 2019.

On February 18, 2020 the claimant again saw Dr. Arnold. Following is a portion of that medical record found at Claimant’s Exhibit 1, pages 80 - 84:

History of Present Illness:

1. Shoulder Pain

Location: left shoulder. The pain is aching. The pain is aggravated by lifting, movement and pushing. The pain is relieved by rest. Associated symptoms include decreased mobility, joint instability, joint tenderness and weakness. Pertinent negatives include bruising, crepitus, difficulty initiating sleep, limping, locking, nocturnal awakening, nocturnal pain, numbness, popping, spasms, swelling, tingling in the arms and tingling in the legs. Hand Dominance: right. Additional information: Patient presents for recheck. s/p L RCR revision on 8/23/19. Patient states ROM is improving and states he has some catching when raising arm overhead. Patient states he has no strength with any overhead activity. ADLS were reviewed.

Impression s/p left shoulder rotator cuff revision 8/23/19
6 months post op better than before.
Patient Plan Patient is 6 months post op. He is better than before surgery. He has occasional soreness but pain is overall better and strength is improving.

He is doing well. He needs to continue with home exercises. As he continues to get stronger he will continue to get better. Call if any increase in pain or decrease in rom.

The patient was advised to call the office if symptoms

worsen or do not improve. The risks, benefits, and side effects of treatment were discussed with the patient. The patient verbalized an understanding of the care plan.

The claimant has asked the Commission to consider his entitlement to wage loss disability. The claimant gave direct examination testimony about the light duty work the respondent provided and his termination from employment with the respondent as follows:

Q Okay. Initially did McKee provide you with some light duty from this injury on November 21, 2017?

A Yes.

Q And what was that light duty?

A I worked downstairs stacking the - - not stacking, but replenishing the display in the break room and cleaning the tables and stuff. And then they sent me to Tahlequah to do nonprofit organization work for Help in Crisis, which is a women's shelter, and I answered the phone and carried trash out there.

Q About how long did McKee provide you with this light duty which included Help in Crisis?

A The Help in Crisis deal lasted 90 days and the program ended.

Q Okay. Did McKee from that point on, that first 90 days, from that point on to today, have they provided you any work that was light duty?

A No, sir.

Q And how were you notified that McKee had terminated your employment?

A I got a letter from Jonathan Koons (phonetic) stating that if I couldn't return to work within a certain period that I would be terminated.

Q And at that time were you still under the care with restrictions by Dr. Heinzelmann?

A Yes, I was.

Q I have got a letter dated about September 30th of 2019 from Mr. Koons. Is that about the time you received the letter?

A Yes, I am sure it was.

The claimant was asked on cross examination about his termination from employment with the respondent and his employment search as follows:

Q Okay. Mr. Hatfield, if I recall correctly, he said you got a letter from McKee in September of '19 saying that your employment had terminated?

A I think that is right.

Q Okay. They have a rule that if you can't return within a certain date they terminate you; correct?

A Correct.

Q Now, Dr. Arnold released you in February of '20. Have you contacted McKee since then?

A No.

Q Okay. Have you looked for work anywhere since you last worked at light duty Help in Crisis or whatever it is, that job that McKee sent you to?

A No, sir. I was still an employee of McKee.

Q Okay. But you haven't physically worked for pay since then; have you?

A. No.

Q Approximately when was the last day you worked there?

A I can't remember dates very well.

Q Was it before or after your second surgery with Dr. Heinzelmann?

A Before.

The claimant was placed on permanent restrictions by Dr. Heinzelmann after his surgery and subsequent release. The claimant was asked about those permanent restrictions on direct examination as follows:

Q Mr. Meredith, I am going to show you what is Claimant's Exhibit 1, Page 1, and it shows some restrictions Dr. Heinzelmann placed on you: No overhead work over 10 pounds and you can lift as much as 60 pounds below the shoulder. Are those the restrictions that Dr. Heinzelmann placed on you?

A Yes.

Q Are those permanent restrictions?

A Yes, sir.

Q And were those restrictions placed on you after you performed the functional capacity exam?

A I am not sure.

Q And then I am going to show you Page 58 of the medical exhibit, Claimant's Medical Exhibit 1, Page 58, and it looks like Dr. Arnold says, "No lifting, pushing, pulling greater than 25 pounds. No repetitive overhead work."

A Yes.

Q Did Dr. Arnold ever change those restrictions?

A No.

The claimant testified that he talked with Vickie Owens, an employee for the respondent, about returning to work with restrictions on direct examination as follows:

Q Did McKee ever provide you an opportunity to return to work with your permanent restrictions?

A No, sir.

Q Did you talk with anyone at any point at McKee regarding doing that job as an over-the-road trucker with

limitations?

A Yes, sir.

Q Who did you talk with?

A Vickie Owens.

Q And what did she tell you about returning to work with limitations?

A Could not work with limitations at all.

Q So what does she do at McKee?

A She is over the health department, I guess, nurse or whatever. She's the nurse upstairs that is in charge.

Q Would you have tried to go back to work making 65,000 and getting your benefits had McKee offered that to you?

A Yes.

Q With Dr. Arnold's surgery, did it make your pain less?

A Yes, it did.

Q Did it get your strength back?

A No.

The award of wage loss is not a mathematical formula, but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements. *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W. 3d 908 (2008). Pursuant to A.C.A. §11-9-522(b)(1), when considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of impairment as well as the employee's age, education, work experience, and all other matters reasonably expected to affect his future earning capacity.

The claimant is 66 years of age and dropped out of school in the 11th grade, although he did receive a GED. The claimant testified that he has no computer or business training. It appears that the

greatest majority of the claimant's work history is made up of truck driving. The claimant was employed with the respondent since December of 1999 as a truck driver. The claimant has also driven for Hudson Foods and Tyson as a feed truck driver. The claimant and his father-in-law were in the trucking business for a period of time. The claimant testified that his father-in-law did the dispatching, his wife kept the books and that he drove the truck and worked in the shop.

The claimant's testimony has been quoted in this opinion, and I believe his testimony to be truthful and credible. The claimant's reliable FCE results and medical records align with the claimant's testimony at the hearing and in his deposition; although, I will acknowledge some minor discrepancies between deposition and hearing testimony.

The claimant has a 2% whole body impairment regarding his left shoulder. He was placed in a heavy classification of work by the FCE and Dr. Heinzelmann; however, the claimant was also permanently restricted to not "manipulate boxes over his head greater than 10 pounds in weight ... no overhead work over 10 pounds and he can lift up to 60 pounds below shoulder level." This is also reflected in the claimant's testimony as the claimant is dominant left-handed and is still able to do several activities at home and recreationally. Some of those activities have required him to alter the way he does them or required help from others, but the claimant does continue to function with restrictions.

The claimant also has other health conditions that were discussed in cross-examination testimony as follows:

Q Mr. Meredith, we met at your deposition. I am Curtis Nebben. I represent McKee Foods. Unfortunately you have had some other health issues outside of this left shoulder injury; haven't you?

A Yes, sir.

Q Unfortunately, you have a chronic kidney disease. You lost one kidney to cancer; is that right?

A Yes.

Q Approximately when was that, sir?

A It was while I was doing the Help in Crisis at Tahlequah.

Q Okay. So, basically, when you were doing your light duty, which I think was after Dr. Heinzelmann's surgery, but before Dr. Arnold's surgery?

A Yes.

Q Okay. And then unfortunately you've also, at least as of the deposition, were just recently diagnosed with leukemia; is that right?

A Yes, sir.

Q And are you receiving treatment for that, sir?

A Yes, sir.

Q Okay. Just briefly, what kind of treatment are you receiving for the leukemia?

A I have to take a pill every morning.

Q Okay. Is that pretty much it right now?

A Yes, sir.

Q Okay. And you are currently drawing your Social Security retirement benefits; aren't you?

A Yes.

Prior to the claimant's compensable left shoulder injury of November 21, 2017, the claimant had a certain size pool of jobs in the work force that were available to him given his age, work experience, physical abilities, education, and other factors. After the claimant's compensable injury and resulting anatomical impairment and work restrictions, that pool of available jobs in the work force has shrunk. The respondent helps to demonstrate this point as the claimant's credible testimony indicates that the respondent does not wish to employ a truck driver with years of experience if that driver is physically restricted. Given the decreased pool of jobs in the work force available to the claimant, applicable law,

and the facts before the Commission, I find that the claimant is entitled to wage loss in an amount that would be equal to a whole body impairment of 5%.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 3, 2021, and contained in a Pre-hearing Order filed that same date are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that he is entitled to wage loss disability in an amount that would be equal to a whole body impairment rating of 5%.

3. The claimant has proven by a preponderance of the evidence that his attorney is entitled to an attorney's fee in this matter.

ORDER

The respondent shall pay to claimant an amount of money that would be equal to a whole body impairment of 5% for wage loss disability.

Respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the benefits awarded herein, with one-half of said attorney's fee to be paid by the respondent in addition to such benefits and one-half of said attorney's fee to be withheld by the respondent from such benefits pursuant to A.C.A. §11-9-715.

All benefits herein awarded which have heretofore accrued are payable in a lump sum and without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

**ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**