

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA11-432

TIMMY HENSLEY

APPELLANT

V.

COOPER TIRE & RUBBER
COMPANY; CROCKETT
ADJUSTMENT; and DEATH &
PERMANENT TOTAL DISABILITY
FUND

APPELLEES

Opinion Delivered October 5, 2011

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NOS. F700295, F703322]

AFFIRMED

RAYMOND R. ABRAMSON, Judge

Timmy Hensley appeals from the Arkansas Workers' Compensation Commission's decision awarding him a thirty-percent wage-loss disability. Hensley contends that he should have been found permanently and totally disabled or awarded greater wage-loss disability benefits. Because the Commission's decision is supported by substantial evidence, we affirm.

Hensley began working for appellee Cooper Tire & Rubber Company in 1984. He performed a variety of physically demanding jobs over the years, and at the time of the injuries at issue, he was repairing tires at Cooper Tire's Texarkana plant and earning \$85,000 a year. He was forty-six years old at the time of his hearing before the administrative law judge (ALJ), and he had a high school education. Hensley sustained an admittedly compensable right shoulder injury while working at Cooper Tire on December 12, 2006. Then, on January 9, 2007, he sustained an admittedly compensable injury to his left shoulder.



Between January 15, 2007, and September 24, 2008, appellant had six shoulder surgeries: five to his right shoulder and one to his left. He also had numerous MRIs, injections, and physical therapy. He had not returned to work for any employer from the time of his January 9, 2007 injury through the time of his hearing.

A hearing was held before the ALJ on July 15, 2010. The parties entered into several stipulations, including that Cooper Tire accepted appellant's shoulder-injury claims and paid related benefits. It was also stipulated that appellant had sustained a thirty-eight-percent impairment to the body as a whole, for which benefits had been paid. At the hearing, appellant's friends James Pickett and Michelle Franklin, and his girlfriend Tiffany Russette, testified regarding his pain and inability to do things he used to do. Appellant testified extensively about his condition. He stated that he has constant pain, and he avoids driving unless it is absolutely necessary. Appellant testified that he was taking Ambien (for sleep), Flexeril (for muscle spasms), Clonazepam (for anxiety), Tramadol (for pain), Benicar (for hypertension), Lortab (for pain), and Prevacid (for esophageal reflux).

Appellant introduced the deposition and written report of vocational specialist Robert White. Mr. White wrote, "Given the number of surgeries [and] limitations as reported by Mr. Hensley[,] it is my opinion that he is not capable of any employment at this time." White testified that appellant could be expected to earn \$7 to \$12 per hour in a sedentary job in Arkansas. He stated that if appellant's complaints of pain were credited, it would be difficult for him to work even in a sedentary job.



The ALJ found that appellant failed to prove that he was permanently and totally disabled, but he had proved entitlement to thirty-percent wage-loss disability (apportioned at fifteen percent to each shoulder injury). The ALJ noted appellant's relatively young age, his high school education, that no physician had documented any permanent restrictions on appellant's use of either shoulder, the lack of any documented muscle atrophy or muscle spasms to corroborate his complaints of pain, and his current social and recreational activities. Regarding appellant's activities, the ALJ found that appellant was currently engaged in a hunting lease; had been fishing five or six times between February 3, 2010, and July 15, 2010; had been dating Ms. Russette steadily since August 2009; goes out to eat with a friend once or twice a week; came to the hearing with a dark tan that he attributed to being in Ms. Pickett's pool with his children; and a jury had determined that he was driving his truck on July 27, 2008, when they found him guilty of driving while intoxicated. The ALJ noted appellant's preexisting conditions, which include a compensable back injury in 1989, for which he received benefits for a twenty-five-percent permanent anatomical impairment to the body as a whole.

In assessing a thirty-percent wage-loss disability, the ALJ considered, among other things, appellant's prior medical history and Mr. White's testimony that appellant's starting wages would be \$7 to \$12 per hour if he were to return to work at his current education level. The Commission affirmed and adopted the ALJ's opinion.

This court has set forth the well-established standard of review in workers' compensation cases as follows:



On appellate review, we view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. Our standard of review on appeal is whether the Commission's decision is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. In cases where the Commission's denial of relief is based upon the claimant's failure to prove entitlement by a preponderance of the evidence, the substantial-evidence standard of review requires us to affirm the Commission's action if its opinion displays a substantial basis for the denial of relief.

Ellison v. Therma Tru, 71 Ark. App. 410, 417, 30 S.W.3d 769, 773 (2000) (citations omitted).

Here, appellant sustained an injury to each shoulder—a portion of his body that is not scheduled under workers' compensation laws. Therefore, appellant's entitlement to permanent disability benefits is controlled by Arkansas Code Annotated section 11-9-522 (Repl. 2002), which provides:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Under this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the disability rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 233, 201 S.W.3d 449, 454 (2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Id.* The Commission may use its superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss



disability. *Henson v. General Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007). The determination of both permanent total disability and wage-loss are fact intensive. *Id.*

At issue in this appeal is whether the Commission's wage-loss determination is supported by substantial evidence. First we address the Commission's findings with regard to appellant's claim for permanent total disability. "Permanent total disability" is defined as "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519(e) (Repl. 2002). The burden of proving permanent total disability is on the claimant. *See id.* Here, appellant has made no attempt to look for work since his injuries, he offered no functional capacity evaluation or permanent physician's restrictions, and he was still able to engage in at least some recreational activities. On this record, substantial evidence supports the Commission's finding that appellant is not permanently and totally disabled.

The same factors support the Commission's award of thirty-percent wage loss. The Commission found that appellant's complaints of pain were not entirely credible. The Commission noted that he was drawing \$39,000 per year in Social Security disability benefits, which can be a factor in the Commission's determination of the amount of wage loss. *See Curry v. Franklin Elec.*, 32 Ark. App. 168, 173, 798 S.W.2d 130, 133 (1990) ("[W]e do not mean to imply that the receipt of social security benefits could not be a factor in wage loss determinations.").

The cases appellant cites are not persuasive under the facts of this case. In *Tucker v. Cooper Std. Automotive, Inc.*, 2010 Ark. App. 7, 374 S.W.3d 44, this court reversed and



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remanded the Commission's award of twenty-percent wage loss where the appellant had been earning \$18 to \$22 per hour, and the undisputed evidence showed that his current light-duty work paid \$12 per hour and his other job possibilities would pay only \$8 an hour. There was no evidence that Tucker was receiving income from any other source. In *Taggart v. Mid America Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643, this court held that a twenty-percent wage-loss award was not supported by substantial evidence. In that case, the claimant had gone from earning approximately \$67,000 per year to future job possibilities at a maximum of \$35,000. Here, thirty-percent wage loss is supported by substantial evidence in light of all of the evidence.

Affirmed.

GLOVER and MARTIN, JJ., agree.

Gary Davis, for appellant.

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