

ARKANSAS COURT OF APPEALS

DIVISION II

No. CA10-822

Opinion Delivered December 8, 2010

SECOND INJURY FUND
APPELLANT

V.

BILLY R. THARP,
JUSTICE FARMS, INC.,
COMMERCE & INDUSTRY INS. CO.,
and DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND
APPELLEES

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F311119]

REVERSED and REMANDED ON
DIRECT APPEAL; AFFIRMED ON
CROSS-APPEAL

WAYMOND M. BROWN, Judge

Appellee Billy Tharp sustained an admittedly compensable cervical spine injury on August 24, 2003, while working for appellee Justice Farms, Inc. Tharp's injury occurred when he was attempting to open the hood on his truck to check the truck's oil. According to the evidence, the hood came down on Tharp, causing him to hit the ground. Tharp sought additional benefits arguing that he suffered a right-shoulder injury and bilateral carpal tunnel as a result of his August 24, 2003 compensable injury. The parties stipulated that Tharp suffered a six-percent impairment to the body as a whole.¹ The issues litigated at the hearing

¹The parties also stipulated that an opinion issued in 2005, which denied Tharp benefits for a lumbar spine injury, was res judicata.

were the compensability of Tharp's right-shoulder and bilateral carpal tunnel injuries; wage loss/permanent total disability; end of the healing period for Tharp's right-shoulder injury and carpal tunnel; Second Injury Fund liability; and the statute of limitations as a defense to Tharp's carpal tunnel claim. The administrative law judge (ALJ) issued an opinion on October 23, 2009, finding that Tharp's right-shoulder injury and carpal tunnel were not compensable; that Tharp was entitled to fourteen-percent permanent partial disability benefits in the form of wage-loss disability; and that the Second Injury Fund was liable for Tharp's wage-loss disability. The ALJ also ordered the Second Injury Fund to pay Tharp's attorney's fees. The Second Injury Fund appealed the ALJ's decision to the Arkansas Workers' Compensation Commission. Tharp filed a cross-appeal contesting the amount of wage-loss disability granted by the ALJ. The Commission affirmed and adopted the ALJ's decision in an order filed on June 4, 2010.

The Second Injury Fund appeals the Commission's decision, arguing 1) that the Commission erred in finding that Tharp waived rehabilitation for "good cause" and 2) that the Commission erred in finding Second Injury Fund liability. Tharp cross-appeals, arguing that the Commission erred in finding that he was only entitled to fourteen-percent wage-loss disability. We remand this case to the Commission for more specific findings concerning the issues on direct appeal; we affirm on cross-appeal.

In reviewing decisions from the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the

Commission’s findings, and we affirm if the decision is supported by substantial evidence.² Substantial evidence exists if reasonable minds could reach the Commission’s conclusion.³ It is the Commission’s function to determine witness credibility and the weight to be afforded any testimony.⁴ This court relies on the Commission to clearly articulate its findings of fact because we do not review the Commission’s decisions de novo.⁵ When the Commission fails to make specific findings on an issue, it is appropriate to reverse and remand the case for the Commission to make such findings.⁶

First, Second Injury Fund contends that the Commission erred in finding that Tharp waived rehabilitation for “good cause.” While the Commission did state that good cause existed for Tharp’s waiver of rehabilitation, the Commission did not make any findings regarding good cause or explain why it made this determination. Further, in finding Second Injury Fund liable, the Commission simply stated that Tharp had an accident in 1983 that resulted in a cervical fusion and that, therefore, Tharp “must have had a permanent partial disability or impairment.” But the Commission did not find—nor did it appear that there was any evidence to suggest—that Tharp suffered a permanent partial disability or impairment in

²*Foster v. Express Pers. Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006).

³*Jivan v. Economy Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

⁴*Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

⁵*Sonic Drive-In v. Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991).

⁶*Id.*

1983 that combined with the recent compensable injury to produce the current disability status, as required under Arkansas law.⁷

Accordingly, we remand this case for the Commission to make specific findings on the issue of Tharp's waiver of rehabilitation for "good cause" as well as its finding that Second Injury Fund is liable for Tharp's fourteen-percent wage-loss disability.

Tharp argues on cross-appeal that the Commission erred by only awarding him fourteen-percent wage-loss disability. We disagree. The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood.⁸ The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience.⁹ Other matters to be considered are motivation, post-injury income, credibility, demeanor, and a multitude of other factors.¹⁰ The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability.¹¹

The evidence at the hearing showed that Tharp was sixty-seven years old; that he received his GED while in the military; that with the exception of owning several businesses

⁷*Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

⁸*Henson v. General Elec.*, 99 Ark. App. 129, 257 S.W.3d 908 (2007).

⁹*Eckhardt v. Willis Shaw Exp., Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998).

¹⁰*Henson, supra*.

¹¹*Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Cite as 2010 Ark. App. 828

in the past, Tharp spent most of his adult life working as a truck driver; that Tharp was released by Dr. Scott W.F. Carle to full duty with no restrictions; that Dr. Anton Petrash felt that Tharp was permanently and totally disabled;¹² that Tharp received disability income in the amount of \$1,400 a month; and that Tharp's testimony was replete with inconsistencies regarding his true physical condition. Because substantial evidence supports the Commission's award of fourteen-percent wage-loss disability, we affirm.

Reversed and remanded on direct appeal; affirmed on cross-appeal.

ROBBINS and GRUBER, JJ., agree.

¹²Tharp's panic disorder and psychiatric conditions contributed to most of Dr. Petrash's opinion.