

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F106609

THOMAS BRUMBELOW, Employee	CLAIMANT
ROGER BRUSTER TRUCKING CO., Employer	RESPONDENT #1
ARKANSAS PROPERTY & CASUALTY GUARANTY FUND (on behalf of Reliance Insurance in Liquidation)	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 18, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MARK FORD, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 16, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on February 12, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the claimant and respondent #1 agreed to the following stipulations:

1. The prior Administrative Law Judge opinion filed May 8, 2002 is final and res judicata.
2. Claimant's healing period ended on September 12, 2002.
3. Respondent has accepted and is paying claimant permanent partial disability benefits in the amount of 7% to the body as a whole based upon the rating assigned by Dr. Bruffett.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent total disability benefits.
2. Attorney fee.
3. Second Injury Fund liability.

At the time of the hearing there were several changes made with regard to the parties' stipulations and the issues to be litigated. First, respondent withdrew its stipulation that claimant had suffered a permanent physical impairment in an amount equal to 7% to the body as a whole as assigned by Dr. Bruffett. Thus, claimant's contention that he is entitled to permanent and total disability benefits includes both impairment and wage loss. In addition, the Second Injury Fund contends that claimant did not suffer a compensable injury.

The claimant contends that he has suffered a permanent physical impairment as a result of his compensable injury and that this impairment coupled with the various wage loss factors entitles him to permanent total disability benefits and an award of attorney fees.

Respondent contends that claimant is not entitled to any permanent disability benefits as a result of his compensable injury. Alternatively, respondent contends that if claimant is entitled to compensation for permanent disability benefits that any benefits attributable to wage loss are the responsibility of the Second Injury Fund.

The Second Injury Fund contends that claimant did not suffer a compensable injury. It also contends that claimant has not suffered any permanent physical impairment as a result of his compensable injury which is supported by objective findings and is the major cause of his disability. The Second Injury Fund also contends that claimant is not permanently totally disabled or entitled to wage loss. In addition, the Second Injury Fund contends that claimant's back condition was latent at the time of his work related injury and therefore is not a basis for Second Injury Fund liability, and finally there is no combination of disabilities to prove Second Injury Fund liability.

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 witnesses and to observe their 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 prior opinion filed May 8, 2002 is final and res judicata.
2. The parties' prior stipulation regarding compensability and its acceptance by this administrative law judge as a finding of fact is binding on the Second Injury Fund. Therefore, claimant has suffered a compensable injury.
3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any permanent benefits as a result of his compensable injury.

FACTUAL BACKGROUND

The claimant is a 51-year-old man who lives in Waldron, Arkansas. Claimant completed the seventh grade and has not obtained his GED. Claimant's jobs have primarily included working in the log woods and driving trucks with claimant having driven trucks for approximately 20 years. Claimant began driving a truck for the respondent in October 2000 and suffered a compensable injury on May 21, 2001. On that date the claimant was using a cheater pipe to tighten straps on a load when the strap broke, causing claimant to fall onto his back. Since that time the claimant has primarily been treated for pain in his left leg and lower back.

Following his compensable injury the claimant was initially seen by Dr. Sessler at the Mena Medical Center and was taken off work for a few days. Claimant attempted to return to work and was able to haul only one load before taking off the remainder of that week. The next week claimant worked a portion of two days before he terminated his

employment with the respondent. At some point claimant also drove a truck for Castle Trucking Company which did not require him to strap down or tarp his loads.

Throughout that period of time the claimant continued to receive medical treatment from various physicians including Dr. Saffman in Little Rock at the respondent's request. Claimant was eventually allowed to change physicians to Dr. Bruffett who first saw claimant on October 10, 2001. Dr. Bruffett has remained claimant's primary treating physician since that date.

This case was the subject of a prior hearing conducted on April 8, 2002. At the pre-hearing conference prior to that hearing the parties stipulated that claimant had suffered multiple compensable injuries on May 21, 2001. This stipulation was accepted as a finding of fact in an opinion filed May 8, 2002. The primary issue at that time was claimant's entitlement to additional temporary total disability benefits. In the opinion of May 8, 2002, I found that claimant had proven by a preponderance of the evidence that he was entitled to additional temporary total disability benefits beginning October 24, 2001, and continuing through a date yet to be determined. That opinion was not appealed by either party.

At the pre-hearing conference prior to the most recent hearing the parties stipulated that claimant's healing period ended on September 12, 2002.

The current issues to be litigated involve claimant's entitlement to permanent total disability benefits, including both impairment and wage loss; Second Injury Fund liability; and a controverted attorney fee.

ADJUDICATION

The first issue for consideration involves the Second Injury Fund's contention that claimant did not suffer a compensable injury. As previously noted, prior to the first hearing in this matter the parties had stipulated that the claimant suffered a compensable injury on

May 21, 2001. That stipulation was accepted by this administrative law judge as a finding of fact in the May 8, 2002 opinion. Since the Second Injury Fund was not a party to the case at that time, the Second Injury Fund would contend that it is not bound by that stipulation and finding and therefore can raise as an issue compensability. I find no merit to this argument. A similar argument was raised by the Death and Permanent Total Disability Trust Fund in *Death & Permanent Total Disability Trust Fund v. Branum*, ____ Ark. App. ____, ____ S.W. 3d ____ (2003). In that particular case, the Trust Fund alleged that it was not bound by a Commission determination regarding dependents because it was not made a party at the time of the original hearing. This argument was rejected by the Court of Appeals who held that pursuant to Commission Rule 28 the only requirement was that the Trust Fund receive notice 90 days prior to when the compensation carrier would have reached its maximum liability. In that particular case notice was given in accordance with Rule 28; therefore, the Trust Fund was not permitted to collaterally attack the original finding.

Likewise, in this case, I find that the Second Injury Fund is not entitled to collaterally attack the prior finding of compensability. Rule 24 of the Commission governs when the Second Injury Fund must be made a party. Subsection (a)(1) of Rule 24 states that a party desiring to raise the issue of Second Injury Fund liability must do so by naming the State Treasurer as a party which is done by notifying the Special Funds Administrator of the Workers' Compensation Commission "no later than thirty (30) days before the date of the first hearing on the issue of permanent disability in writing by a form of mail requiring a signed receipt." Thus, there is no requirement under the rules that the Second Injury Fund receive any notice of potential liability until 30 days prior to the first hearing on permanent disability. Here, there has been no showing that the Second Injury Fund was not made a party to this claim prior to 30 days before the hearing on June 16, 2003. Therefore, I find that the Second Injury Fund is bound by the prior stipulation and finding

of fact regarding compensability.

The primary issue in this case involves claimant's contention that he is entitled to permanent total disability benefits as a result of his compensable injury. As previously noted, the respondent initially stipulated that it had accepted and was paying permanent partial disability benefits in an amount equal to 7% to the body as a whole based upon an impairment rating assigned by Dr. Bruffett. However, respondent subsequently withdrew that stipulation and it along with the Second Injury Fund both contend that claimant has failed to meet his burden of proving by a preponderance of the evidence that he has suffered a permanent physical impairment as a result of his compensable injury and therefore is not entitled to permanent disability benefits.

A claimant has the burden of proving by a preponderance of the evidence that they are entitled to an award for permanent physical impairment. A.C.A. §11-9-102(4)(F)(ii)(a) states that: "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" is defined at A.C.A. §11-9-102 (14) as more than 50 percent of the cause and a finding of major cause must be established according to the preponderance of the evidence.

In this particular case, the parties took the deposition of Dr. Wayne Bruffett, an orthopaedic surgeon, who has been claimant's primary treating physician since October 2001. In his deposition Dr. Bruffett testified that claimant's MRI scan revealed degenerative changes at two levels in the low back, some disc bulging, and a small tear in the disc at L5-S1. Dr. Bruffett went on to indicate that there was no evidence of nerve root compression and that he did not think the bulge and small tear were clinically significant. Dr. Bruffett stated that the degenerative changes at the L4-5 and L5-1 levels were due to the aging process. He also noted that claimant had no neurological deficits or muscle spasm. Most importantly, Dr. Bruffett stated that the 7% impairment rating he assigned to the claimant was based upon degenerative findings.

Q. But let me clarify. That [7% rating] was for the degenerative change that you found on the MRI and the x-rays, is that correct?

A. Yes.

Q. So then let me ask my question again. The seven percent that you gave were for the objective degenerative changes you found on Mr. Brumbelow's back, is that right?

A. Yes.

Thus, according to Dr. Bruffett's testimony, the permanent physical impairment rating he assigned to the claimant was for degenerative disc disease which he testified was due to the aging process.

I believe it is also important to note that in one of Dr. Bruffett's medical reports he diagnosed claimant as suffering from a lumbar disc herniation without nerve root impingement. Dr. Bruffett was asked about this diagnosis at his deposition. He testified that the disc was not ruptured and that it could be called either a bulging disc or herniation, the difference was more semantical in nature. He did state that there was not a nerve compression that was causing any clinical symptoms. Thus, there is insufficient evidence that this bulging disc mentioned by Dr. Bruffett is causing any of his symptoms due to the fact that there is no evidence of nerve root compression.

In short, claimant has the burden of proving by a preponderance of the evidence that he is entitled to permanent disability benefits. Permanent benefits may only be awarded if there is evidence that the compensable injury was the major cause of the disability or impairment. Major cause is more than 50 percent of the cause. Here, there is insufficient evidence that the compensable injury claimant suffered while working for respondent on May 21, 2001 was the major cause of his disability or impairment. To the contrary, Dr. Bruffett has testified that the permanent impairment rating he assigned was for degenerative changes which was a result of the aging process, not an injury.

Accordingly, based upon the testimony of Dr. Bruffett, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffers from a permanent impairment as a result of his compensable injury.

Having found that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered any permanent impairment as a result of his compensable injury, claimant is not entitled to benefits for wage loss. In order to be entitled to benefits for wage loss, a claimant must first prove that they sustained a permanent physical impairment. *Cathy Needham v. Harvest Foods*, Full Commission Opinion filed October 8, 1997 (E407259); *Elizabeth Hunter v. City of No. Little Rock*, Full Commission Opinion filed May 11, 1998 (E500902); *Roger Osborne v. Logan County*, Full Commission filed August 20, 1998 (E513263). Thus, while Dr. Bruffett did place some limitations upon the claimant's ability to return to work and the functional capacities evaluation would indicate that claimant's ability to perform some jobs have been limited, there is insufficient evidence that claimant's injury is the major cause of his permanent physical impairment; therefore, claimant is not entitled to benefits for a loss in wage earning capacity.

ORDER

The Second Injury Fund is bound by the prior determination that claimant suffered a compensable injury while working for respondent on May 21, 2001. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he is entitled to permanent disability benefits as a result of his compensable injury. Claimant has failed to meet his burden of proving by a preponderance of the evidence that his injury was the major cause of any permanent physical impairment. Having failed to prove that he sustained a permanent physical impairment, claimant is not entitled to benefits for wage loss. Therefore, this claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE