

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E913515

VIVIENE CUMBIE	CLAIMANT
BOST HUMAN DEVELOPMENT SERVICES, INC.	NO. 1 RESPONDENT
AIG CLAIM SERVICES, INC. INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED SEPTEMBER 22, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents No. 1 represented by R. SCOTT MORGAN, Attorney, Pine Bluff, Arkansas.

Respondent No. 2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 7, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 15, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The prior opinion is res judicata and the law of this case.

3. Respondents No. 1 have accepted a 7 percent impairment rating.

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

1. Additional medical to St. Edwards and Dr. Swicegood.
2. Wage loss over the 7 percent impairment rating.
3. Second Injury Funds liability.
4. Attorney's fees.
5. Whether the claimant is entitled to penalty and interest on the impairment rating.

In regard to the foregoing issues the claimant contends that she sustained a compensable injury to her left hip and low back arising out of and in the course of her employment with the respondent employer on June 11, 1998. The respondents accepted the claim as compensable and initially paid benefits. There have been previous hearings concerning the need for continuing medical benefits, and after a hearing, the Honorable Elizabeth Danielson did find favorably the claimant's entitlement to continuing medical benefits, and the parties ultimately agreed that the respondents would pay for an evaluation by Dr. Capocelli. Since that date, the respondents have refused to pay any further continuing benefits despite Dr. Capocelli's referral of the claimant to Dr. Swicegood for pain management. The claimant is entitled to payment of reasonable and necessary medical treatment as provided by Dr. Swicegood, and is entitled to continuing physical therapy and denervation as recommended by Dr. Swicegood. She is also entitled

to payment of the 7 percent anatomical rating issued by Dr. Capocelli, and wage loss up to and including total permanent disability. She is also entitled to a statutory attorney fee as well as penalty and interest on the unpaid impairment rating.

In regard to the foregoing issues Respondents No. 1 contend that they are not aware of what medical bills remain unpaid and do not have a report with a 7 percent disability rating for the claimant. Additionally, respondents are unaware of any recommended treatment for the claimant.

In regard to the foregoing issues Respondent No. 2 contends that the claimant did not suffer any permanent damage as a result of the June 11, 1998, episode and any rating assigned is based on pre-existing lumbar conditions not caused during the June 11, 1998, motor vehicle accident. Further, pursuant to Chamberlain Group v. Rios and Second Injury Fund, 45 Ark. App. 144 (1994) the claimant was not operating with a disability at the time of the 1998 motor vehicle accident, therefore, there is no Second Injury Fund liability.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and the respondents submitted documentary evidence marked Respondents' Exhibit No. 1. Also blue booked to this record will be the response from Respondent No. 1 as it regards the claimant's entitlement to penalty and interest on the unpaid

impairment rating. This document will be marked Respondents' Exhibit No. 2.

#### DISCUSSION

The claimant testified that she was 61 years old, had a GED as well as a two-year associate degree. The claimant testified that she used her associate degree at the Hartford School as a substitute teacher as well as a special ed aid. The claimant testified that she was a teacher for the respondent and, at the time she was hired, it was not necessary that she be a certified teacher. The claimant testified that currently the respondent requires that their teachers be certified. The claimant testified that besides working as a teacher for the respondent she also drove a bus to pick up children and it was on one of her van routes that she was involved in a motor vehicle accident and was injured. The claimant explained that the children who attend the respondent's school are special and many have behavioral problems as well as other disabilities.

The claimant testified that before she began working in the Hartford School System as a teacher's aid and substitute teacher, she had worked at Baldor for three years. The claimant explained that she sat at a bench and hammered flanges off of motor things and that later on she was transferred in to using a machine. The claimant testified that she could no longer do the Baldor job or work for Hartford Schools and the respondent due to the requirement of sitting and standing. The claimant testified that even standing to do dishes causes her to hurt indicating that standing more than ten minutes at a time is difficult. The claimant testified that she

uses a TENS unit as well as takes medication which helps with her discomfort. The claimant testified that she has very localized pain on her left side between her back and hip. The claimant describes this pain as an aching hurting pain which occasionally will radiate into her leg or down into her groin area.

The claimant testified that she has seen Dr. Holder, Dr. Harmon, Dr. Barr, Dr. Capocelli as well as Dr. Swicegood for treatment of her back injury. The claimant agreed that Dr. Capocelli, in January 2002, assessed her with a 7 percent rating for her back which has not been paid. The claimant agreed that Dr. Capocelli referred the claimant to Dr. Swicegood for pain management and Dr. Swicegood has administered her two steroid injections which have not resulted in much relief of her discomfort. The claimant agreed that Dr. Swicegood has recommended that she undergo treatment in the form of a denervation which she is interested in undergoing.

The claimant testified that Dr. Swicegood had no other treatment to offer her except for the denervation and that the workers' compensation carrier had denied this treatment. The claimant further agreed that she has not seen Dr. Swicegood since January 2002. The claimant testified that she is very interested in any type of treatment that will help her get off of her pain medications indicating that she takes Vicodin as well as Darvocet. The claimant testified that her family doctor, Dr. Barr, has been prescribing her medications since her comp carrier has discontinued providing them for her. The claimant testified that before her

motor vehicle accident she was able to work and had planned to work until she was sixty-two. The claimant further testified that since her accident she no longer can work for the respondent nor can she even do a lot of the things that she normally did around her own home.

The claimant testified that in 1955 and 1962 she underwent several major surgeries to remove all but three fourths of her total lung capacity. The claimant testified that she also had two ribs removed due to her lung condition. The claimant testified that as a result of her lung condition, she has what is called pocket infections on her lungs and she has to take antibiotics every day of her life. The claimant testified that the Vicodin which she takes to help alleviate her pain causes fluid to build up in her lungs and this is another reason that she would like to find alternate treatment so that she would not have to take this medication. The claimant testified that this lung condition has caused her to have problems breathing but that she has been able to work all these years as long as she was able to take her time with what she did. The claimant testified that, "I have problems that way, (breathing) when I was teaching school but I never missed because of it." The claimant agreed that since 1962 she has not been hospitalized as a result of her lung condition but her lung condition has stayed about the same. The claimant agreed that Dr. Barr as well as Dr. Webb have treated her for her lung condition.

On cross examination by Respondents No. 1, the claimant agreed that her lung condition was called bronchiectasis and she has had

that since she was seven years old. The claimant testified that her first lung surgery in 1955 was when she was thirteen and her last one was in 1962. The claimant testified that her lung condition has limited what she has been able to do throughout her life but her lung condition combined with her back condition have further limited her activities and ability to do things. The claimant testified that there were home exercises and treatments which she had done in order to help keep her lung condition in check but due to her back problems she has been unable to do these exercises and treatments. The claimant testified that after her motor vehicle accident, she did work for the Area Agency on Aging for two years. The claimant explained that she sat with a friend for five hours a day. The claimant testified that this job ended when her friend had to go into the nursing home because she, the claimant, could no longer help her to the bathroom or help her get out of her chair. The claimant testified that she has not applied for any other jobs since she quit working for the respondent in the Area Agency job.

Under cross examination by Respondent No. 2, the claimant indicated that based on her lung condition, hip problem as well as her age, she did not think that rehabilitation or retraining was viable in her case. On redirect examination, the claimant explained that during the period of time that her workers' compensation benefits had been terminated and she was unable to receive her medications, she went to work for the Area Agency in order to be able to provide her needed medications. The claimant testified that the respondent worked with her in every way after her motor vehicle

accident even letting her lie on the floor to work with the children. The claimant testified that it was not until she almost dropped one of the children that she realized she had to quit. The claimant testified in response to Respondents No. 1's recross examination that, because of her lung condition, the respondent had tailored her job in order for her to be able to perform her duties.

The parties have stipulated and the prior opinions set forth that this claimant sustained a compensable injury to her left hip as a result of a motor vehicle accident when working for the respondent. These prior opinions set forth the extensive medical treatment which this claimant has received for this injury. All medical treatment has been paid up to Dr. Swicegood's recommendation of a denervation treatment for this claimant. Respondents No. 1 have stipulated that they have accepted a 7 percent impairment rating for this claimant's hip injury.

The medical records set forth that the claimant has received treatment by Dr. Marilyn Barr for her lung condition. Dr. Barr writes on April 19, 1999, that the claimant still fights bronchiectasis at all times. The doctor notes that the claimant has had bilateral lobectomies and as a result has a frequent cough. Dr. Barr notes that the claimant takes Amoxicillin twice a day for her lung condition. Among other things, Dr. Barr diagnosed the claimant with having bronchiectasis and medications were prescribed. Dr. Barr had written about a year earlier in October 1998 that the claimant was being treated by Dr. Webb since she has severe bronchiectasis and she has had both lobes of her lungs removed. Dr.

Barr notes here that the claimant stays on Amoxicillin all of the time.

Dr. Capocelli, who had been one of the claimant's treating physicians for her back problems, assesses the claimant with a 7 percent whole body impairment rating based on the A.M.A. Guides, Forth Edition. Dr. Capocelli sets forth this impairment rating on January 18, 2002. Prior to this rating being assessed, Dr. Capocelli referred the claimant to Dr. John Swicegood for pain management as set forth in his note dated September 18, 2001. Dr. Swicegood administered injections to this claimant for her pain control on November 26, 2001, and again on January 23, 2002. Dr. Swicegood notes before her second injection that the claimant experienced several days of relief after her last sacroiliac joint injection only to relapse despite conservative efforts, medical therapy and physical therapy, noting that she continues to have marked pain. Dr. Swicegood writes on January 23, 2002, that he has talked with the claimant and wishes to repeat the joint injection one additional time and if her pain relief again relapses, they will have to discuss other definitive measures. Dr. Swicegood concludes this report after he has administered the claimant's injections that if her pain relief is temporary once again, he will discuss with her radio frequency techniques which may be more definitive and helpful to her.

Respondents No. 1 have accepted the 7 percent impairment rating as assessed by Dr. Capocelli. This assessment by Dr. Capocelli was made on January 18, 2002, where he sets out that the claimant has

been under his care for non surgical low back problems suffered as a result of a motor vehicle accident. The respondents have argued in their brief which is blue booked to this record, that Capocelli's rating in January 2002 was unclear as to what injury the doctor was rating and it was not until March 19, 2003, that Dr. Capocelli clarified his rating. In my opinion, Dr. Capocelli's rating clearly is based upon her back injuries which he was treating her for resulting from her motor vehicle accident. Ark. Code Ann. §11-9-802(b) sets forth:

If any installment of compensation payable without an award is not paid within fifteen days after it becomes due...there shall be added to the unpaid installment an amount equal to 18 percent thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of Controversion is filed or an extension is granted the employer under Section 11-9-803 or unless such non payment is excused by the Commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

The respondents have not controverted this 7 percent impairment rating nor did they file a notice of controversion. This 7 percent impairment rating has been accepted by the respondents without an award of said benefit but they have failed to pay the impairment rating timely, therefore, interest in the amount of 18 percent should attach to the unpaid impairment rating beginning on January 18, 2002, to run until the date the impairment rating was paid. In addition to this assessment of interest, the respondents shall also pay a penalty of 25 percent on the impairment rating. The

respondents, in their brief, have indicated that by March 19, 2003, Dr. Capocelli had clarified to their satisfaction that the claimant was entitled to a 7 percent impairment rating for her compensable injury and it is indicated by the respondent's letter dated August 27, 2003, that they are just in the process of obtaining checks to pay the 7 percent impairment rating to the claimant. Therefore, I find their failure to pay this 7 percent in a timely fashion to be both intentional and willful.

I further find that the claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment as recommended by her treating physician, Dr. Anthony Capocelli, as he refers the claimant Dr. John Swicegood for pain management. Therefore, I find that the respondents should pay for the treatment by Dr. Swicegood at St. Edwards Medical Hospital for this claimant's compensable injury. The claimant has sustained a compensable injury and her authorized treating physician, who has assessed her with a 7 percent permanent partial impairment rating, sets out in his impairment rating that he has referred the claimant for chronic pain management. Therefore, I find the treatment by Dr. Swicegood as administered through St. Edwards Mercy Medical Center to be both reasonable and necessary for the management of this claimant's pain resulting from her compensable injury.

I also find that the claimant has proven by a preponderance of the evidence that she is entitled to wage loss over and above her 7 percent impairment rating in the amount of an additional 7 percent, giving her a total disability rating of 14 percent to the body as a

whole. The additional 7 percent impairment rating shall be paid by the Second Injury Fund since I find that the claimant has proven that it is a combination of her two major medical problems which has resulted in her disability. The claimant has testified and the record set forth that she has an ongoing chronic lung condition which has affected her ability to work. The claimant has taken antibiotics for this chronic lung infection and loss of lung capacity for the majority of her life. The claimant has testified that her lung condition, even before her motor vehicle accident, limited her activities but that the respondent tailored her job in order for her to be able to work. The claimant has also testified that when she returned to school to get her associate's degree, acquiring this more limited degree was all she was able to do as a result of her lung condition. The Second Injury Fund, therefore, shall be liable for paying the additional 7 percent.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The prior opinion is res judicata and the law of this case.
3. Respondents No. 1 have accepted a 7 percent impairment rating.
4. The claimant has proven by a preponderance of the evidence that she is entitled to 18 percent interest on the unpaid impairment rating beginning from January 18, 2002, to the date which the impairment rating was paid. The claimant also is entitled to a 25

percent penalty on this unpaid impairment rating. See discussion above.

5. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment as provided through St. Edwards Mercy Medical Center and Dr. John Swicegood for the ongoing treatment of her chronic pain resulting from her compensable injury. See discussion above.

6. The claimant has proven by a preponderance of the evidence that she is entitled to wage loss over and above her 7 impairment rating in the amount of an additional 7 percent, giving her a total disability rating of 14 percent to the body as a whole. See discussion above.

7. The Second Injury Fund is found to be liable for this additional 7 percent impairment since it is a combination of the claimant's motor vehicle accident and resulting 7 percent impairment rating from this accident as well as her preexisting and long standing chronic lung problem which have combined to create this claimant's 14 percent disability. See discussion above.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant is entitled to additional medical treatment by Dr. Swicegood provided through St. Edwards Mercy Medical Center which shall be paid by Respondents No. 1.

The claimant has proven by a preponderance of the evidence her entitlement to wage loss over and above her 7 percent impairment

rating in the amount of an additional 7 percent giving her a total disability rating of 14 percent to the body as a whole. This additional 7 percent shall be paid by the Second Injury Fund since it has been found that it is a combination of the claimant's preexisting lung condition as well as her compensable injury which establishes this disability rating.

The claimant is entitled to an 18 percent interest on the 7 percent impairment rating to be paid from January 18, 2002, to the date that the impairment rating is paid along with a 25 percent penalty, all to be paid by Respondents No. 1.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

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

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

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE