

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F009818

CRAIG EDGMON, Employee	CLAIMANT
MALONE'S MECHANICAL, Employer	RESPONDENT #1
TRANSPORTATION INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED AUGUST 21, 2003

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

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent #1 represented by JAY KUTCHKA, Attorney, Fort Smith, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 28, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 21, 2003, and a pre-hearing order was filed on May 22, 2003. 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 parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to his back on August 16, 2000.
4. The claimant was earning an average weekly wage of \$583.00 which would entitle him to weekly compensation benefits at the rate of \$388.00 for total disability benefits and \$291.00 for permanent partial disability benefits.
5. Respondents are paying permanent partial disability benefits based upon a 10%

impairment rating.

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

1. Temporary total disability benefits from November 21, 2002 through April 22, 2003.
2. Wage loss.
3. Attorney fee.

Subsequent to the pre-hearing conference the Second Injury Fund was joined as a party by the respondent employer.

The claimant contends that he is entitled to an additional period of temporary total disability benefits from November 21, 2002 through April 22, 2003. Claimant further contends he is entitled to wage loss benefits and an attorney fee.

Respondents contends the claimant is not entitled to additional temporary total disability benefits and that he cannot prove his entitlement to wage loss benefits. To the extent claimant is entitled to wage loss benefits, respondent contends that the Second Injury Fund is liable.

The Second Injury Fund contends that claimant is not permanently totally disabled. The Second Injury Fund also contends that is has no liability because there is no combination of disabilities or impairments and that if there is a combination, it is not greater than the disability or impairment that would have resulted from the last injury in and of itself.

At the time of the hearing there was some discussion regarding the introduction of an employment application subsequent to the hearing. Correspondence received from the parties subsequent to the hearing indicates that the employment application will no longer be submitted. In addition, at the end of the hearing there was testimony presented regarding claimant's ability or inability to seek additional medical treatment from an authorized physician. Subsequent correspondence and a telephone conference

conducted between claimant's attorney and respondent's attorney has resolved this issue at this time.

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 May 21, 2003, and contained in a pre-hearing order filed May 22, 2003, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 21, 2002 through April 22, 2003.

3. As a result of his compensable injury, claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

4. The Second Injury Fund is liable for payment of permanent partial disability benefits in the amount of 50% to the body as a whole based upon claimant's loss in wage earning capacity.

5. The Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 50% to the body as a whole.

FACTUAL BACKGROUND

The claimant is a 47-year-old man with a twelfth grade education. Claimant previously suffered a compensable injury to his back in 1994 while working at the Turkey Track Ranch. As a result of that compensable injury claimant underwent a surgical

procedure which was performed by Dr. Standefer. Following claimant's medical treatment claimant was assigned a permanent physical impairment rating in an amount equal to 10% to the body as a whole.

Approximately 17 months after his 1994 injury the claimant went to work for the respondent as an apprentice plumber. As an apprentice plumber, claimant worked for the respondent during the day and also attended plumbing classes at night. The apprentice program was a five year program of which claimant completed three and one-half years.

Claimant suffered his most recent compensable injury while working for respondent on August 16, 2000. Claimant testified that on that date he was in the process of installing pipe in a drop-in ceiling and as he leaned back to place the pipe through a hole in the wall his back popped. After some initial treatment from a doctor in Sallisaw, Oklahoma, claimant was eventually referred back to Dr. Standefer. Dr. Standefer performed a second surgical procedure on the claimant's low back on October 24, 2000. Claimant continued to have complaints of pain and after further testing Dr. Standefer recommended a third surgical procedure. This procedure was canceled shortly before it was to be performed due to a misunderstanding between claimant and Dr. Standefer regarding the exact procedure. Dr. Standefer ultimately assigned the claimant a permanent physical impairment rating in an amount equal to 10% to the body as a whole as a result of his 2000 compensable injury. This impairment rating was accepted by the respondent.

Subsequent to his last evaluation with Dr. Standefer, claimant was also seen for evaluations by Dr. Prychodko and Dr. Runnels.

Claimant has filed this claim contending that he is entitled to temporary total disability benefits from November 21, 2002 through April 22, 2003. Claimant also contends that he is entitled to benefits for wage loss and a controverted attorney fee. In addition, liability of the Second Injury Fund has also been raised as an issue.

ADJUDICATION

A. TEMPORARY TOTAL DISABILITY BENEFITS.

Initially, claimant contends that he is entitled to additional temporary total disability benefits beginning November 21, 2002 and continuing through April 22, 2003. In order to be entitled to temporary total disability benefits for this period of time, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Dr. Standefer, claimant's primary treating physician, authored a report dated September 12, 2002 summarizing claimant's medical care beginning with his 1994 injury. Dr. Standefer indicated that he had recommended a third surgical procedure to the claimant which claimant had chosen not to have after discovering the instrumentation which would be used. Dr. Standefer went on to note that he had released claimant from his clinic. He also assigned claimant impairment ratings totaling 10% to the body as a whole as a result of claimant's most recent compensable injury. Finally, Dr. Standefer indicated that he had previously discussed claimant's physical limitations and that he had nothing else to add to those.

Following claimant's release from Dr. Standefer, claimant requested a change of physicians. As a result of this request, claimant was allowed to change physician by order of the Commission's Medical Cost Containment Unit to Dr. Prychodko in Little Rock. Although the report contained in the medical records indicates that it was completed on February 2, 2003, the report indicates that the office visit actually occurred on November 21, 2002. In addition, claimant testified that he was evaluated by Dr. Prychodko in November 2002. A review of Dr. Prychodko's report indicates that he performed an extensive evaluation of the claimant. His report also indicates that he prescribed medications for the claimant at that time. Importantly, a review of Dr. Prychodko's report

does not indicate that claimant was totally incapacitated from working as of the date of the initial visit on November 21, 2002.

Subsequent to that visit claimant was also seen by Dr. Vincent Runnels, a neurosurgeon, for an independent medical evaluation on April 4, 2003. Dr. Runnels in his report dated April 22, 2003 indicated that he discovered some hysterical overlay during his examination of the claimant. Dr. Runnels also indicated that he would recommend non-operative treatment for a period of time for the claimant. He also noted that claimant should consider social security disability or retraining and that claimant should receive follow-up treatment from a family physician.

The period for which claimant seeks temporary total disability benefits coincides with the time of his visit to Dr. Prychodko and his subsequent visit with Dr. Runnels. As previously stated, in order to be entitled to temporary total disability benefits for this period claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. While claimant may have seen these physicians for additional evaluations, and it could be argued that claimant remained within his healing period, I find insufficient evidence that claimant remained totally incapacitated from working during this period of time. Prior to his visit with Dr. Prychodko claimant had been released by Dr. Standefer and there is no indication that Dr. Prychodko was of the opinion that claimant was totally incapacitated from working as of November 21, 2002.

Accordingly, for the foregoing reasons, based upon the evidence presented I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 21, 2002 through April 22, 2003.

B. WAGE LOSS.

The next issue for consideration involves claimant's contention that he is entitled to permanent disability benefits associated with a loss in wage earning capacity. Pursuant

to A.C.A. §11-9-522(b)(1), when considering claims for permanent disability benefits in excess of the permanent physical impairment, the Commission may take into account in addition to the percentage of permanent physical impairment various factors including the claimant's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. Here, as previously noted, the claimant is 47 years old and has a twelfth grade education. Furthermore, while much of his work as an apprentice plumber was on the job training, claimant was also required to attend classes in order to become a journeyman plumber. In fact, claimant had completed approximately three and a half years of the five year program.

The medical evidence indicates that as a result of claimant's initial compensable injury in 1994, he received a permanent physical impairment rating in an amount equal to 10% to the body as a whole. Furthermore, following claimant's most recent compensable injury in August 2000, claimant has been assigned an additional permanent physical impairment rating in an amount equal to 10% to the body as a whole for a total amount of 20% to the body as a whole. In a report dated April 24, 2002, Dr. Standefer indicated that he did not believe the claimant would be able to resume his normal manual labor occupation regardless of whether or not claimant underwent a third surgical procedure. Dr. Standefer stated that claimant would have limitations which included the avoidance of lifting more than 25 to 35 pounds and only then on occasion. He also indicated that claimant should avoid repeated bending, alternate sitting, standing and walking.

The evidence indicates that prior to working for the respondent as an apprentice plumber he worked at Turkey Track Ranch where he suffered his initial back injury in 1994. Claimant testified at the hearing that his job duties for the ranch included breaking horses, breeding cattle, mending fences, and hauling feed. Claimant has also worked for Crown Zellerback, a wood production facility. Claimant testified that he ran a forklift for this facility for approximately seven and a half years and that his job responsibilities sometimes

required him to move products weighing as much as 100 pounds. The evidence including claimant's testimony at the hearing and at his deposition also indicates that claimant has worked for Blue Ribbon Downs, a horse racing track, on two separate occasions. The first time claimant was employed by Blue Ribbon Downs he drove tractors and a water truck. During claimant's second employment with Blue Ribbon Downs he loaded horses in the starting gate.

Claimant testified that his current problems include an inability to bend over and put his shoes on. Claimant wears his shoes unlaced and simply slips them on. Claimant also testified that he has pain and numbness in his leg. He testified that he can sit for approximately three hours if he sits a certain way. Claimant testified that he is unable to do yard work or work around the house.

Claimant testified that he earned \$14.10 per hour for respondent and that he worked 40 hours each week plus overtime.

Finally, I note that claimant testified that since the time of his compensable injury he has not looked for employment. This is a factor which may be considered in assessing wage loss. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W. 2d 276 (1982).

After consideration of the relevant wage loss factors presented in this case, I find that claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. Claimant has been assigned permanent physical impairment ratings in an amount equal to 20% to the body as a whole and has had physical limitations placed upon his ability to lift by his treating physician. Claimant's prior jobs have included vigorous manual labor which claimant will no longer be able to perform. On the other hand, claimant is only 47 years old and has a high school education. In addition, the evidence indicates that claimant was able to complete three and a half years of an apprentice plumber program which included

classes at night. In addition, it is also a relevant factor that claimant has not looked for work. Accordingly, based upon the foregoing evidence, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole.

In reaching this decision I find that claimant has proven by a preponderance of the evidence that his injury was the “major cause” of his impairment and his loss of wage earning capacity.

C. SECOND INJURY FUND LIABILITY.

Respondent contends that liability for claimant’s loss in wage earning capacity should be borne by the Second Injury Fund. The requirements for Second Injury Fund liability were discussed by the Court in *Mid-State Construction v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988). First, the employee must have suffered a compensable injury at their present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent injury to produce the current disability status.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the requirements of Second Injury Fund liability have been met. First, the claimant did suffer a compensable injury at his present place of employment with the respondent. Second, prior to that injury the claimant did have a permanent partial disability or impairment. As a result of his 1994 injury the claimant was assigned a permanent physical impairment rating by Dr. Standefer in the amount of 10% to the body as a whole.

Finally, I also find that this prior disability or impairment has combined with claimant’s most recent injury to produce claimant’s current disability status. The Second Injury Fund contends that its liability is not a mere mathematical computation. In other words, the mere fact that claimant had a prior anatomical impairment coupled with a second injury and another anatomical impairment does not automatically mean that the

prior impairment has combined with the most recent injury to produce a greater disability than would have existed if only the last injury were considered by itself. While the Second Injury Fund is correct that its liability is not automatic; neither can the prior impairment be ignored. My review of the evidence indicates that claimant's prior impairment has combined with his most recent injury to produce his current disability status. I believe it is significant that claimant does not have a mere 10% impairment to the body as a whole which resulted from his most recent injury, but instead now has a 20% impairment rating when both injuries are considered. This combined 20% rating is significant and has resulted in Dr. Standefer opining that claimant will not be able to resume manual labor. Thus, while evidence of a prior impairment does not automatically combine with a recent impairment, I find under the facts presented in this case that claimant's prior permanent impairment did in fact combine with his most recent injury to produce his current disability status. Furthermore, I find that this combination has resulted in claimant suffering a greater disability than he would have suffered if the last injury was considered alone and of itself.

Accordingly, for the foregoing reasons, I find that the Second Injury Fund is liable for payment of benefits associated with claimant's loss in wage earning capacity which equals 50% to the body as a whole. I also find that the Second Injury Fund has controverted the claimant's entitlement to these compensation benefits.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits beginning November 21, 2002 and continuing through April 22, 2003. Claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. The Second Injury Fund is liable for payment of benefits

associated with claimant's loss in wage earning capacity. The Second Injury Fund has controverted the claimant's entitlement to these benefits.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein. This fee is to be paid by the Second Injury Fund. A.C.A. §11-9-715(a)(2)(A).

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE