

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212312

MAYS STILLS		CLAIMANT
ARMSTRONG BROTHERS TOOL COMPANY		RESPONDENT
FIDELITY & GUARANTY INSURANCE, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED SEPTEMBER 30, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 7, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on April 21, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Subsequent to the entry of the pre-hearing order, the Second Injury Fund was joined as a party in this case, and the issue of Second Injury Fund liability was added. A copy of this pre-hearing order with that amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On October 9, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$425.00 for total disability and \$319.00 for permanent partial disability.
3. On October 9, 2002, the claimant sustained a compensable injury to his back.

4. There is no dispute over the payment of medical expenses.
5. There is no dispute over temporary total disability benefits accruing through February 10, 2003.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to additional temporary total disability benefits from February 11, 2003 through a date yet to be determined.
2. The claimant's entitlement in the alternative to permanent disability benefits for both impairment and wage loss, including PTD.
3. Appropriate attorney's fee.
4. Whether the claimant is barred from receiving disability benefits under either Ark. Code Ann. §11-9-522(b) or §11-9-526.
5. Applicability of Ark. Code Ann. §11-9-525.

In regard to these issues, the claimant contends:

"Claimant was injured on October 9, 2002, while he was working on a sandblaster when he went to loosen a bolt and it broke. The weight came down on his back. Basically, we all recognize he is of advanced age and that he has worked at this company for a long time, but the question is what impairment he has as a result of the injury in question."

In regard to these issues, the respondents #1 contend the claimant temporarily aggravated his pre-existing back condition and they have paid all benefits to which he is entitled. Additionally, respondents made a bona fide offer to return claimant to work within his restrictions even obtaining physician approval of the work, and claimant has failed to return to work, thus he is not entitled to additional indemnity benefits. Further, claimant's treating physician has given a 0% impairment rating. Further, respondents state that the October 9, 2002 incident is not the major cause of claimant's back complaints.

In regard to these issues, the Second Injury Fund contends that the claimant cannot demonstrate, under the facts and the law, that he is permanently and totally disabled or is

entitled to any benefits for anatomical impairment or wage loss.

DISCUSSION

I. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

The first issue to be addressed concerns the claimant's entitlement to additional temporary total disability benefits from February 11, 2003, through a date yet to be determined. The burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must show by the greater weight of the credible evidence that he continued within his healing period from the effects of his compensable injury and continued to be totally disabled from performing all forms of regular gainful employment as a result to this injury, Arkansas State Highway Transportation Department v. Breshears, 271 Ark. 398, 609 S.W. 2nd 81(1980).

The duration of the healing period is a medical question that must be resolved on the basis of the greater weight of the credible medical evidence presented. Applicable case law provides that the healing period ends when the claimant achieves the maximum benefit of time and medical treatment in the healing or resolution of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved and at least stabilized, at a level where nothing further in the way of medical treatment can be reasonably expected to provide improvement, then the healing period has ended. The mere continuation of chronic symptoms, after that time, is not sufficient to extend the healing period.

The medical reports and records of Dr. Vincent Runnels show that he released the claimant from any further active medical treatment, effective March 7, 2003. Dr. Runnels is a neurosurgeon and has been the claimant's primary treating physician. At the time of his last visit, Dr. Runnels indicated that the claimant would continue to require anti-inflammatory medication and pain medication for an indefinite period. He also stated that the claimant was to continue his home exercises for the remainder of his life. The claimant

was directed to lose weight.

The medical evidence also contains two narrative reports authored by Dr. Cyril Raben and directed to the claimant's attorney. These narrative reports show that the claimant was seen by Dr. Raben on only one occasion, January 17, 2003. In his report of April 11, 2003, Dr. Raben makes a curious statement:

"The reasons for us to do the intervention that we have done so far (an aggressive conservative approach) are so that he would be able to get back to some level of function."

However, no records of Dr. Raben have been introduced to establish that he provided the claimant with any actual treatment for his compensable injury, "aggressive conservative" or otherwise. As previously noted, the reports of Dr. Raben indicate only one visit on January 17, 2003. At that time, Dr. Raben noted that the claimant was going to seek chiropractic treatment. Although there is an indication that Dr. Raben scheduled a return visit for February 28, 2003, Dr. Raben's narrative report of that date does not in any way indicate that he actually saw the claimant on that date. I would also note that no chiropractic reports or records have been introduced to show that the claimant actually sought or received any chiropractic treatment after his January 17, 2003 visit with Dr. Raben.

In his reports, Dr. Raben also "suggests" that the claimant undergo "a minimally invasive surgical procedure such as an arthroscopic or tube surgery". However, he offers no explanation or reason for this "suggestion". By March of 2003, the claimant does not appear to have been experiencing any radicular symptoms, which would be suggestive of nerve root impingement. There is no indication that the MRI study performed on the claimant demonstrated any nerve root impingement. Even "minimally invasive" surgical procedures are not customarily performed in the absence of any evidence of nerve root impingement or neurological deficit. This fact is recognized by Dr. Runnels in his report of December 26, 2002.

After consideration of the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his healing period from the effects of his compensable injury extended to March 7, 2003. However, he has failed to prove that it continued beyond that date. Thus, he would not be entitled to any temporary disability benefits after March 7, 2003.

In regard to the claimant's entitlement to additional temporary total disability benefits from February 11, 2003 through March 7, 2003, the claimant must also prove that the compensable injury rendered him totally disabled during this time. To a certain extent, this issue is tied in with the respondents contention that the claimant would be barred from receiving temporary total disability benefits for an unjustified refusal of employment, which was offered him by the respondent and was within his physical limitations, Ark. Code Ann. §11-9-526. (Obviously, his only temporary disability benefits are involved during this period and the provisions of Ark. Code Ann. §11-9-522, are not applicable to this type of benefit).

On February 5, 2003, Dr. Runnels released the claimant to return to work only for the respondent at "light duty per job description". I have no idea what "job description" Dr. Runnels considered. The respondents have offered a document outlining some 15 potential positions (Respondent's Exhibit No. 1, page 25). Some of these positions would appear to be within the restrictions set by Dr. Runnels at that time and some do not. The claimant testified that the actual job he was offered by the respondent involved operating a drill press and sweeping up. He stated that these positions would involve bending, stooping, and twisting, as well as standing for prolonged periods. Clearly, such a position would not coincide with the restrictions placed on the claimant's potential employment activities, at that time by Dr. Runnels.

It appears that when the claimant received the "light duty" release from Dr. Runnels, Dr. Runnels had not released him to seek employment in the open job market, but only for a particular position with the respondent. I would also note that during this period the

claimant had been taken off work, entirely, by Dr. Raben.

After consideration of the evidence presented, it is my opinion that the claimant has shown by the greater weight of the evidence that during the period of February 11, 2003 through March 7, 2003, he was also rendered temporarily totally disabled from performing any forms of regular gainful employment as a result of the effects of his compensable injury. Further, the respondents have failed to prove by the greater weight of the credible evidence that the claimant unjustifiably refused suitable employment during this period. Thus, I find that the claimant has proven the second requirement for his entitlement to additional temporary total disability benefits from February 11, 2003 through March 7, 2003, and is not barred from receiving such benefits by the provisions of Ark. Code Ann. §11-9-526.

II. PERMANENT PHYSICAL IMPAIRMENT

The next issue concerns the claimant's entitlement to permanent benefits for permanent physical impairment. Again, the burden rests upon the claimant to prove his entitlement to these benefits. In order to meet this burden, the claimant must prove that his compensable injury was the "major cause" of an ascertainable degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a). He must further show the existence of "objective and measurable physical findings" to support this degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-704(c)(1)(B). No portion of this degree or percentage of permanent impairment can be based upon pain, loss of range of motion, or straight leg raising tests, Ark. Code Ann. §11-9-102(16)(A)(ii). Finally, the specific degree or percentage of permanent impairment must be calculated in a manner that conforms with the official rating guide. At the present time, this official rating guide is the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition), Ark. Code Ann. §11-9-522(g).

The claimant has offered no evidence that any physician has assessed a specific degree or percentage of permanent physical impairment for his compensable back injury. In fact, the reports and records of Dr. Runnels reveal that it is his expert medical opinion that the claimant has experienced no permanent impairment to his back from his injury of October 9, 2002.

After consideration of all the evidence presented, I find Dr. Runnels' opinion to be controlling. His opinion is stated with conviction and clarity. Further, he adequately explains the basis for this opinion. Finally, the facts assumed by Dr. Runnels in forming this opinion are supported by essentially all of the evidence presented.

Obviously, the plain x-rays and MRI study performed on the claimant objectively establish the presence of various defects or abnormalities involving the claimant's lumbar spine. These defects take the form of osteoarthritic changes and degenerative disc disease. Such defects are produced by the presence of longstanding degenerative conditions, rather than any recent acute trauma. Dr. Runnels has diagnosed the claimant's injury to be in the form of a facet strain of his lumbar spine, that may have resulted in temporary aggravation of these pre-existing degenerative conditions. Although Dr. Runnels has placed permanent restrictions on the claimant's potential physical activities, it is apparent from his reports and records that these restrictions are prophylactic in nature (i.e. to prevent the potential of future aggravations), rather than being attributable to the effects of the claimant's compensable injury on October 9, 2002. There is simply no evidence presented to show that any of the objectively documented defects, involving the claimant's lumbar spine, were caused by the compensable injury of October 9, 2002, or that the compensable injury resulted in any additional permanent physical damage to his portion of the claimant's body.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that his compensable injury of October 9, 2002, was the "major cause"

of any specific degree or percentage of permanent physical impairment that would meet the various requirements of the Act. Thus, he is not entitled to any benefits for permanent physical impairment, as a result of his compensable injury of October 9, 2002.

III. PERMANENT “DISABILITY” OR LOSS OF WAGE EARNING CAPACITY

As the claimant has failed to prove that the compensable injury of October 9, 2002, was the “major cause” of any specific percentage or degree of permanent physical impairment, he cannot be awarded any benefits for permanent “disability” or loss of wage earning capacity, Walmart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W. 3rd 727(2000). Therefore, his claim for benefits for permanent “disability” or loss of wage earning capacity, including permanent total disability must be denied. It also became unnecessary to address the effect of Ark. Code Ann. §11-9-522 and §11-9-526, in regard to the claimant’s entitlement to such benefits.

IV. SECOND INJURY FUND LIABILITY

_____As the claimant has failed to prove that the compensable injury of October 9, 2002, was the “major cause” of any degree or percentage of permanent physical impairment and has further failed to prove that he would be entitled to any benefits for permanent “disability” for his compensable injury, Ark. Code Ann. §11-9-525 would be inapplicable to the present claim . The Second Injury Fund would have no liability in this case, and any and all claims made in this case against the Second Injury Fund must also be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On October 9, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On October 9, 2002, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$425.00 for total disability and \$319.00 for

permanent partial disability.

4. On October 9, 2002, the claimant sustained a compensable injury to his back or lumbar spine.
5. There is no dispute, at the present time, over the payment of medical expenses.
6. There is no dispute over the payment of temporary total disability benefits accruing through February 10, 2003, and all such benefits have previously been paid.
7. The claimant has proven by the greater weight of the credible evidence that he is entitled to continuing temporary total disability benefits from February 11, 2003 through March 7, 2003. Specifically, he has proven by the greater weight of the credible evidence that during this period he continued within his healing period from the effects of his compensable injury and was rendered totally disabled from performing regular gainful employment as a result of the injury. The claimant has failed to prove by the greater weight of the credible evidence that his healing period from the effects of his compensable injury extended beyond March 7, 2003. Thus, he would not be entitled to temporary disability benefits after that date.
8. The claimant has failed to prove that the compensable injury of October 9, 2002, was the major cause of any specific degree or percentage of permanent physical impairment, which would be supported by objective and measurable physical findings and could be calculated in a manner that conforms to the official rating guide adopted by this Commission.
9. As the claimant has failed to prove that his compensable injury was the major cause of any specific degree or percentage of permanent physical impairment, he is not entitled to any benefits for actual permanent “disability”

or loss of wage earning capacity.

10. The claimant is not barred from receiving the additional temporary total disability benefits, herein awarded, by the provisions of Ark. Code Ann. §11-9-526. Specifically, the respondents have failed to prove that he unjustifiably refused suitable employment during this period.
11. As the claimant has failed to prove that he is entitled to benefits for permanent physical impairment or permanent disability, Ark. Code Ann. §11-9-525 would be inapplicable to this claim and the Second Injury Fund would have no liability for benefits.
12. The respondents have controverted the claimant's entitlement to any additional temporary total disability benefits after February 10, 2003, and his entitlement to any permanent disability benefits for either permanent physical impairment or permanent "disability" (i.e. loss of wage earning capacity).
13. The Second Injury Fund has controverted the claimant's entitlement to any benefits from said Fund.
14. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the additional temporary total disability benefits herein awarded.

ORDER

The respondents, Armstrong Brothers Tool Company and Fidelity & Guaranty Insurance Company, shall pay to the claimant additional temporary total disability benefits for the period of February 11, 2003 through March 7, 2003.

The respondents, Armstrong Brothers Tool Company and Fidelity & Guaranty Insurance Company, shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional temporary total disability benefits. One-half of this fee is the obligation of these respondents in addition to such benefits. The remaining one-half of this

fee shall be withheld by the respondents from such benefits.

For the reasons heretofore set forth in this Opinion, the claimant's request for permanent disability benefits for both permanent physical impairment and permanent "disability" or loss of wage earning capacity must be denied and dismissed.

For the reasons heretofore set forth in this Opinion, any and all claims made against the Second Injury Fund of the State of Arkansas should be and hereby are dismissed.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge