

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301811

KEVIN CAMPBELL		CLAIMANT
KELLY SERVICES, INC.		RESPONDENT
AMERICAN CASUALTY COMPANY OF READING, PA INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED JUNE 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

Respondents No. 1 represented by LEE MULDROW, Attorney, Little Rock, 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 March 23, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on January 21, 2004. The pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the Second Injury Fund announced that it was accepting liability for permanent benefits attributable to any combined permanent disability and would stipulate that Ark. Code Ann. §11-9-525 was applicable to this claim. This rendered moot the second issue listed in the pre-hearing order. The Second Injury Fund further announced that it was accepting liability for a combined disability of 20% to the body as a whole. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On February 12, 2003, the relationship of employee-employer-carrier

existed between the parties.

2. The appropriate weekly compensation rates are \$272.00 for total disability and \$204.00 for permanent partial disability.
3. On February 12, 2003, the claimant sustained a compensable injury to his low back or lumbar spine.
4. There is no dispute over the payment of medical expenses or temporary disability benefits.
5. The claimant's healing period ended on October 9, 2003.
6. Ark. Code Ann. §11-9-525 is applicable to this case and the Second Injury Fund is liable for any combined disability in excess of the permanent physical impairment from the last injury.

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 benefits for permanent disability, including both permanent physical impairment and actual "functional" disability.
2. The claimant's entitlement to the late permanent penalty on all permanent partial disability benefits accrued prior to December 15, 2003.
3. Attorney's fees and controversion.

In regard to these issues, the claimant contends:

a. The claimant contends that he sustained injury to his spine in 2000 that resulted in surgery and that the combined effects of his 2000 injury with those of his 2003 injury causes him to be disabled than he would have been if he had only had the 2003 injury. Accordingly, there is a Second Injury Fund liability in this case.

b. The claimant contends that the respondents have controverted the claimant's entitlement to permanent disability benefits in excess of the seventeen percent (17%) impairment rating and if they do not initiate payment of benefits in regard to the seventeen percent (17%) impairment rating, immediately,

they will have controverted these benefits.

c. The claimant contends that even if the respondents immediately initiate payment regarding the seventeen (17%) impairment rating, they are still liable for a late payment penalty.

In regard to these issues, the respondents contend:

“Respondents contend claimant is receiving all benefits to which he is entitled. Further respondents contend that a portion of the claimant’s 17 percent impairment is attributable to pre-existing factors; claimant has not sustained significant wage loss disability; and that the facts justify a finding of Second Injury Fund liability.”

In regard to these issues, the Second Injury Fund contends:

“The Second Injury Fund contends the claimant has experienced functional disability in an amount equal to 20% to the body as a whole. The Second Injury Fund acknowledges its liability for payment of these benefits. The anatomical impairment rating assigned by Dr. Anagnost will be paid by the carrier on or about March 27, 2005. The Second Injury Fund will begin payment of functional disability benefits at this time to continue for a period of 90 weeks. It is the Fund’s further contention that claimant is limited to this amount of functional disability benefits as he had failed to cooperate in efforts to provide rehabilitation and/or job placement assistance.”

DISCUSSION

I. EXTENT OF PERMANENT IMPAIRMENT ATTRIBUTABLE TO THE COMPENSABLE INJURY OF FEBRUARY 12, 2003

The first matter to be discussed is the degree or percentage of permanent physical impairment that is attributable to the claimant’s admittedly compensable injury of February 12, 2003. The respondents (Kelly Services, Inc. and American Casualty of Reading, Pennsylvania) have conceded liability for a permanent physical impairment of 5% to the body as a whole and have commenced the payment of permanent partial disability benefits for this degree of impairment.

The medical evidence contains various expert opinions concerning the extent of permanent physical impairment, due to the claimant's compensable injury. All of these opinions have been expressed by Dr. Steven Anagnost, an orthopaedic surgeon and the claimant's primary treating physician. However, it is the duty of this Commission, and not that of Dr. Anagnost, to calculate the particular degree or percentage of permanent physical impairment produced by the claimant's compensable injury.

The Act first requires that all determinations concerning the existence and extent of permanent physical impairment must be based upon "objective physical or mental findings", Ark. Code Ann. §11-9-704(c)(1)(B). Any determination of the existence and extent of permanent physical impairment must also conform to the current official rating guide, which has been adopted by this Commission, Ark. Code Ann. §11-2-9-522(g). At the present time, this official rating guide is the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). However, the Act further provides that pain, range of motion, and any other subjective factors can be given no consideration in determining the extent of permanent physical impairment for injuries such as that experienced by the claimant, Ark. Code Ann. §11-9-522(g)(1)(B) and Ark. Code Ann. §11-9-102(16)(A)(ii). Finally, the compensable injury must be the "major cause" of the particular degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

It quickly becomes apparent that Dr. Anagnost's rating contained in his report of October 9, 2003, does not satisfy these various requirements of the Act. He expressly states that at least a portion of this rating is based upon "subjective" factors, such as weakness and restriction of range of motion of the lumbar spine.

The present claimant's loss of range of motion in his lumbar spine would reasonably appear to be "objective" in nature, as it is the result of the surgical placement of steel "hardware" and the surgically induced bony fusion of the L4 vertebra, L5 vertebra,

and sacrum, consideration of loss of range of motion is specifically prohibited by the Act in assessing permanent physical impairment for spinal injuries, Ark. Code Ann. §11-9-102(16)(A)(ii). The legislature's decision to conclusively make range of motion a "subjective" finding in regard to spinal or back injuries, is controlling.

I would also note that there is no indication by Dr. Anagnost that his assessment of permanent physical impairment on October 9, 2003, was calculated in a manner that was derived from the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). It can not be assumed that Dr. Anagnost used this guide in formulating his opinion.

I have given no weight to the opinions of Dr. Anagnost that the claimant has experienced a 17% permanent physical impairment as a result of his compensable injury of February 12, 2003. Instead, I have derived my own assessment of the percentage or degree of permanent impairment after applying the statutory requirements to the credible medical evidence presented.

The medical evidence shows that solely as a result of his compensable injury of February 12, 2003, the claimant initially underwent corrective surgery in the form of hemilaminectomies with partial fascectomies and diskectomies at L4-5 and L5-S1. This surgery was carried out on March 10, 2003. As a natural consequence of his compensable injury of February 12, 2003, and the surgery on March 10, 2003, the claimant ultimately required additional surgery, in the form of complete laminectomies with medial fascectomies, bilateral foraminotomies and complete diskectomies at L4-5 and L5-S1, and a posterior lumbar interbody fusion with bone grafting and the use of milled prosthetic implants. This extensive surgical procedure was carried out on June 25, 2003.

The greater weight of the evidence presented shows that the claimant's compensable injury of February 12, 2003, was the "major cause" of his need for these two surgical procedures. Thus, this compensable injury would also be the "major cause" of any

permanent physical impairment that resulted from these two surgical procedures.

The American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition) provides a method for the assessment of permanent physical impairment due to specific spinal disorders (such as those experienced by the claimant) that gives no consideration to pain, loss of range of motion, or other "subjective" findings. This method is found in table 75 on page 113 of the Guides. This Commission has long endorsed and has frequently employed this table for calculating the percentage or degree of permanent physical impairment resulting from specific spinal injuries.

However, this particular case is complicated by the fact that the claimant had previously experienced an injury involving the same portions of his lumbar spine and had previously undergone a left L4-5 laminectomy with discectomy by Dr. Anthony Capocelli on July 21, 2000. As a result of that injury and surgical procedure, Dr. Capocelli had assessed a permanent physical impairment of 12% to the body as a whole (report of January 4, 2001). In the report, Dr. Capocelli states that this rating is based on the American Medical Association's Guides to the Evaluation of Permanent Impairment (fourth edition). However, he does not indicate which particular method of the Guide he employed. Clearly, he did not use table 75.

It appears that Dr. Anagnost also addressed the matter of the claimant's prior injury and surgery at L4-5. In response to an inquiry by the respondents, Dr. Anagnost opined that 20% of the claimant's "current condition" is the result of the pre-existing injury and surgery. Dr. Anagnost offers no insight into the reasoning he used in reaching this conclusion. I would also note that he incorrectly states that Dr. Capocelli had previously found and operatively treated an L5-S1 disc herniation (Dr. Capocelli's records indicate that he observed only bulging of the L5-S1 disc, which was not operatively treated).

After consideration of all the evidence presented, it is my opinion that the degree or percentage of permanent physical impairment, that is attributable to the claimant's

compensable injury of February 12, 2003, should be calculated in the following manner: The greater weight of the credible medical evidence shows that the claimant would currently fall under Category IV D and E of table 75. He has undergone a two level spinal fusion with decompression and with residual “objective” signs or symptoms (diminished reflexes and swelling). He has also undergone a total of three surgical procedures or “operations” in this particular area.

Using the Category IV D and E, a permanent physical impairment of 17% is recommended. This figure is derived by taking the 12% recommended for a single level lumbar spinal fusion with decompression and with residual signs or symptoms and adding an additional 2% for the two levels involved and then adding an additional 3% for the last surgical procedure being his third operation. In this regard, it is my opinion that IV E provides for an additional 2%, when two levels or involved. This section expressly states that 1% is to be added “per level” involved, not per additional level. I would also note that this situation concerning multiple levels appears to be similar to that concerning multiple operations. In regard to multiple operations, it is obvious that 1% is to be added for each operation, including the first surgery.

Also using table 75, I find that the medical evidence presented shows that the claimant’s prior injury and initial surgery (involving the L4-5 intervertebral disc) would have placed him in category II D of table 75. For lumbar injuries and surgeries falling under this classification, a permanent physical impairment of 8% is recommended.

In order to determine the appropriate degree or percentage of permanent physical impairment, for which the compensable injury of February 12, 2003, was the “major cause”, it is my opinion that the 8% permanent physical impairment due to the claimant’s prior lumbar injury and surgery should be subtracted from the 17% permanent physical impairment he is currently experiencing. Thus, I find that the claimant’s compensable injury of February 12, 2003, was the “major cause” of a permanent physical impairment of

9% to the body as a whole. The respondents, Kelly Services, Inc. and American Casualty Company of Reading, Pennsylvania, are liable to the claimant for permanent partial disability benefits attributable to this degree of permanent physical impairment.

II. PERMANENT FUNCTIONAL DISABILITY FOR LOSS OF WAGE EARNING CAPACITY OR “COMBINED DISABILITY”

Next, it becomes necessary to determine the percentage or degree of permanent disability that is attributable to functional disability or loss of wage earning capacity that has been produced by the combined effects of the claimant’s multiple permanent injuries. The procedure for making this determination is outlined in Ark. Code Ann. §11-9-525(b)(4). This subsection states:

“After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an Administrative Law Judge or the Worker’s Compensation Commission, the degree or percentage of the employee’s disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall be determined by the Administrative Law Judge or the Commission, and the degree or percentage of disability or impairment which existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and the compensation for that balance, if any, shall be paid out of the Fund provided for in §11-9-301.”

The foregoing subsection requires three separate determinations. The first is the degree or percentage of permanent physical impairment caused by the last compensable injury. The second determination is the degree or percentage of disability or impairment from all injuries and conditions, compensable or otherwise which were in existence at the time the “second Injury” was sustained. The third and final determination is the current degree or percentage of disability and impairment that the claimant has experienced as the result of all of his various permanently disabling injuries or conditions, including his “second injury”.

The degree or percentage of permanent physical impairment caused by the

claimant's "last" compensable injury (i.e. the compensable injury of March 12, 2003) has already been determined in this Opinion. This degree or percentage of permanent physical impairment is in the amount of 9% to the body as a whole. As previously noted, the respondent employer and carrier is liable for permanent partial disability benefits attributable to this degree or percentage of permanent physical impairment.

The degree or percentage of permanent physical impairment, which was caused by the claimant's previous back or lumbar spine injury, has also already been determined in this Opinion. This degree or percentage of permanent physical impairment is in the amount of 8% to the body as a whole. However, it remains necessary to determine the degree or percentage of permanent functional disability for loss of wage earning capacity that resulted from the claimant's previous low back or lumbar injury and resulting surgery, which was in existence at the time of his current compensable injury. In this regard, the evidence shows that the claimant's prior low back or lumbar injury resulted in physical limitations and restrictions. He was medically restricted from lifting weights over 25 pounds, from frequent bending, and from climbing or crawling (Respondent's Exhibit No. 1, page 17). Other demonstrated physical restrictions are contained in the Functional Capacity Evaluation found on pages 19-31 of Respondent's Exhibit No. 1. Clearly, this previous injury limited the potential jobs the claimant could perform and prevented him from returning to the position he held at the time of this prior injury. However, the record reveals that the claimant did return to regular gainful employment in the same field (i.e. truck driving). Although the effects of this previous injury on the claimant's ability to earn wages was not negligible, neither was it severe. In my opinion, the evidence reflects that the claimant's low back or lumbar spine injury resulted in a permanent functional disability or loss of wage earning capacity equivalent to a 7% permanent partial disability to the body as a whole. Thus, the claimant's previous low back or lumbar spine injury and initial surgery was producing a permanent partial disability (permanent physical impairment plus

permanent functional disability) in the amount of 15% to the body as a whole, at the time of the claimant's compensable injury on February 12, 2003.

The record further shows that at the time of the claimant's "last" injury, he was also experiencing permanent physical impairment as a result of an injury to his neck or cervical spine. The medical record indicates that the claimant suffered a disc protrusion or herniation at C5-6 that resulted in a single level discectomy and fusion on March 4, 2002. This injury and procedure would entitle the claimant to a permanent physical impairment of 8% to the body as a whole, table 75 IV C. There is no evidence that this compensable injury and its resulting surgery produced any degree of permanent functional disability or loss of wage earning capacity. There is no evidence that this injury resulted in any noticeable restrictions on the claimant's potential employment activities or had any adverse impact on his employability. Thus, this pre-existing injury or condition was producing only permanent impairment at the time of the claimant's current compensable injury.

In summary, I find that the greater weight of the credible evidence establishes that at the time of his compensable injury, of February 12, 2003, the claimant was experiencing permanent impairment and disability in the amount of 23% to the body as a whole (15% attributable to his prior low back or lumbar spine difficulties and 8% attributable to his prior neck or cervical difficulties).

When all of the claimant's permanent physical impairments are combined, he is now experiencing permanent physical impairment totaling 25% to the body as a whole (8% for his prior lumbar injury and surgery, 8% for his prior cervical injury and surgery, and 9% for his current injury and two surgeries). Although he was previously medically restricted from frequent bending, his multiple surgeries (particularly his double level fusion) would effectively prevent almost any bending or twisting at the waist, even on a non frequent basis. He has now been totally precluded from any type of truck driving position, even those where no lifting is involved. He continues to be medically restricted from lifting more

than 25 pounds and climbing or crawling. These restrictions would prevent the claimant from returning to many of his prior employments and would also preclude him from engaging in a substantial number of employments for which he would otherwise be qualified (particularly in the manual labor field). When these medical restrictions are considered in light of the claimant's relatively young age, the level of his education, his high motivation to return to employment, and the severity and magnitude of his various permanent injuries (as reflected by his permanent physical impairment), I find that the claimant has proven that he is currently experiencing a combined permanent functional disability, from all causes, in the amount of 30% to the body as a whole. When this is added to his combined permanent physical impairment, his total permanent partial disability, from all causes, is 55% to the body as a whole.

Therefore, employing the formula provided by Ark. Code Ann. §11-9-525(b)(4), the claimant's pre-existing permanent impairment and disability of 23% to the body as a whole, is subtracted from his current total partial disability and impairment of 55% to the body as a whole. This would leave a remainder of 32% to the body as a whole. From this amount, the permanent physical impairment that was occasioned by his compensable injury of February 12, 2003 of 9% to the body as a whole would next be subtracted. This yields a "balance" of 23% to the body as a whole, which would be the liability of the Second Injury Fund.

III. LATE PAYMENT PENALTY

The final matter to be addressed is the claimant's request for imposition of the penalty provided by Ark. Code Ann. §11-9-802(b) on permanent partial disability benefits accruing prior to December 15, 2003. The burden rests upon the claimant to prove all of the facts necessary for the imposition of this penalty.

The evidence presented establishes that the claimant's healing period from the effects of his current compensable injury ended on October 9, 2003. Thus, permanent

partial disability benefits would have begun to accrue on October 10, 2003. The first “installment” of this permanent partial disability would have “become due” two weeks later, on October 24, 2003. These “installments” would have continued to “become due” every two weeks thereafter. Ark. Code Ann. §11-9-802(b).

The claimant testified that his checks from the respondent continued unabated through some time in late October or early November of 2003. Although the evidence does not specifically indicate, it would appear that the respondent continued the payment of temporary total disability benefits through some time in “late October” or “early November” of 2003. Clearly, they would be entitled to credit for any overpayment of temporary total disability against the permanent partial disability benefits to which the claimant became entitled on October 10, 2003.

The claimant testified that the next check he received from the respondent was dated November 23, 2003 and was in the amount of \$1,936.00. The claimant does not give the exact date on which he received this check. Thus, I must assume that it was on or about December 23, 2003. The dollar amount of this check would be the equivalent of 9.49 weeks of permanent partial disability. However, there is no evidence concerning the exact calendar period this check covered (i.e. whether it only covered benefits which had accrued prior to December 23, 2003 or whether it also represented payment for benefits that would accrue after December 23, 2003). The total period of time between October 10, 2003 and December 23, 2003, is only ten weeks four days.

Clearly, the respondent’s payment of permanent partial disability benefits on or about December 23, 2003, would represent the timely payment of any installments that had become due within 15 days prior to that date. As two weeks of installments must accrue, before they become “due”, the late payment penalty would not be appropriate on any benefits which accrued within 29 days prior to December 23, 2003, or November 24, 2003.

Thus, at best, they would only be liable for the penalty provided by Ark. Code Ann. §11-9-802(b) on permanent partial disability benefits, if any, that accrued between the date upon which the respondents' credit would have run out for their overpayment of temporary total disability and November 24, 2003. Unfortunately, based on the evidence presented, it is impossible to determine when the respondents credit for the overpayment of temporary total disability benefits would have run out (i.e. the claimant has only vaguely identified the date his temporary total disability checks ceased).

The respondents argue that any late payment of permanent partial disability benefits should be excused, as this delay was occasioned by their diligent inquiry into the basis and grounds for the permanent impairment rating assessed by Dr. Anagnost. I cannot find this an acceptable argument. The respondents were clearly aware that the claimant had experienced some percentage or degree of permanent physical impairment from his compensable injury of February 12, 2003. They should have also been reasonably aware that this degree of permanent physical impairment would obviously entitle the claimant to more than a few weeks of permanent partial disability benefits. While the respondents were certainly entitled to investigate the validity of Dr. Anagnost's rating, permanent partial disability payments should have commenced and been continued for a reasonable period of time during their investigation. I would also note that the records show that the respondents appear to have actually instituted the payment of permanent partial disability benefits prior to any inquiry being made of Dr. Anagnost, concerning his rating (Respondent's Exhibit No. 2, page 120).

However, after consideration of all the evidence presented, in regard to this issue, I find that the claimant has failed to present sufficient evidence to determine whether or not this penalty is, in fact, applicable, and has certainly failed to present sufficient evidence to establish with any degree of certainty the amount of benefits to which this penalty would attach. Thus, the claimant's request for this penalty is denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 12, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On February 12, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$272.00 for total disability and \$204.00 for permanent partial disability.
4. On February 12, 2003, the claimant sustained compensable injuries to his low back or lumbar spine, in the area of L4-5 and L5-S1.
5. There is no dispute over the payment of medical expenses, which have been incurred as a result of the claimant's compensable injury, and all such expenses have or are being paid.
6. There is no dispute, at the present time, over the payment of temporary disability benefits, and all appropriate temporary total disability benefits have been paid.
7. The claimant's healing period from the effects of his compensable injury ended on October 9, 2003.
8. Ark. Code Ann. §11-9-525 is applicable to the present claim and the Second Injury Fund of the State of Arkansas is liable for any combined disability, in the manner provided by this subsection.
9. At the time of the claimant's compensable injury on February 12, 2003, he was experiencing permanent partial impairment and permanent partial disability or loss for wage earning capacity totaling 23% to the body as a whole.
10. Following the end of his healing period from his compensable injury of

February 12, 2003, the claimant was experiencing a total permanent physical impairment and total permanent partial disability for loss of wage earning capacity of 55% to the body as a whole.

11. The compensable injury of February 12, 2003, was the major cause of a permanent physical impairment of 9% to the body as a whole. Pursuant to Ark. Code Ann. §11-9-525, the respondents, Kelly Services, Inc. and American Casualty Company of Reading, Pennsylvania, are liable for this degree or percentage of permanent partial disability.
12. The “balance” of permanent partial disability remaining, after the application of the provisions of Ark. Code Ann. §11-9-525(b)(4), is in the amount of 23% to the body as a whole. Pursuant to the provisions of this subsection, this is the liability of the Second Injury Fund of the State of Arkansas.
13. The claimant has failed to prove that he is entitled to any penalties provided by Ark. Code Ann. §11-9-802(b), in regard to any permanent partial disability benefits accruing prior to December 15, 2003.
14. The respondents, Kelly Services, Inc. and American Casualty Company of Reading, Pennsylvania, have controverted the claimant’s entitlement to any permanent partial disability benefits in excess of 5% to the body as a whole. These respondents have also controverted the claimant’s entitlement to the penalty provided for by Ark. Code Ann. §11-9-802(b), in regard to any permanent partial disability benefits.
15. The Second Injury Fund of the State of Arkansas has controverted the claimant’s entitlement to the payment of any permanent partial disability benefits in excess of 20% to the body as a whole.

ORDER

The respondents, Kelly Services, Inc. and American Casualty Company of Reading,

Pennsylvania, continues to be liable for all reasonably necessary medical services required by the claimant as a result of his compensable injury of February 12, 2003.

The respondents, Kelly Services, Inc. and American Casualty Company of Reading, Pennsylvania, shall pay to the claimant permanent partial disability benefits equivalent to a 9% permanent physical impairment to the body as a whole. These respondents are further entitled to credit for all such benefits previously paid.

The Second Injury Fund of the State of Arkansas shall pay to the claimant permanent partial disability benefits equivalent to a 23% permanent partial disability to the body as a whole with said payments to commence once the respondent employer and carrier has completed the payment of permanent partial disability benefits for the 9% permanent physical impairment.

The respondents, Kelly Services, Inc. and American Casualty Company of Reading, Pennsylvania, shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein found to be their liability, which is in excess of 5% to the body as a whole. One-half of this attorney's fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from such benefits.

The Second Injury Fund of the State of Arkansas shall pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein found to be its liability, which is in excess of 20% to the body as a whole. One-half of this attorney's fee is the obligation of the Second Injury Fund in addition to any benefits due and payable to the claimant. The remaining one-half of his attorney's fee is to be withheld by the Second Injury Fund from benefits herein awarded from them to the claimant.

The Second Injury Fund of the State of Arkansas is also liable for one-half of the cost of the taking and transcribing of the transcript of the hearing on March 23, 2004.

For the reasons heretofore set forth in this Opinion, the claimant's request for

imposition of the penalty provided by Ark. Code Ann. §11-9-802(b) should be and hereby is denied.

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.

MICHAEL L. ELLIG
Administrative Law Judge