

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E802937

GARLAN FOOTE	CLAIMANT
HILAND DAIRY CO. JOINT VENTURE	NO. 1 RESPONDENT
CRAWFORD & COMPANY INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED JANUARY 2, 2004

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 WORLEY, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 2, 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 July 21, 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. On March 2, 1998, the relationship of employee-employer-carrier existed between the parties.

3. Prior opinions are res judicata and the law of the case as to Respondent No. 1 and the claimant.

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

1. Permanent total disability benefits.
2. Additional medical expenses from April 1, 2003.
3. Second Injury Fund Liability.
4. Attorney's fee.
5. Was the March 1998 injury the major cause of the claimant's need for a knee replacement.
6. Was the claimant's March 1998 knee injury the major cause of his impairment rating.

In regard to the foregoing issues the claimant contends that he is currently totally permanently disabled, or alternatively is entitled to wage loss over and above the 20% lower extremity anatomical rating previously awarded by his treating physician, Dr. Axelsen. The Second Injury Fund should also be made a party, and be found liable, based upon the claimant's prior conditions of polio, three prior surgeries, including, but not limited to, a medial meniscectomy of the right knee in the early 1970's and a tibial osteotomy also early in the early 1970's, all out of the State of Minnesota, with no medical records being available in reference to the same. The claimant also suffers from preexisting severe tricompartmental arthritis with a significant valgus deformity in the right knee area. The claimant also suffers from pre-existing advanced degenerative arthritis of his lumbar spine and

hip along with pre-existing degenerative disc disease with severe canal stenosis at L3-4; L4-5; and L5-S1, primarily because of diffuse bulging annulism, bilateral ligamentum flavum hypertrophy, and bilateral degenerative facet joint disease. In addition, the claimant is entitled to continuing treatment of his right knee, based upon his treating physician's recommendation for continuation of a knee brace, and Ultracet for the foreseeable future, along with a strong likelihood of an additional total knee replacement being necessary within the next ten years. Further, the claimant is entitled to being reimbursed \$80.61 paid to Sparks Hospital, and is entitled to an Order directing the Respondents to reimburse Medicare for payments made for treatment of his right knee at Sparks Hospital, including, but not limited to, CT spine lumbar on October 30, 2002. Also, the claimant has been notified that there may be additional bills at Sparks which have not been paid, or have been paid by Medicare, which needs to be reimbursed. The claimant is also entitled to a statutory attorney's fee.

In regard to the foregoing issues the Respondent No. 1 contends that the claimant is not permanently and totally disabled. He has suffered a scheduled injury and is not entitled to wage loss disability above and beyond the impairment rating that has been assigned to him. Alternatively, in the event the claimant is found entitled to any additional permanent disability benefits above and beyond his impairment rating, the respondent's position is that the Second Injury Fund has liability for those benefits. Respondent contends that all appropriate benefits have been and are continuing

to be paid with regards to this matter. Respondents No. 1 elaborated on their contentions as set forth on pages 3, 4 and 5 of the transcript.

In regard to the foregoing issues Respondent No. 2 contends that the claimant cannot prove that the work related incident of March 2, 1998, produced any degree of permanent anatomical impairment. That injury has been diagnosed as "sprain/strain." The 50 percent rating to the right lower extremity rendered by James Honey, PT, on February 5, 1999, does not comply with the requirements of the Arkansas Workers' Compensation Act, even though it was apparently "adopted" by Dr. Axelsen. The claimant cannot prove that the "major cause" of the need for the total right knee replacement is the work incident of March 2, 1998. The claimant cannot prove that the March 5, 1998, work incident was the "major cause" of any permanent anatomical impairment assigned for the right knee. Alternatively, if it is found that the claimant is entitled to an award of the 50 percent rating to the right lower extremity, there is no combination of disabilities or impairment in that the claimant has indicated in his answers to Second Injury Fund Interrogatories that he was not experiencing any difficulties with his right knee prior to the work incident of March 2, 1998. Also, alternatively, if the claimant is entitled to the 50 percent scheduled rating, the Second Injury Fund would not have liability because any combination of disability or impairment would not be greater than the disability/impairment from the last injury, considered alone and of itself. If the right knee replacement is

compensable, the replacement device replaced all prior knee defects and eliminated their existence. If the claimant is entitled to any degree of permanent anatomical impairment for the March 2, 1998, work incident (sprain/strain), he still cannot prove that he is permanently and totally disabled. The knee problem is a scheduled injury, and Mr. Foote worked for a considerable period of time after his release from treatment in 1999 following his right knee replacement. He has voluntarily removed himself from the workforce. Any medical problems associated with his left knee, right hip bursitis, shoulder, or low back cannot be considered in determining his extent of wage loss disability because none of those conditions are causally connected to the March 2, 1998, work incident and all arose after that date. Even though Respondents No. 1 have voluntarily accepted and paid benefits for temporary total disability, medical, and the 50 percent to the lower extremity anatomical impairment rating, such acceptance does not preclude the Second Injury Fund from exerting any of the defenses advanced herein. See the case of Gary Schalski v. Family Cleaners and Second Injury Fund, Claim No. E711809, Opinion of Administrative Law Judge Elizabeth Danielson dated June 5, 2003. The Fund is not asking that the claimant reimburse Respondents No. 1 for those benefits. Additionally, the Fund would offer any other defense shown at trial, whether or not specifically pled.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical bills marked Claimant's Exhibit

No. 1. Respondents No. 1 submitted medical documentation marked Respondents No. 1's Exhibit No. 1. Respondent No. 2 submitted documentary evidence marked Respondent No. 2's Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was 63 years old and had gone to the eighth grade but never received a GED. The claimant testified that he did receive some training to become a welder and believes that he received a certificate for this. The claimant testified that he utilized his welding skills for a period of time but due to leg problems he last used his welding skills in 1979.

The claimant testified that when he was a year to a year and a half old he was diagnosed with polio which has affected his legs over his lifetime. The claimant testified that his right leg has primarily been affected. The claimant testified that back in the 70s when he was living in Minnesota he underwent surgery on his right knee a couple of times for congenital problems. The claimant was asked if the cane he was using when he came into the hearing was something that he had used for a long period of time and the claimant responded that he had used it ever since his accident with the respondent. The claimant testified that he sustained a compensable injury to his right knee while working for the respondent on March 2, 1998. The claimant testified that this accident was reported immediately and he began receiving treatment by a variety of doctors. The claimant agreed that Dr. Axelsen has been his primary care physician for his right knee. The claimant

agreed that Dr. Axelsen operated on his knee the first time in 1998 shortly after his injury and then he underwent a second operation in 2003. The claimant agreed that subsequent to his knee injury he has applied for and is receiving social security disability benefits. The claimant testified that after he began receiving social security he continued to work some for another employer and then was self employed driving a truck until his health problems got so severe he could not continue with his employment.

The claimant agreed that he has been before the Commission on two prior occasions, the first to litigate the issue of compensability of his right knee injury and second to litigate his entitlement to additional medical treatment for his compensable injury. The claimant agreed that both of these decisions were favorable to him, were appealed and these appeals were affirmed in his favor. It has been stipulated by Respondent No. 1 and the claimant that these prior opinions are now res judicata and the law of the case.

The claimant testified that he has continued to be treated by Dr. Axelsen for his ongoing knee problems. The claimant agreed that in January 2003 Dr. Axelsen scoped his right knee and that the doctor has continued to prescribe medications as well as prescribed a brace for his knee. The claimant testified that he has received treatment by Dr. Axelsen which he and Medicare have paid since the respondents have refused to provide benefits since April 1, 2003. The claimant also testified that Medicare does not cover prescription drugs so he must pay for this himself.

The claimant testified that he has been a truck driver most of his life, however, he did work for approximately eight years for Whirlpool in the warehouse driving a jeep or forklift loading trucks. The claimant testified that due to his physical problems he would be unable to his welding job or drive trucks. The claimant explained that he cannot sit for a long period of time and cannot do a lot of bending, lifting and climbing. The claimant testified that he also has developed back and hip problems which were not diagnosed or identified until after his knee injury. The claimant testified that as a result of his back and hip problems, he underwent a hip replacement in April 2003. Through discussion of the parties, it was clarified that no benefits for the back and hip are being requested and that the back and hip problems were preexisting the claimant's compensable injury of March 2, 1998, although not diagnosed and addressed until after his compensable injury. The claimant testified that due to his knee, hip and back problems, he is unable to do any type work.

On cross examination by Respondent No. 1, the claimant agreed that he has had several surgeries on his right knee beginning in 1976 with the latest being in January 2003. The claimant also agreed that his diagnosis of childhood polio has affected his legs and caused him to walk with a limp all of his life. The claimant agreed that if the medical records set forth that he has been diagnosed with arthritis in his left knee, he would not disagree with that but did not recall. The claimant also agreed that he has been diagnosed with osteoarthritis in his hips as well as in his

low back and that he has high blood pressure as well as having taken medications for depression for some thirty years. The claimant testified that following his compensable injury, he worked for Northwest Trucking as a truck driver working forty hours a week hauling to cities such as Atlanta and Birmingham. The claimant testified that for a truck driver to work only forty hours per week was considered part time in the trucking industry. The claimant testified that while working for Northwest Trucking he brought home about \$400.00 per week and worked for the trucking company about a year to a year and a half. The claimant testified that he had knee surgery in January 2003 and a hip replacement in April 2003. The claimant testified that the prescriptions he was given by Dr. Axelsen before his hip surgery were for his knee. The claimant agreed that the prescriptions which he has turned in as well as the cost of a brace for his knee have been denied by the respondents. The claimant agreed that the brace that he has is a stabilizer for his right knee. The claimant was asked about his self employment as a truck driver and the claimant explained that this was sort of a joint venture with his son, indicating that he was buying the truck and his son was to do the driving but that it did not work out so he has now sold the truck. The claimant testified that this self employment lasted a little over a year. The claimant testified that he still has a valid CDL and he last took a DOT physical in 1999 before he began working for Northwest Trucking. The claimant testified that other than the restriction of having to wear glasses there were no other restrictions on his CDL. The

claimant testified that he last drove his truck in January just before his knee surgery. The claimant testified that his income, while he was operating his own truck, varied from \$800 to \$500 per week due to the fact that some days he was not able to drive. The claimant testified that he has been on social security disability for approximately two years and draws around \$900 each month. The claimant testified that during the period of time he was working for Northwest Trucking he voluntarily got off social security but in between the time he worked for Northwest and he became self employed he got back on social security. The claimant testified that for the year 2002, he would estimate his annual income to be around \$80,000 to \$90,000 gross which included his social security.

On cross examination by Respondent No. 2, the claimant testified that prior to his March 2, 1998, compensation injury, he had not been receiving any treatment or seeing a doctor for his leg or knee. The claimant agreed that during the period of time he worked for Respondent No. 1, he was able to do all of the duties required of him until his injury. The claimant was asked if his preexisting problems with his knee had ever presented an obstacle to employment or caused him to earn less than he otherwise would have earned and the claimant indicated in his response to interrogatories that, yes, while he worked for Whirlpool he was not able to do some of the jobs because he had to twist and turn. The claimant testified that he quit his job at Whirlpool for reasons other than he inability to physically do the work. The claimant agreed that he had never been refused a job because of his prior

condition with his leg. The claimant agreed that after Dr. Axelsen released him following his knee replacement surgery, the doctor indicated that he could drive a truck, get in and out of a truck and he could drop and hook. The claimant further agreed that his only limitation was that of loading and unloading. The claimant agreed that his low back and hip problems came up after his compensable injury. The claimant further agreed that he did not realize that he had any preexisting hip and low back problems until after his March 2, 1998, injury.

After a review of this entire record, including all of the medical attached, I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled. It is not questioned that this claimant has had serious knee problems and undergone a knee replacement for which Respondent No. 1 has accepted and paid out a 50 percent impairment rating to the right lower extremity as a result of his March 2, 1998, compensable injury. The claimant has testified that prior to this March 1998 injury he was working full time and having no problems relating to his low back, hips or left leg. There is some indication that the claimant has been treated for depression for several years but again the claimant has not indicated that this, in any way, debilitated him and kept him from being hired by different employers or finding work. The claimant agreed that he had never been laid off or dismissed for any prior condition and he was never refused a job because of his prior condition with his leg. The claimant has certainly testified that he suffered from

childhood polio which affected both of his legs, his right worse than his left, but that other than the problems with his right knee, he has never been refused a job or been dismissed from a job due to his physical problems. Therefore, the claimant has shown no physical impairment or disability from a second injury prior to his compensable right knee injury of March 2, 1998. The claimant has testified that he was working earning a substantial amount of money up until shortly before his last right knee surgery. Dr. Axelsen has not assessed the claimant with any additional impairment rating as a result of this additional surgery and has even written that the claimant could return to his prior job status. Currently, the claimant is possibly more disabled as a result of his hip replacement and low back problems but these physical problems reveal themselves after his compensable injury and Ark. Code Ann. §11-9-525(3) sets forth that latent injuries cannot be considered previous disabilities or impairment which would give rise to a claim against the Second Injury Fund. The claimant's knee injury is a scheduled injury and I find that the claimant has failed to meet his burden of proof of showing that he is permanently and totally disabled as a result of his compensable injury.

Since the claimant's compensable injury is a scheduled injury and he has failed to meet his burden of proof to show that he is permanently and totally disabled, there will be no finding of Second Injury Fund liability in this matter. I also will not address issue number five and six since these were both raised by

the Second Injury Fund and are now moot as to the fund since they have been dismissed from this claim.

I do find that the claimant has proven by a preponderance of the evidence that he is entitled to ongoing treatment for his right knee compensable injury. It has previously been found that the claimant sustained a compensable injury to his right knee. The respondents have accepted and paid a 50 percent impairment rating to the claimant's right knee and it has previously been found that the claimant is entitled to additional medical treatment for his right knee. Therefore, treatment as prescribed by Dr. Axelsen as it pertains to this claimant's right knee problems should be and shall be the responsibility of Respondents No. 1.

FINDINGS & CONCLUSIONS

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

2. On March 2, 1998, the relationship of employee-employer-carrier existed between the parties.

3. Prior opinions are res judicata and the law of the case as to Respondent No. 1 and the claimant.

4. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable right knee injury. There has been no showing that the claimant has a combination of a preexisting disability which combined with his compensable injury would entitle him to benefits for permanent and total disability. The claimant certainly has not shown that his right knee injury has permanently and totally

disabled him and without a showing of permanent and total disability, there is no wage loss entitlement for a scheduled injury. Also see discussion above.

5. There is no Second Injury Fund liability in this matter.

6. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable right knee injury at the expense of Respondents No. 1. See discussion above.

7. The respondents have controverted this claimant's entitlement to additional medical treatment.

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

ORDER

The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

There is no Second Injury Fund liability found in this matter.

The claimant is entitled to additional medical treatment for his compensable right knee injury at the expense of Respondent 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.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE