

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F102506

DAVID HENSON, Employee	CLAIMANT
QUICK LAY PIPE COMPANY, Employer	RESPONDENT #1
FREMONT INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MAY 12, 2004

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

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by JOHN WEBSTER, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 19, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 26, 2004, and a pre-hearing order was filed on January 27, 2004. 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 low back on February 14, 2001.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$410.00 for total disability benefits and \$308.00 for permanent partial disability benefits.

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

1. Unpaid MRI.
2. Unpaid mileage.
3. Claimant's entitlement to permanent partial disability based upon an impairment rating and wage loss.
4. Attorney fee.

Subsequent to the pre-hearing conference and prior to the hearing the Second Injury Fund was made a party to this claim and its liability has been added as an issue. In addition, respondent #1 is also requesting a credit for temporary total disability benefits paid in the amount of \$4,896.50 and an attorney fee of \$228.00. Finally, with respect to the unpaid MRI scan and mileage, the parties agreed that these issues have been resolved with respondent #1 agreeing to pay for the MRI scan. Accordingly, the issues for litigation at the hearing include claimant's entitlement to permanent partial disability benefits, credit for overpayment of temporary total disability benefits, Second Injury Fund liability, and an attorney fee.

The claimant contends that he is entitled to permanent partial disability benefits including impairment and wage loss as a result of his compensable injury. The claimant also contends that he is entitled to a controverted attorney fee on unpaid benefits.

Respondent #1 contends that it is only liable for payment of permanent partial disability benefits in an amount equal to 7% to the body as a whole as a result of claimant's compensable injury. Respondent #1 contends that any other benefits due and owing the claimant for permanent disability are the responsibility of the Second Injury Fund. In addition, respondent seeks a credit for overpayment of temporary total disability benefits in the amount of \$4,896.50 and overpayment of an attorney fee in the amount of \$228.00.

The Second Injury Fund contends that it has no liability for compensation benefits.

The record in this case consists of the prior hearing transcript from September 24,

2001, the hearing transcript from April 19, 2004, and in addition the parties have submitted post-trial briefs which have been blue-backed.

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 January 26, 2004 and contained in a pre-hearing order filed January 27, 2004, are hereby accepted as fact.

2. Respondent #1 is entitled to a credit for any temporary total disability benefits and related attorney fees paid to claimant subsequent to August 7, 2003.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to permanent partial disability benefits as a result of his compensable injury in an amount equal to 33% to the body as a whole. This includes a 13% impairment rating and a loss in wage earning capacity in an amount equal to 20% to the body as a whole.

4. The Second Injury Fund is not liable for payment of permanent partial disability benefits.

5. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 26% to the body as a whole.

#### FACTUAL BACKGROUND

The claimant is a 32-year-old man who initially injured his low back in 1991 while playing high school football. Claimant underwent surgery as a result of that injury.

After driving a truck for Tyson Foods and working as manager in a fast-food

restaurant, claimant went to work for respondent #1 as a tanker truck driver. Claimant's responsibilities for Respondent #1 involved delivering water to new oil derricks and extracting mud and water out of oil pits.

On February 14, 2001, the claimant was attempting to straighten a bent leg on a trailer by pulling on the leg with a 2 x 4 and hitting it with a sledge hammer when he experienced sharp pain in his back which radiated down the back of his legs. The claimant reported this incident but continued to work. Claimant continued to complain of back pain and was eventually sent by Respondent #1 to Dr. Williams at the Spiro Family Clinic. Claimant was initially evaluated by Dr. Williams on February 1, 2001, and was prescribed medication for muscle spasms. Claimant attempted to return to work for respondent #1 but was unable to do so because of back pain.

Claimant eventually came under the care of Dr. G. David Casper, an orthopaedic surgeon in Oklahoma City, Oklahoma. On April 28, 2003 the claimant underwent a 360-degree bilateral fusion which included the insertion of cages and a bar into the claimant's lumbar spine.

Claimant was subsequently referred to Dr. Pardee by Dr. Casper for an independent medical evaluation. Dr. Pardee assigned the claimant a permanent physical impairment rating in an amount equal to 13% to the body as a whole as a result of his compensable injury.

As a result, claimant has filed this claim contending that he is entitled to permanent partial disability benefits, including impairment and wage loss. As previously noted, other issues have also been raised including Second Injury Fund liability and respondent's request for a credit for overpayment of benefits.

#### ADJUDICATION

RESPONDENT'S ENTITLEMENT TO CREDIT.

Based upon the evidence presented, I am unable to determine the amount of credit to which the respondent might be entitled. Instead, I simply find that respondent #1 is entitled to a credit for any temporary total disability benefits and corresponding attorney's fee paid subsequent to August 7, 2003.

In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remained 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). In this particular case, even if it were assumed that claimant remained within his healing period subsequent to August 7, 2003, I find based upon the evidence presented that claimant did not suffer a total incapacity to earn wages after that date. In his progress report of August 7, 2003, Dr. Casper stated that the claimant was having virtually no back pain and that his main complaint was an inability to bend over to tie his shoes. Dr. Casper went on to order additional physical therapy for the claimant and with regard to claimant's work status, Dr. Casper stated:

His current status will be upgraded to the point that he could be released to light work with lifting of 10 pounds, no stooping, bending, squatting, kneeling, climbing, or operating a vehicle.

Dr. Casper also completed a form dated August 7, 2003 indicating that claimant was released to light duty work with these temporary restrictions. It was Dr. Casper's opinion that the claimant would reach maximum medical improvement in another six to nine months.

Claimant's next visit with Dr. Casper occurred on September 18, 2003. At that time Dr. Casper indicated that "at this point he has probably reached maximum medical improvement." Dr. Casper went on to indicate that he would like to get an independent

evaluation of the claimant. At the hearing this evaluation was referred to as a functional capacities evaluation; however, Dr. Casper referred claimant to Dr. Pardee for a second opinion and the assignment of a permanent physical impairment rating. Although claimant was unable to see Dr. Pardee until January 2004, this does not change the fact that according to Dr. Casper the claimant was physically capable of returning to light duty work as of August 7, 2003.

Given Dr. Casper's opinion that claimant was capable of returning to light duty work as of August 7, 2003, claimant did not suffer a total incapacity to earn wages after that date. Accordingly, respondent #1 is entitled to a credit for any temporary total disability benefits and the corresponding attorney fee paid subsequent to August 7, 2003.

#### IMPAIRMENT.

Although Dr. Casper performed the surgery on claimant, Dr. Casper did not assign a permanent physical impairment rating. Instead, Dr. Casper referred claimant to Dr. Pardee, a specialist in occupational medicine. In a report dated January 16, 2004, Dr. Pardee stated that in his opinion the claimant had a 13% permanent physical impairment rating to the body as a whole as a result of his February 14, 2001 compensable injury.

Following that report, attorneys for both respondent #1 and the claimant wrote Dr. Pardee requesting clarification of his opinion, including the basis of the rating as well as the edition of the AMA guideline which he relied upon in assigning his impairment. Dr. Pardee responded by letter dated February 11, 2004 indicating that under both the 5<sup>th</sup> Edition and the 4<sup>th</sup> Edition of the AMA guides claimant would be entitled to a 13% permanent physical impairment rating as a result of his compensable injury.

Following Dr. Pardee's report of February 11, 2004, respondent #1's attorney again wrote Dr. Pardee requesting his opinion as to the extent of claimant's permanent impairment resulting from his 1991 surgery and his opinion regarding the major cause of

claimant's current condition. In response to this inquiry, Dr. Pardee in a letter dated March 5, 2004 stated that in his opinion the claimant had a pre-existing 15% impairment to his lumbar spine as a result of the 1991 surgery. He also stated that the major cause of the claimant's current low back disability was his pre-existing condition.

A claimant has the burden of proving by a preponderance of the evidence that he is entitled to an award for permanent anatomical impairment. *Weber v. Best Western of Arkadelphia*, Full Commission Opinion filed November 20, 2003 (F100472). Furthermore, permanent benefits will only be awarded if the compensable injury was the major cause of the disability or impairment. A.C.A. §11-9-102(4)(F)(ii)(a).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a permanent physical impairment in an amount equal to 13% to the body as a whole as a result of his compensable injury. In reaching this decision, I note that respondent #1 in its brief contends that claimant has a total impairment of 13% of which 9% is attributable to his 1991 injury. I disagree with the contention that claimant has a total impairment of 13%. First, I note that Dr. Pardee did not assign an overall impairment of 13%, but instead indicated in his initial reports that claimant had a 13% permanent impairment as a result of the 2001 injury. When subsequently asked to assign an impairment rating attributable to the 1991 surgery, Dr. Pardee assigned a 15% impairment rating to that surgery.

While medical opinions from treating physicians regarding permanent impairment are evidence to be considered, it is the Commission's function to determine the correct amount of anatomical impairment. In this particular case, after reviewing the AMA Guidelines, 4<sup>th</sup> Edition, Table 75, I find that as a result of claimant's 1991 injury he had a permanent physical impairment in an amount equal to 9% to the body as a whole. This includes a surgically treated disc lesion without residual signs or symptoms which results

in an impairment rating of 8% to the body as a whole. An additional 1% is added for the additional level which was involved in 1991 for a total of 9%.

With respect to the claimant's 2001 compensable injury, I find that claimant has suffered a permanent physical impairment in an amount equal to 13% to the body as a whole. Table 75 assigns a 12% impairment rating for a single level spinal fusion with residual signs or symptoms. Here, claimant did have residual signs and symptoms as a result of his compensable injury. In addition, Table 75 also awards an additional 1% for each level affected. Accordingly, I find that as a result of claimant's compensable injury he has suffered a permanent physical impairment in an amount equal to 13% to the body as a whole based upon the AMA Guidelines, 4<sup>th</sup> Edition. I also find that the major cause of this 13% impairment rating was claimant's compensable injury of February 14, 2001.

With respect to this issue, I note that respondent #1 contends in its post-hearing brief that it has accepted liability for a permanent impairment rating in an amount equal to 7% to the body as a whole. However, respondent #1 did not stipulate to this liability at the time of the pre-hearing conference and did not offer any evidence at the hearing that it had accepted liability for any permanent impairment. As a result, I find that respondent #1 has controverted claimant's entitlement to benefits associated with the 13% permanent physical impairment rating.

#### WAGE LOSS.

The next issue for consideration involves claimant's contention that he is entitled to permanent partial disability benefits related to a loss in wage earning capacity as a result of his compensable injury. When considering a claim for permanent partial disability benefits in excess of the permanent physical impairment the Commission may take into account in addition to the impairment various factors including the claimant's age, education, work experience, and other matters reasonably expected to affect their future

earning capacity. A.C.A. §11-9-522(b)(1). Here, the claimant is a 32-year-old high school graduate who obtained his CDL license in 1996 after completing a 10 week course at a trucking academy. In addition to driving a truck for respondent #1, claimant also testified that his prior jobs included driving a truck for Tyson Foods and managing a fast food restaurant for one and a half years.

Claimant is currently working as a relief driver for his brother. Claimant testified that they currently spend three days driving to Portland, Oregon, and three days coming back. Claimant has been performing this work for approximately one month and is paid \$250.00 per week.

Claimant testified that he can no longer unload trucks and this limits his ability to perform some truck driving jobs. Nevertheless, claimant testified that he has applied for jobs with various trucking companies and believes he is physically capable of driving a truck.

At the time of the hearing there was some testimony regarding discussions claimant had with his current employer about working full time. Claimant testified that assuming he was able to work full time, he believed he could earn anywhere from \$500 to \$1000 per week. However, claimant also testified that he does not have a job offer with his current employer or any other trucking company for full-time work. While it is possible that claimant may be able to return to that type of work in the future, claimant has not yet done so and it would be speculation to find that claimant is capable of returning to work full time making \$500 to \$1000 per week. Speculation and conjecture are not to be substituted for credible evidence by the Commission. *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979).

Finally, it is also important to note that in his report of March 5, 2004, Dr. Pardee stated that claimant could return to work with restrictions of lifting no more than 50 pounds occasionally or 40 pounds repetitively. Claimant's bending at the waist should be limited

to 40 times per hour. Dr. Pardee opined that these restrictions would place claimant in the medium category of job activities. Furthermore, I also note that a functional assessment completed in March 2004 indicates that claimant can perform work in the medium category.

After consideration of all the relevant wage loss factors presented, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 20% to the body as a whole as a result of his compensable injury. I also find that the major cause of this disability is claimant's compensable injury. While claimant believes he is capable of returning to work full time and earning more money, such a finding at this time would be speculation. At the time of the hearing claimant was only earning \$250.00 per week. Furthermore, claimant has had significant limitations placed upon him and he testified that his inability to unload trucks would limit the truck driving jobs available to him. Furthermore, Dr. Pardee and the functional assessment indicate that claimant is only capable of performing work in the medium category. Given all of this evidence, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 20% to the body as a whole.

#### SECOND INJURY FUND LIABILITY.

The final issue for consideration involves Second Injury Fund liability. The Arkansas Supreme Court has set forth a three-part test for determining Second Injury Fund liability: 1), the employee must have suffered a compensable injury at his present place of employment; 2), prior to that injury the employee must have suffered a permanent partial disability or impairment; and 3), the prior disability or impairment has combined with the recent compensable injury to produce the employee's current disability status. *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988).

Here, I find that the first two elements of Second Injury Fund liability have been met.

First, claimant did suffer a compensable injury at his present place of employment. Second, claimant suffered a prior injury in 1991 for which he underwent surgery and I have previously found that as a result of that prior injury that claimant had a permanent physical impairment in an amount equal to 9% to the body as a whole. However, I find that claimant's prior disability or impairment has not combined with his most recent compensable injury to produce his current disability status. Although claimant did undergo surgery in 1991 for a football related injury, claimant testified that no physical limitations were placed upon him other than not playing football. Claimant was also physically able to operate a small farm of 20 acres, 16 cattle, and 4 horses after 1991. However, after his compensable injury claimant was forced to sell his livestock, leaving him with only one cow and no horses. Claimant testified that after 1991 he was able to perform all job activities for his employers including driving a truck and unloading. It was only after claimant's most recent injury that claimant was given limitations with regard to his ability to lift and it was the opinion of Dr. Pardee and the functional assessment that claimant could only perform work which fell into the medium category of job activities. Thus, while claimant did have some pre-existing impairment, I find that his current disability status is the result of his recent compensable injury, not a combination of his recent compensable injury and his pre-existing condition. Accordingly, I find that the Second Injury Fund is not liable for payment of compensation benefits.

It is for these same reasons that I have given little weight to Dr. Pardee's statement that the major cause of claimant's current low back disability is his pre-existing condition. In my view, the evidence simply does not support such a finding. It was not until after the compensable injury in 2001 that significant limitations were placed upon claimant's ability to work and it was not until after 2001 that he was physically incapable of operating his farm. Accordingly, I find that the major cause of claimant's 13% physical impairment and his loss in wage earning capacity in the amount of 20% is his 2001 compensable injury, not

his pre-existing condition.

AWARD

Respondent is entitled to credit for any temporary total disability benefits and corresponding attorney's fee paid on those benefits subsequent to August 7, 2003, the date claimant was released to return to light-duty work by Dr. Casper. Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 33% to the body as a whole as a result of his compensable injury. This includes a permanent physical impairment in an amount equal to 13% and a loss in wage earning capacity in an amount equal to 20%. The Second Injury Fund is not liable for payment of disability benefits. Respondent #1 has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 33% to the body as a whole.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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