

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112194

WILLIE HILL, EMPLOYEE

CLAIMANT

GENERAL ELECTRIC RAILCAR, EMPLOYER

RESPONDENT NO. 1

SEDGWICK CLAIMS MGMT. SVS., TPA

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED NOVEMBER 3, 2004

Hearing before Administrative Law Judge J. Mark White on September 16, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Nelson V. Shaw, Attorney at Law, Texarkana, Texas.

Respondents represented by Mr. Charles D. Barnette, Attorney at Law, Texarkana, Arkansas.

Second Injury Fund represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 16, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on July 12, 2004, and a Prehearing Order was entered that same day. A copy of the July 12, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including October 22, 2001; that on October 22, 2001, the claimant sustained a compensable injury; that respondents no. 1 accepted the October 22, 2001, injury as compensable and paid benefits; that the claimant has been assigned a permanent anatomical impairment rating of 14% to the body as a whole, which respondents no. 1 have accepted and are paying; and that the claimant earned an average weekly wage of \$449, entitling him to a compensation rate of \$299 for total disability benefits and \$225 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant has sustained wage loss in excess of his assigned anatomical impairment rating; the extent of liability, if any, of the Second Injury Fund; whether additional medical treatment is reasonably necessary in connection with the compensable injury; whether the respondents' claim against the Second Injury Fund is without reasonable grounds; and controversion and attorney's fees. At the hearing, the parties agreed to waive the issue of rehabilitation benefits.

The claimant contends that he is entitled to wage-loss disability benefits over and above his assigned permanent anatomical impairment rating of 14% to the body

as a whole; and that he may need additional medical care.

Respondents contend that all benefits owed the claimant have been accepted and are being paid; that if the claimant is entitled to any wage-loss benefits above and beyond his 14% impairment rating, it is the sole responsibility of the Second Injury Fund; and that any wage-loss disability above and beyond the 14% impairment rating is due to the claimant's severe obesity and prior problems.

The Second Injury Fund contends that the claimant cannot prove entitlement to wage-loss disability in excess of the 14% anatomical impairment accepted by respondent no. 1; that respondent no. 1 cannot prove that the Second Injury Fund has liability in this case; that the claimant did not suffer from any prior physical condition that would have been capable of a rating of permanent anatomical impairment; that obesity, per se, is not a condition which is capable of an assignment of permanent anatomical impairment under the *AMA Guides*, 4th Edition; that there is no statutory or case law authority for the proposition that a "tendency toward obesity" can be characterized as a "pre-existing condition," citing *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 335 (1999); that there is no combination of disabilities or impairments; in the alternative, that any alleged combination is not greater than the disability or impairment from the October 22, 2001, workers' compensation injury, considered alone and of itself; and that respondent no. 1 has

instituted and continues this claim against the Second Injury Fund without reasonable grounds, and that costs should be assessed per Ark. Code Ann. § 11-9-714.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he has sustained wage-loss disability of 26% over and above his permanent anatomical impairment of 14%, resulting in a combined impairment of 40%.
4. The claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his wage-loss disability.

5. The claimant's obesity is not a prior impairment or disability within the meaning of Ark. Code Ann. § 11-9-525.
6. The respondents have failed to prove by a preponderance of the evidence that any prior disabilities or impairments have combined with the claimant's compensable injury to produce his current disability status.
7. The respondents have therefore failed to prove by a preponderance of the evidence that the Second Injury Fund has any liability herein.
8. The respondents no. 1 have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant worked for the respondent-employer for more than thirty years, the last fourteen as a “car-man A” repairing railroad cars. On October 22, 2001, he was atop a hopper car operating a grinder. He unhooked his safety harness to move to another position when he lost his balance and fell some 18 or 20 feet to the ground, hitting concrete. He fractured his pelvis and his left arm in the fall. After initial treatment in Texarkana, he was airlifted to Parkland Hospital in Dallas, where two surgeries were performed to install plates and rods in his pelvis and arm.

Nine months after the accident he returned to work in a light-duty position, working in the parts department. He worked for two months and then left work for another surgery. The respondent-employer did not allow him to return back to work after this surgery, claiming that an injured worker with more seniority had “bumped” him from the position via union rules. The claimant has not worked since.

The claimant is obese, weighing some 375 pounds. I agree with the Second Injury Fund that the claimant could more accurately be described as “very stocky and muscular.” He has what would commonly be described as a “barrel” chest, in that he has wide shoulders, and the circumference of his chest appears almost as

large as that of his waist. He is very muscular – he testified that before his injury he was able to lift as much as 250 pounds. His muscular nature and stocky appearance lead me to think that any limitations his size might impose on his ability to work are not necessarily due to obesity, *per se*.

II. Adjudication

A. Wage-Loss Disability Benefits

In considering permanent disability benefits in excess of a claimant's anatomical impairment, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant was 53 years old as of the hearing. He worked for the respondent for more than thirty years, first as a sandblaster and forklift driver and then as a car-man. Before that he worked as an auto mechanic, a roofer, and a

factory line worker. He has a high school degree and vocational training in auto mechanics. A functional capacity evaluation performed February 3, 2003, found he was able to perform medium-level work, though his shoulder performance was “poor” and he was unable to kneel, squat or climb. The claimant testified that he has difficulty walking without a cane and that he cannot climb stairs or ladders. He is currently receiving Social Security disability benefits.

I cannot find that the claimant is motivated to return to work. Nonetheless, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage-loss disability of 26% over and above his permanent anatomical impairment of 14%, resulting in a combined impairment of 40%. As discussed below, a preponderance of the evidence shows that the claimant’s present disability is not attributable to any pre-existing condition. I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his wage-loss disability.

B. Second Injury Fund Liability

The Second Injury Fund exists to protect employers of handicapped workers so that the employers will not be held liable “for a greater disability or impairment than actually occurred while the worker was in his or her employment.” ARK. CODE

ANN. § 11-9-525(a)(1). Three elements must be proven to establish the liability of the Second Injury Fund. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). “Disability” is statutorily defined as a loss of wage-earning capacity. ARK. CODE ANN. § 11-9-102(8). “Impairment” is any condition “sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause for the impairment.” *Mid-State Construction Co. v Second Injury Fund*, *supra*. An impairment need not be a work-related condition, nor must it necessarily be shown to have caused a loss of wage-earning capacity. *Id.*

The first element has been satisfied, in that the parties have stipulated to the compensability of the claimant’s injury. The second element may have been satisfied in part, but I find that the third element has not been satisfied.

The respondents contend that the claimant’s obesity is a pre-existing disability or impairment sufficient to raise the Fund’s liability. In support of this proposition, the respondents first cite Social Security Ruling (SSR) 00-3p. This

Ruling, however, was superseded by SSR 02-1p in 2002. Ruling 02-1p, a policy interpretation of the Social Security Administration, states that the Administration will find obesity to be an impairment “when, alone or in combination with another medically determinable physical or mental impairment(s), it significantly limits an individual’s physical or mental ability to do basic work activities.” The respondents have introduced no evidence whatsoever to show that the claimant’s obesity limits his ability “to do basic work activities.” In fact, the functional capacity evaluation obtained by the respondents shows the claimant is capable of performing medium-level work. Thus, there is no evidence to show that the claimant’s obesity would be considered an impairment for purposes of Social Security.

The respondents cite various court cases that mention or discuss obesity. None of the cited cases directly support the respondents’ contention that obesity can be an impairment or disability within the meaning of Ark. Code Ann. § 11-9-525. One case cited by the respondents, *Trout v. Meeks Lumber Co.*, is in fact an unpublished opinion and as such may not be considered herein. Ark. Sup. Ct. R. 5-2(d).

The respondents offered testimony that the claimant’s obesity interfered with his ability to perform his specific job functions. Even if I found this testimony credible – which I do not – it would matter not, for the respondents kept the

claimant as an employee despite his obesity, and his ability to earn wages was thereby undiminished. The claimant's obesity cannot be a prior "disability," for there is no evidence whatsoever that his obesity ever affected his wage-earning capacity before his compensable injury.

The *AMA Guides* do not provide a means of rating an impairment caused by obesity, nor is obesity a scheduled injury. Even if the claimant's obesity were a compensable condition, it alone and of itself could not "support an award of compensation." *Cf. Mid-State Construction Co. v Second Injury Fund, supra*. Therefore, the claimant's obesity cannot be an "impairment." Since the claimant's obesity is neither an impairment nor a disability, it alone cannot create liability for the Second Injury Fund, for it fails the second element of proving Fund liability – that "*prior to that injury the employee must have had a permanent partial disability or impairment*" (emphasis added).

Some of the claimant's other pre-existing conditions – his prior knee injury, for instance – could constitute impairments or disabilities satisfying the second element of Second Injury Fund liability. But there is simply no credible evidence to show that any of these pre-existing conditions have combined with his compensable injury to produce his current disability status. In fact, the medical evidence points to the opposite conclusion.

In response to a question from the respondents, Dr. Bierner wrote:

In my opinion none of the patient's prior medical conditions if any had any relationship to the amount of impairment that I determined in this rating of 02/03/2003. The patient reported to me a history of hypertension and some heart problems and prior right knee surgery and hernia repair. He stated he had had left lateral epicondylitis for which he had been treated surgically but that would not cause any of the impairments that I have seen today. The patient was apparently able to perform his job as a repairman and rail car man for 30 years according to him.

The respondents provided Dr. Bierner with additional medical records concerning the claimant's prior problems, but none of these records changed his opinion:

These records do show that the patient was treated for various injuries in the past. However these records do not show that the patient had any significant permanent impairment as a result of these prior injuries.

He continues:

Therefore my conclusion remains unchanged that the information I have been provided while it establishes the patient has had prior injuries to various body parts, does not show that the patient had permanent impairment of these body parts. In fact, the functional capacity evaluation [from before the compensable injury] and physical therapy evaluation [from before the compensable injury] is documented and as stated above show normal range of motion, normal musculoskeletal function and would refute the claim that there was any preexisting impairment that should be subtracted from

the impairment rating I calculated.

Dr. Jim J. Moore expressed similar opinions:

In my opinion the patient had no pre-existing process that would be contributory to the patient's injury or current medical findings.

I find that the respondents have failed to prove by a preponderance of the evidence that any prior disabilities or impairments have combined with the claimant's compensable injury to produce his current disability status. Therefore, I find that the respondents have failed to prove by a preponderance of the evidence that the Second Injury Fund has any liability herein.

C. Sanctions

Arkansas law provides:

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect to the claim or order have been instituted or continued without reasonable grounds, the cost of the proceedings shall be assessed against the party who has instituted or continued the proceedings.

ARK. CODE ANN. § 11-9-714.

The sanctions required by this statute are not discretionary; costs "shall" be assessed if proceedings are continued without reasonable grounds. The Second Injury Fund contends that the respondents' claim against it has been brought

without reasonable grounds. I find that reasonable grounds existed for the respondents' claim, and thus I decline to assess costs against the respondents.

D. Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The claimant testified that he will eventually need surgery to remove the pin in his shoulder. I can find no evidence in the record to show that any of the claimant's physicians have definitively recommended this or any other surgery as of yet. Because the claimant's physicians have not yet made a definitive recommendation of surgery, I find that the issue of additional medical treatment is premature and need not be decided at this time.

AWARD

The claimant has proven by a preponderance of the evidence that he has sustained wage-loss disability of 26% over and above his permanent anatomical

impairment of 14%, resulting in a combined impairment of 40%. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Nelson V. Shaw, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge