

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F107049/F211475

TERRY KOONCE, Employee	CLAIMANT
CEDARVILLE WATERWORKS, Employer	RESPONDENT #1
CUNNINGHAM LINDSEY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED MARCH 25, 2004

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

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

Respondent #1 represented by LEE MULDROW, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case comes on for review following hearings conducted on December 15, 2003 and February 23, 2004.

A hearing on this claim was originally scheduled for December 15, 2003 with issues as to the extent of claimant's permanent disability, Second Injury Fund liability, and a controverted attorney fee. At the time of the December 15 hearing it was determined that the Second Injury Fund was not stipulating to a compensable injury. Therefore, the hearing was rescheduled and an amended pre-hearing order was filed on December 18, 2003 indicating litigation of the following issues:

1. Compensability.
2. Extent of claimant's permanent disability, including impairment and loss in wage earning capacity.
3. Second Injury Fund liability.
4. Attorney fee.

Prior to the most recent hearing, claimant has raised as an issue his entitlement to Botox injections as recommended by Dr. Fisher.

The claimant contends that he suffered compensable injuries to his back in April 2000 and on April 13, 2001. Claimant contends that since the respondent is no longer stipulating to compensability, then it has controverted claimant's entitlement to all compensation benefits. Claimant also contends that respondent is estopped from denying the claim because the respondent paid for a spinal cord stimulator that requires maintenance and periodic treatment. Claimant contends that he relied upon respondent's acceptance of his claim as compensable and would not have had the stimulator inserted if respondent had not accepted liability. Claimant contends that he is entitled to continued Botox injections as recommended by Dr. Fisher. Finally, claimant contends that he is permanently totally disabled as a result of his compensable injuries.

Respondent contends that it initially accepted as compensable claimant's injury to his back on April 13, 2001 and paid compensation benefits, including permanent physical impairment based upon a rating of 13% to the body as a whole. Respondent is no longer willing to stipulate to compensability and agrees that any benefits received after the date of the hearing would be considered controverted. Respondent states that it is not asking for repayment of benefits previously made to the claimant. With respect to the Botox injections, respondent contends that claimant's compensable injury was to his low back and that the Botox injections prescribed by Dr. Fisher have been to the thoracic spine, not the lumbar spine. Therefore, respondent contends that the injections are not reasonable and necessary.

The Second Injury Fund contends that claimant cannot prove that he is entitled to any permanent benefits arising from injuries in April 2000 or on April 13, 2001. Specifically, the Second Injury Fund contends that it does not have liability in this case and that it owes no attorney fee.

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 witnesses and to observe their 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 Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on April 13, 2001.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$379.00 for total disability benefits and \$284.00 for permanent partial disability benefits.
4. Respondent has paid some compensation benefits including permanent partial disability based upon a 13% impairment rating.
5. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent in April 2000.
6. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his thoracic and lumbar spine while employed by respondent on April 13, 2001.
7. Claimant has met his burden of proving by a preponderance of the evidence that the Botox injections recommended by Dr. Fisher are reasonable and necessary for treatment of his compensable injury.
8. As a result of his compensable April 13, 2001 injury, claimant has suffered a permanent physical impairment in an amount equal to 6% to the body as a whole.
9. Claimant has failed to prove by a preponderance of the evidence that he is

permanently totally disabled. Claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

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

11. Respondent is liable for a controverted attorney fee on all compensation benefits, including those previously paid by respondent.

FACTUAL BACKGROUND

The claimant has been employed by the respondent since 1986. Claimant's duties primarily included operating a backhoe and working with water pipes, meters, et cetera. Claimant contends that in April 2000 he suffered a compensable injury to his back while working for respondent for which he sought medical treatment from Dr. Hayes, a chiropractic physician, and Dr. Thompson, a neurosurgeon. Testing performed in April 2000 revealed that claimant had a herniated disc at the L5-S1 level. Although surgery was discussed, claimant did not undergo surgery and continued to work for the respondent.

Claimant contends that he suffered a compensable injury while working for respondent on April 13, 2001 when he injured his back while lifting on a pipe. Following that incident the claimant has been evaluated by various physician including Dr. Hayes, Parham, Johnson, and Fisher. Claimant has also undergone evaluations by Dr. Schlesinger, Dr. Standefer, and Dr. Short. Claimant underwent a lumbar disectomy on May 11, 2001 which was performed by Dr. Johnson. This surgery alleviated some of claimant's pain but claimant has continued to have some pain and was referred to Dr. Fisher for pain management. Dr. Fisher has treated the claimant with steroid injections, the insertion of a spinal cord stimulator, medication, and Botox injections.

At some point in time following his surgical procedure the claimant attempted to

return to work for the respondent but was unable to continue due to back pain.

The respondent initially accepted as compensable an injury to claimant's spine on April 13, 2001. Respondent paid temporary total disability benefits, medical benefits, and permanent partial disability benefits in an amount equal to 13% to the body as a whole based upon an impairment rating assigned by Dr. Short. Claimant subsequently filed this claim requesting a determination as to the extent of his permanent disability. As previously noted, issues have also arisen regarding compensability of claimant's injuries, Second Injury Fund liability, claimant's entitlement to Botox injections, and a controverted attorney fee.

ADJUDICATION

COMPENSABILITY OF INJURY - APRIL 2000.

Initially, claimant contends that he suffered a compensable injury to his low back while working for respondent in April 2000. Claimant testified that during the month of April 2000 he was doing a lot of heavy work which he believed contributed to his back condition. As a result of claimant's back complaints he sought medical treatment from Dr. Hayes, a chiropractic physician, whom claimant had seen on a number of occasions since December 1997. Claimant also testified that he sought medical treatment from Dr. Thompson, a neurosurgeon, to determine the cause of his back condition. Dr. Thompson ordered an MRI scan of the claimant's lumbar spine which revealed a herniated disc at the L5-S1 level. The MRI report of April 24, 2000 indicates that this herniation may contact and displace the left S1 nerve root. Dr. Thompson's medical reports indicate that surgery was contemplated but was not performed. In a report of June 7, 2000, Dr. Thompson indicated that "the patient is pretty well compensated but not fully free of pain." Dr. Thompson went on to indicate that claimant was going to continue to have additional back pain from time to time but that claimant was fairly stable and would hopefully not have to

have surgery performed.

I find that claimant's claim for a compensable injury in April 2000 is a claim for a gradual onset injury, not a claim for a specific incident identifiable by time and place of occurrence. The claimant did not testify regarding a specific incident identifiable by time and place of occurrence which occurred in April 2000. Instead, claimant seems to relate his back complaints in April of 2000 to the general work he was performing during that period of time as opposed to a specific incident. An employee does not have to identify an exact date, but there must be an "identifiable" incident under A.C.A. §11-9-102(4)(A)(i). *Edens v. Superior Marble and Glass*, 346 Ark. 487, 58 S.W. 3d 369 (2001). A generic description of work is not sufficient -- there must be a particular specific incident. *Hapney v. Rheem Manufacturing*, 342 Ark. 11, 26 S.W. 3d 777 (2000); *Thomas Bardrick v. Rheem Manufacturing Co.*, Full Commission Opinion filed February 21, 2003 (F108263).

Having found that claimant's claim for an injury in April 2000 is not a specific injury, I find that claimant's claim is for a gradual onset injury to his back. A claimant seeking benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for medical treatment. *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App. 231, 48 S.W. 3d 540 (2001); *Freeman v. Con-Agra Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001). In addition, objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart v. Leach, supra*; *Wal-Mart Stores v. VanWagner*, 337 Ark. 443, 990 S.W. 2d 522 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the

evidence that he suffered a compensable gradual onset injury to his back while working for respondent in April 2000. Specifically, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with the respondent.

As previously noted, claimant attributes his back problems in April 2000 to his work activities with respondent. Claimant testified that he reported this belief to his boss, Fred Snipes. As a result of these complaints claimant sought medical treatment from Dr. Hayes, the chiropractic physician, and Dr. Thompson, the neurosurgeon. A review of the medical reports from both Dr. Hayes and Dr. Thompson fails to mention any work related injury in April 2000. In fact, beginning in April 2000 claimant sought medical treatment from Dr. Hayes on 36 separate occasions between April 2000 and April 13, 2001, the date of the next alleged injury. None of Dr. Hayes' medical reports mentions a work related injury.

Also testifying at the hearing was Andrea Koonce, the claimant's wife of seven years. Koonce testified that she vaguely recalled the claimant having some problems with his back in April 2000 and seeking medical treatment from Dr. Thompson. Claimant's wife testified that in the one year prior to April 13 the claimant did not specifically say anything about having injured his back while working for respondent in April 2000.

Q. Would it be fair to say that during that one-year period of time before the April 13th date that he didn't say anything to you about hurting his back at work with this employer, Cedarville Waterworks?

A. Not specifically.

Accordingly, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent in April 2000. As a result of claimant's back complaints he sought medical treatment from both Drs. Hayes and Thompson. The medical reports of those

treating physicians do not reflect a history of any work related injury. Furthermore, claimant's wife testified that claimant did not specifically mention having injured himself at work while working for respondent prior to April 13, 2001. Therefore, I find that claimant has failed to meet his burden of proving a compensable injury to his back in April 2000.

COMPENSABILITY OF INJURY -APRIL 13, 2001.

Unlike the alleged injury in April 2000, claimant testified that he suffered a compensable injury to his back as a result of a specific incident identifiable by time and place of occurrence on April 13, 2001. Claimant testified that he suffered an injury to his back on that date when he felt a sharp pain in his back while pulling on a pipe to repair a water leak. Thus, claimant's claim is for a specific injury. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

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 suffered a compensable injury to his thoracic and lumbar spines while working for respondent on April 13, 2001.

Initially, I find that claimant has met his burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. As previously noted, claimant testified that he suffered the injury to his back while lifting a pipe on April 13, 2001. Claimant testified that he reported this injury to his supervisor on that date. Claimant's supervisor was not called to contradict claimant's testimony regarding the reporting of this injury.

Following this incident, claimant again returned to Dr. Hayes, the chiropractic physician, for medical treatment. Claimant also attempted to seek medical treatment from Dr. Heaver. Claimant also sought medical treatment from Dr. Parham before he was referred to Dr. Johnson, a neurosurgeon who eventually performed surgery on claimant's lumbar spine.

In finding that claimant has met his burden of proof, I do acknowledge that Dr. Hayes' medical reports do not mention a work-related injury. Likewise, when claimant sought medical treatment from Dr. Parham on April 26 Dr. Parham's medical report does not mention a work-related injury. Instead, Dr. Parham's report indicates that claimant indicated that his back went out on him and that he slept wrong on April 13, 2001. However, I believe that there is sufficient evidence to find that claimant was contending that he had injured his back at work. As previously noted, claimant had attempted to seek medical treatment from Dr. Holly Heaver on April 25, 2001. Dr. Heaver did not see claimant that date and a medical report introduced into evidence by the claimant indicates that Dr. Heaver would not see the claimant because it was a workers' compensation claim.

As a result, claimant sought medical treatment from Dr. Parham the next day on April 26, 2001. Although Dr. Parham did not record a history of a work related injury, Dr. Parham did note that claimant had attempted to see Dr. Heaver the day before and that she would not see him because this was a workers' compensation claim.

Thus, although these medical reports do not contain a history of a work related incident, the medical report of Dr. Heaver and Dr. Parham clearly indicate that claimant was contending that this was a work related claim. I also note that when claimant sought medical treatment from Dr. Johnson he completed an in-patient medical history on May 7, 2001 and indicated that his accident was work related.

Based on the foregoing, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that his injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. In making this finding I do note that prior to April 13, 2001 claimant had been diagnosed as suffering from a herniated disc at the L5-S1 level for which surgery was contemplated. After April 13, 2001 a second MRI scan was performed on May 2, 2001 which also revealed a herniated disc at the L5 level.

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W. 2d 664 (1990); *Minor v. Poinsett Lumber & Manufacturing Company*, 235 Ark. 195, 357 S.W. 2d 504 (1962); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W. 2d 550 (1996).

In this particular case, I find that claimant's pre-existing herniated disc was aggravated by the injury on April 13, 2001. The MRI scan report of May 2, 2001 does indicate that claimant suffers from a herniated disc at the L5 level. However, the report also indicates that the herniation is more prominent than the prior study of April 4, 2001.

It appears that the date of the prior study referred to in the May 2, 2001 report is incorrect and it should reflect the prior MRI study of April 24, 2000. There is no evidence that claimant underwent an MRI scan or any other type of radiographic study on April 4, 2001. Nevertheless, even April 4, 2001 would have been before the alleged injury date of April 13, 2001. Accordingly, I find that the report indicating that claimant's herniated disc is more prominent subsequent to the April 13, 2001 injury is sufficient evidence to find that the injury caused internal physical harm to claimant's body which required medical services and resulted in disability and that it is medical evidence supported by objective findings establishing an injury.

In addition to finding that claimant suffered a compensable injury to his lumbar spine, I also find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his thoracic spine as a result of the injury on April 13, 2001. Dr. Johnson's medical reports indicate as early as June 27, 2001 that claimant was having muscle spasms in his thoracic spine area. As a result, Dr. Johnson prescribed medication for those spasms. Also, physical therapy notes from July 2001 indicate that claimant is having muscle spasm in the mid-thoracic area.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his lumbar and thoracic spines while employed by respondent on April 13, 2001.

BOTOX INJECTIONS.

Following his surgical procedure by Dr. Johnson the claimant continued to complain of pain in his back area. As a result, claimant was eventually referred to Dr. Robert Fisher for pain management. Included in Dr. Fisher's treatment have been Botox injections. These injections were initially paid for by respondent but respondent now contends that it is not liable for payment of these injections. Respondent's position is that the injections

were for claimant's thoracic spine while his compensable injury, if any, was to his lumbar spine. However, I have found that claimant also suffered a compensable injury to his thoracic spine on April 13, 2001.

The claimant has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of a compensable injury. *Norma Beatty v. Ben Pearson, Inc.*, Full Commission Opinion filed February 17, 1989 (D612291).

After reviewing the evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that the Botox injections are reasonable and necessary in relation to his compensable thoracic spine injury. This finding is based upon claimant's testimony that the injections alleviate his pain as well as my review of the medical reports from Dr. Fisher indicating that Botox injections are necessary for treatment of claimant's condition.

PERMANENT IMPAIRMENT.

Following claimant's compensable injury of April 13, 2001, claimant was assigned a permanent physical impairment rating in an amount equal to 13% to the body as a whole by Dr. Bradley Short in a report dated June 25, 2003. The respondent accepted and paid permanent partial disability benefits based upon this 13% impairment rating. However, the extent of claimant's permanent impairment is now at issue. Pursuant to A.C.A. §11-9-102(4)(F)(ii)(a) permanent benefits are awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Major cause is defined as more than 50 percent. A.C.A. §11-9-102(14)(A).

In this particular case, the claimant had a pre-existing condition; namely, a herniated disc at the L5-S1 level. In a letter dated November 19, 2003, Dr. Thompson who was one of claimant's treating physicians for that pre-existing condition stated that he last saw claimant in June 2000 with a diagnosis of a disc herniation at the L5-S1 level. It was his

opinion based upon the *AMA Guides, Fourth Edition*, that that condition would result in a permanent physical impairment in an amount equal to 7% to the body as a whole.

Accordingly, of the 13% total impairment assigned by Dr. Short, I find that 7% was pre-existing. Therefore, I find that claimant's compensable injury of April 13, 2001 was the major cause of 6% of claimant's total permanent impairment rating.

As previously noted, respondent has already accepted payment based upon the 13% rating; therefore, respondent is entitled to a credit for benefits paid over and above the 6% rating.

WAGE LOSS.

The next issue for consideration involves the extent of claimant's permanent disability over and above his permanent physical impairment rating. As previously noted, claimant has an overall impairment rating of 13% to the body as a whole of which 6% is attributable to his April 13, 2001 compensable injury. Claimant contends that he is permanently totally disabled as a result of his compensable injury. A.C.A. §11-9-519(e)(i) defines permanent total disability as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." In determining the extent of claimant's disability the Commission may take into account in addition to the percentage of permanent physical 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).

After reviewing the evidence in this case, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. Instead, after consideration of the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

The claimant testified that he believes that he is incapable of working and earning any meaningful wages. Claimant testified that he did attempt to return to work for respondent on one occasion but was unable to do so due to continued back pain. Other than attempting to return to work for respondent, claimant has sought no other employment.

Dr. Johnson, the neurosurgeon who performed claimant's surgery, stated in a report dated January 25, 2002 that claimant could return to work performing light duty work. Dr. Johnson indicated that claimant should not push or pull and that he would be limited to lifting no more than 15 pounds and would be limited in his ability to sit.

Following his compensable injury the claimant was evaluated by Dr. Schlesinger for an independent medical evaluation. In a report dated January 6, 2003, Dr. Schlesinger notes that further surgery is not an option for the claimant. Dr. Schlesinger recommended permanent placement of the claimant's spinal cord stimulator and this was subsequently done by Dr. Fisher. Dr. Schlesinger recommended that the claimant get off of narcotics and assigned the claimant a permanent physical impairment rating in an amount equal to 12% to the body as a whole.

Claimant has also undergone an evaluation by Dr. Standefer. Dr. Standefer also opined that claimant's condition was non-surgical. Dr. Standefer indicated that claimant's primary therapy should consist of non-narcotic pain mediation, exercise, a walking program, and a recognition that claimant would continue to have some residual low back pain. Dr. Standefer indicated that claimant should resume as normal a level of activity as possible and that if he could not resume his former occupation that he should consider retraining.

As previously noted, claimant has come under the care of Dr. Fisher for pain management. Dr. Fisher's treatment has included injections, medication, and placement of a spinal cord stimulator. Despite this treatment claimant's condition has not significantly

improved. In a letter dated August 25, 2003, Dr. Fisher noted that claimant has developed post-laminectomy syndrome with chronic pain and as a result has lost the ability to sit or stand more than 10 minutes or so at a time. Dr. Fisher was of the opinion that this was a permanent condition which was not likely to improve.

The claimant underwent a functional capacities evaluation on October 1, 2003. A review of that evaluation indicates that claimant gave less than maximal effort. Even with less than maximal effort the functional capacities evaluation indicated that claimant would be able to perform at least sedentary work as long as he could frequently change postural positions and was allowed to sit or stand at will. An addendum to the functional capacities evaluation dated October 10, 2003 indicates that claimant is capable of alternating between sitting and standing for an entire eight hour work day.

Testifying on behalf of respondent was Dale Thomas, a rehabilitation specialist. Thomas testified that after reviewing the medical reports, the functional capacities evaluation, and his interview with the claimant, it was his opinion that the claimant was capable of performing work which would normally be considered light work which required lifting of no more than 20 pounds and the ability to get up and down during the work day. Thomas testified that typical jobs with these physical restrictions included work as a security guard, assembly work, cashier jobs, customer service, retail sales, telemarketing, and dispatch. Thomas testified that a security guard in the Fort Smith area could expect to earn from \$7.50 to \$10.00 per hour.

It is also important to note that the claimant is 37 years old. He is a high school graduate and has taken classes at a community college in order to obtain water certifications.

After reviewing the relevant wage loss factors, I find that claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Instead, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to

the body as a whole. Clearly, claimant's ability to perform many jobs has been lost due to his need to sit or stand at will and change positions. This was the opinion of Dr. Fisher. On the other hand, the functional capacities evaluation indicates that claimant gave less than maximal effort and that at a minimum the claimant could perform work which allowed frequent changes of position with sitting and standing at will. Jobs which fall into this classification were identified by Dale Thomas, the vocational rehabilitation specialist. The claimant is a relatively young man with a high school education and a demonstrated ability to receive additional training as evidenced by his ability to attend classes at a community college for water certification. Given all of this evidence, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. This results in claimant being entitled to permanent partial disability benefits in an amount equal to 66% to the body as a whole.

SECOND INJURY FUND LIABILITY.

The test for determining Second Injury Fund liability was set forth by the Court in *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1998). 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. Finally, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

After reviewing the evidence in this case, I find that the Second Injury Fund is not liable for compensation benefits. First, I do find that claimant suffered a compensable injury at his present place of employment as previously discussed. I also find that prior to his work-related injury the claimant had a permanent partial impairment. As previously noted, the claimant was diagnosed as suffering from a herniated disc at the L5-S1 level in April 2000. Dr. Thompson, claimant's treating physician in April 2000, has opined that that

condition would have resulted in a permanent physical impairment in an amount equal to 7% to the body as a whole. However, I do not find that the claimant's pre-existing impairment combined with his most recent compensable injury to produce the current disability status. The simple fact that claimant had a pre-existing impairment does not automatically mean that the current disability status is greater than that which would have existed following the most recent injury considered alone and of itself. Although claimant had a pre-existing impairment and a diagnosis of a herniated disc at the L5-S1 level, surgery was not performed at that time. In fact, Dr. Thompson in a report of June 7, 2000 indicated that while claimant would continue to have some pain that he was stable at that time and Dr. Thompson stated that it was his hope that claimant would recover without the need for surgery. Following this treatment the claimant returned to work for respondent and continued to perform his regular job duties without complications until the injury of April 13, 2001.

Thus, while claimant did have a pre-existing impairment, I find that claimant's current disability status is the result of the last injury which claimant suffered on April 13, 2001. Therefore, I find that claimant's pre-existing impairment did not combine and therefore find that the Second Injury Fund has no liability for permanent partial disability benefits in this case.

ATTORNEY FEE.

As previously noted, the respondent initially accepted as compensable an injury to claimant's lumbar spine on April 13, 2001 and paid compensation benefits, including permanent partial disability benefits based upon a 13% impairment rating. At the time of the most recent hearing respondent was no longer stipulating that claimant suffered a compensable injury, but instead contended that claimant did not suffer a compensable injury. Respondent was not requesting reimbursement from the claimant and did

acknowledge that benefits subsequent to the hearing would be considered controverted. I find that respondent has not only controverted claimant's entitlement to unpaid benefits, but I also find that respondent has controverted claimant's entitlement to all compensation benefits, including those previously paid.

In *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998), the respondent likewise had accepted a claim as compensable and paid some compensation benefits. The respondent subsequently controverted the claim, including medical treatment in the amount of \$35.00. The claimant filed a claim requesting that the claim be held compensable and controverted and an attorney fee awarded on all benefits, not just the unpaid \$35.00 medical bill. The Arkansas Supreme Court found that the respondent had controverted claimant's entitlement to all benefits, including those which had previously been paid. The Court noted that while the respondent did not request reimbursement that it was allowed a credit for payment of benefits. The Court noted that making an employer liable for attorney's fees serves a legitimate social purpose such as discouraging oppressive delay and recognition of liability, deterring arbitrary and capricious denial of claims, and ensuring the ability of claimants to obtain adequate and competent legal representation. The Court noted that while the respondent in *Cleek* had paid all but \$35.00 of the claimant's medical expenses, it had not recognized liability for her injury; therefore, if the claimant had not prevailed on the liability issue of her claim she would have been barred from seeking any future medical expenses or disability benefits. The Court went on to note that the controversion of the injury claim forced the claimant to try the case fully on its merits and employ counsel.

Likewise, in this case, the respondent initially accepted claimant's injury as compensable and paid some compensation benefits. However, by subsequently denying liability it placed claimant in a position where if he had not prevailed on compensability of his claim, he would have been barred from seeking permanent disability benefits and

payment for the Botox injections. Therefore, by failing to accept liability and forcing claimant to try this case fully on the merits, respondent has controverted claimant's entitlement to not only unpaid compensation benefits but also those benefits previously paid.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by respondent in April 2000. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his thoracic and lumbar spine while employed by respondent on April 13, 2001. Claimant has proven by a preponderance of the evidence that the Botox injections are reasonably necessary for treatment of his compensable thoracic spine injury. As a result of his compensable injury, claimant has suffered a permanent physical impairment in an amount equal to 6% to the body as a whole. In addition, claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. Respondent is entitled to a credit for all permanent partial disability benefits previously paid. The Second Injury Fund has no liability for permanent partial disability benefits. Respondent has controverted claimant's entitlement to all unpaid and paid compensation benefits.

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

