

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202647

RUBEN MITCHELL, EMPLOYEE	CLAIMANT
SIEGEL ROBERTS OF ARKANSAS, EMPLOYER	RESPONDENT #1
HARTFORD CASUALTY INS. CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH AND PERMANENT DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED OCTOBER 11, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on July 16, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE MICHAEL RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine claimant's entitlement to additional workers' compensation benefits.

On April 13, 2004, a pre-hearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the

hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commissions' Exhibit #1. Respondent #2 contends that whatever the degree of the claimant's functional disability the same is the product of the October 2001, injury and surgery; that the claimant has returned to work, and therefore cannot demonstrate that he is permanent and totally disable.

The testimony of Ruben Mitchell, the claimant, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Ruben Carl Mitchell, the claimant, with a date of birth of August 17, 1942, is a high school graduate with two years of post secondary education. Claimant was in the military for three years in Special Forces with training in small arms. The functional capacity evaluation of May 5, 2003, reflects that while serving in Vietnam claimant was wounded. During claimant's two years of undergraduate studies he enrolled in criminal justice courses.

Claimant was employed by respondent #1 as a truck driver from December 1998 through December 2002. On October 1, 2001, claimant suffered an injury within the course and scope of his employment with Respondent #1. In describing the mechanics of the October 1, 2001, injury, the testimony of the claimant reflects:

There was a drainage ditch in front of the docks that we had to back up to back the trucks up into the docks. There were grates over the drainage ditch and over the years they had

become loosened and they would, if you stepped on them they would fall through. We reported it several times but it was never fixed and one morning on October the 1st, I went down to get my truck and it was dark and I stepped on the grate and fell through. I fell backwards and landed on a big chunk of concrete and jammed my L5-S1. (T.18-19)

The October 1, 2001, injury of the claimant was accepted as compensable by Respondent #1 and appropriate corresponding workers' compensation benefits paid to and on his behalf.

After a period of conservative treatment to address the injury growing out of the October 1, 2001, accident, claimant was referred to Dr. Kenneth Tonymon, a Jonesboro neurosurgeon, by Dr. Brewer Rhodes. Claimant was initially evaluated by Dr. Tonymon on February 12, 2002. After a physical examination and review of prior pertinent diagnostic studies Dr. Tonymon's impression of the claimant's complaints was that of right L5-S1 herniated nucleus pulposus with a rostral and foraminal extension, and L5 root compression along with S1 root compression. (CX 1, p2) On March 7, 2002, claimant was admitted to St. Bernards Medical Center and underwent a right L5-S1 lateral recess decompression under the care of Dr. Tonymon. (CX 1, p6-7) Claimant was seen in follow up by Dr. Tonymon on two occasions following the March 7, 2002, surgery. During the July 17, 2002, follow-up visit, after noting the treatment measures that the claimant had undergone to address the residuals of the October 1, 2001, injury, to

include medication and the use of TENS unit, Dr. Tonymon referred the claimant to Dr. Calin A. Savu, a Jonesboro pain management specialist. (CX 1, p9)

Claimant treated with Dr. Savu from July 8, 2002 through August 13, 2002, for complaints relative to the October 1, 2001, compensable injury. On July 17, 2002, Dr. Savu performed a lumbar epidurogram relative to the claimant. (CX 1., p16-17) On July 23, 2002, claimant underwent an interlaminar epidural steroid injection L4-L5, under the direction of Dr. Savu. (CX 1, p18) On March 13, 2002, Dr. Savu performed a transforaminal epidural steroid injection, on the right L4-L5. (CX 1, p19-20)

Claimant was referred by Dr. Savu to Dr. Jim L. Keller for physical therapy three times a week for three weeks, relative to diagnosed post-op laminectomy syndrome with radiculitis. (CX 1,p21-22) Claimant was discharged from the care of Dr. Keller on September 11, 2002. (CX 1, p23)

Claimant continued to experience residuals relative to his low back growing out of the October 1, 2001, compensable injury. A return visit to Dr. Tonymon on September 12, 2002. The September 12, 2002, report of Dr. Tonymon, relative to his follow-up visit with the claimant reflects, in pertinent part:

Mr. Mitchell returns to the office today with pain in the right scroilica region. He still cannot sit or ride in a care for any length of time. For example, it takes him about 55 minutes to drive from his home to Jonesboro and he has to stop at least one time to get out and move around to bring his symptomatic pain level down to a tolerable level.

His right preoperative leg pain is still resolved.

He underwent a lumbar MRI with/without contrast 07/13/02 at the request of Dr. Savu. I reviewed this study in the office today. It demonstrates at L4-5 degenerative disc changes with a left paracentral bulge. At L5-S1 the right lateral recess decompression is well seen and the S1 root is under no pressure.

His present company is now closing down so he is interested in what he will be able to do.

I have advised him to avoid jobs, which require prolonged sitting as well as repetitive bend also recommended that the claimant return to Dr. Savu to see if radio frequency rhizotomy of his sacroiliac joint would be beneficial to the claimant. (CX 1, p24)

The medical in the record reflects that claimant was next seen following his September 12, 2002, visit to Dr. Tonymon by Dr. John D. Brophy, a Memphis neurosurgeon, pursuant to a request of respondents #1 for a second opinion. The October 4, 2002, clinic note of Dr. Brophy reflects that claimant was evaluated on said date and that Dr. Brophy had access to the claimant's prior pertinent medical records. The October 4, 2002, report of Dr. Brophy reflects the impression of the claimant's complaint as residual right lower extremity radicular pain status post right L5-S1 discectomy without radiographic evidence of recurrent herniation or residual nerve root compression and right SI joint pain. The October 4, 2002 evaluation report of Dr. Brophy concludes:

RECOMMENDATIONS: I have suggested a

trial of Neurontin in a progressive dose to 300 mg. t.i.d. He was counseled concerning the risks of lightheadedness. We will also initiate a trial of Feldene 20 mg. po q d. He was counseled concerning the risks of GI irritation. He will continue to progress his home exercise program. If his symptoms have not improved over the next several weeks, he would be considered a candidate for a trial of a second right SI joint injection. He will undergo follow-up evaluation in this office in approximately three weeks. He is cleared to return to work at light duty with no lifting over 10 pounds, no repetitive stooping or bending and no driving more than 30 miles. (CX1, p. 26)

When the claimant was again seen by Dr. Brophy on October 25, 2002, a recommendation was had that a formal orthopedic evaluation of the claimant's right hip be made to determine if further treatment was indicated. (CX1, p. 27)

On October 31, 2002, the claimant was evaluated by Dr. Mark S. Harriman, a Memphis orthopedic physician, relative to his right hip complaint pursuant to the referral of Dr. Brophy. Dr. Harriman recommended additional diagnostic studies to include an MRI of the claimant's hip and EMG of the right lower extremity. (CX1, p. 33-34) The claimant was again seen by Dr. Harriman on November 21, 2002, and later underwent an MRI of the lumbar spine with and without contrast. (CX1, p. 28-29) In an addendum to the November 21, 2002 report, Dr. Harriman noted:

I do feel that Mr. Mitchell's ongoing symptoms and possible L5 radiculopathy would be related to his original problem. The symptoms that he

has currently developed only six or eight weeks after his initial surgery and I see no way to separate them from his initial injury. (CX1, p. 36)

The claimant was last seen by Dr. Harriman on December 5, 2002, and thereafter returned to the care and treatment of Dr. Brophy.

The claimant was last seen by Dr. Brophy on December 24, 2002. The December 24, 2002 report of Dr. Brophy reflects, in pertinent part:

Mr. Mitchell underwent evaluation with lumbar MRI, with and without contrast, on 26 November, 2002. This study demonstrates evidence of previous surgery on the right at L5-S1. There is no definite evidence of recurrent HNP or residual nerve root compression. The facet joint is intact and there is no evidence of disc space infection. There is degenerative disc disease at L4-5 with a central bulging component without evidence of HNP or nerve root compression at this level. MRI of the pelvic and hips without contrast dated 14 November 2002 by report is within normal limits. EMG/nerve conduction study of the right lower extremity performed by Dr. Dale Cunningham on 14 November, 2002 is considered consistent with a right L5 radiculopathy.

Mr. Mitchell is now nine months status post right L5-S1 diskectomy by Dr. Tonymon in Jonesboro. In my opinion, there is no indication for further surgical intervention at this time. We have attempted standard medical treatment options with regard to his residual complaints which have been ineffective. Based on the results of the November 2002 MRI, there is no

objective reason why he could not return to work at full duty without restriction. I will consider Mr. Mitchell at maximum medical improvement on 27 December, 2002 with a PPI rating (according to the AMA Guidelines, 5th Ed.) of eleven percent (11%). (CX1, p. 37)

On April 21, 2003, the claimant was evaluated by Dr. Dr. Guy L'Heureux, a West Memphis orthopedic physician. The April 21, 2003, report of Dr. L'Heureux reflects that he had access to the claimant's prior pertinent medical records and history. Further, the report details the results of the physical examination conducted by Dr. L'Heureux during the claimant's April 21, 2003 visit. The report further reflects, in pertinent part:

DISCUSSION: It is quite evident that Mr. Mitchell sustained an important disc at L5-S1 with a right paracentral annular tear. He also has a right posterolateral L5 small disc herniation and a left paracentral annular bulge L4-5. On the first MRI of December 20, 2001 there is also degenerative hypertrophic facet changes bilaterally greater on the right than on the left. The surgery has been successful to a certain extent, but has left him with some pain most likely related to the L5 radiculopathy described by Dr. Cunningham and also due to the fact that he has important facet arthropathy. I do not think that the patient had sufficient physical therapy and well guided enough physical therapy to help him overcome this major pain problem. It is not surprising that he has developed some signs of symptom magnification, but the objective signs of the physical evaluation definitely explain some of the pain. (1) Those physical signs are difficulty to extend completely and rapidly after a forward flexion. (2) The ankle jerk is completely absent

on the right. (3) Straight leg raise with back pain and tight hamstrings bilateral. Finally, I proceeded to measure both thighs 15 cm above the superior aspect of the patella and it is even at 43 cm.

* * *

It is my opinion that this patient needs to be assessed with a Functional Capacity Evaluation and most likely after that with much more extensive physical therapy. The patient has quit his exercise program in December because he was having pain doing that and did not realize that the exercise program will probably be an important component of the answer to his problem. I have had a long conversation with him explaining to him this problem and the patient is willing to do whatever is needed in order to improve his condition. At this point he definitely could not do any other work other than sedentary and there are very low possibilities that he may be able to return to any sort of work other than sedentary in the future. (CX1, p. 44-45)

The claimant was again seen by Dr. L'Heureux on June 9, 2003. Dr. L'Heureux noted that the claimant had undergone the Functional Capacity Evaluation of May 5, 2003 which found him to be in the light to medium work range capacity. (CX1, p. 38-41) In addition to noting in the June 9, 2003, report that the claimant was diabetic on Glucotrol, the report reflects:

I have again a long conversation with him and it is quite evidence that the patient will not be able to return to regular work. According to his FCE and to my evaluation the patient can return to

light duty work as of now, but he would have to follow restrictions. One would be a type of work where he can do a lot of walking and doesn't have to do but minimum sitting and change positions often. No lifting more than twenty-five pounds regularly and forty pounds occasionally. No long distance riding in a vehicle. (CX1, p. 46)

When seen in follow-up by Dr. L'Heureux on August 6, 2003, it was noted that the claimant had not received any relief from conservative treatment. The August 6, 2003 report does reflect, in pertinent part:

As far as medication, the patient is put on Celebrex 200 one daily with breakfast as a usual dosage, but occasionally he can take two a day. I gave him a prescription of 48 with three refills. The patient says that he has some Oxycontin at home but doesn't want to take it because of the side effect of grogginess. I explain to him that occasionally if it does happen that he has more pain than usual he could take one in order to be more comfortable.

As far as work the patient realized that he is very limited in the possible employment in the area where he lives. On the other hand, he is about 50 miles from Jonesboro and close to 50 miles from Memphis, so the driving is difficult for him, so trying to find a job in these markets makes it very difficult for him. (CX1, p. 47)

At the time the claimant was seen by Dr. L'Heureux on October 6, 2003, he was taking Celebrex. The October 6, 2003, report further reflects that the claimant could not sit for a long time, could not drive very long, could not squat and was very limited in

lifting ability. With respect to returning to work Dr. L'Heureux noted in the October 6, 2003, report that the claimant could return to permanent light to medium work range capacity lifting 40 pounds occasionally and maximally. (CX1, p. 48-49)

The claimant's testimony reflects that after he realized he could not return to work as a truck driver he complied with job placement efforts of individuals secured by Respondent No. 1 to assist in the undertaking. The claimant testified:

I've sent out resume on every company that the lady gave me the address to that was hiring security people. I put down limitations, medical limitations that I had on the application or on the resume, rather, and I never heard from any of them. (T. 23)

The claimant submitted an application for a correctional officer position at the Mississippi County Correctional facility, however, was unable to pass the physical. Claimant attributes his inability to pass a physical to residuals of his compensable injury, although he acknowledged that he did become winded during the physical, a product of his pre-existing coronary artery disease. Further, the claimant acknowledged that he cannot physically pass a Department of Transportation physical because he now takes insulin, which addresses his pre-existing diabetes.

The testimony in the record reflects that the claimant obtained employment with the Arkansas Bo Weevil Eradication Program as the result of an employment application. The claimant's job duties entailed setting out bo weevil traps and traveling out to the area to check the traps on a daily basis. Claimant testified:

It really wasn't any physical requirement hardly at all but just driving a stake in the ground and placing the trap on it and driving it through and then they had these little 4-wheelers that they call mules that you have to go across the fields to check the traps you put out. And it was really rough terrain that we had to drive over. (T. 24)

The claimant last worked for the Arkansas Bo Weevil Eradication Program on April 28, 2004, when he had another heart attack and had to take off work four to six weeks in order to recuperate. However, the claimant testified that prior to the heart attack he knew that he would be unable to continue performing the job:

The, riding the mule, that four-wheeler across those roads and the rough ground terrain, farm ground, it was just getting to the point where I was having to eat Ibuprofen more each day that I drove and it was getting to the point where I was just, I mean I couldn't hardly get out of bed in the morning. (T. 42)

The claimant asserts that he is unable to perform any job as a result of the residuals of his October 1, 2001, compensable injury. The claimant's testimony reflects, with respect to his restrictions, which he attributes to the residual of his October 1, 2001, injury:

I can't sit for any length of time. I can't drive any distance. I can't bend, twist or stoop. I don't know of any job that has been presented to me that fits into any of these descriptions. I don't know of anything that I can do, like I said, I can't sit for any length of time. Moving about, twisting, and turning, I'm in constant pain. But I'd be willing to try anything, you know, that I

could find that I could do. (T. 25)

The claimant noted that he spends a typical day lounging around the house, taking Ibuprofen, laying on the sofa or sitting in a recliner, and, on occasion, walking around the house.

The testimony of the claimant reflects that he currently takes prescription medication for his diabetes and coronary artery disease. The claimant takes over-the-counter medication, Ibuprofen, to address his pain complaints attributable to the October 2001 compensable injury. As noted in the reports of Dr. L'Heureux, the claimant confirmed that while he has Oxycontin he refrains from taking medication because, "It really messes with my head." (T. 27)

At the time of the hearing the claimant's source of income was Social Security disability. Claimant also noted that at the time he turned 62 years of age, he will be eligible for railroad retirement benefits. The claimant notes that because of the severe physical condition/restrictions he experiences, he does not feel that there are any jobs that he could perform.

The evidence reflects that in 1992 the claimant was diagnosed with diabetes. While the claimant enjoyed a productive employment history subsequent to the diagnosis, the diabetes was under control until April of 2004, when the claimant was required to use Insulin. Further, the evidence discloses that in June 2001, the claimant's coronary heart disease was treated with the placement of stints. The claimant noted that the stints were

placed in on a Friday and by the following Monday he returned to the employment of Respondent #1. The claimant's compensable injury in his employment with Respondent # 1 occurred on October 1, 2001. The claimant denies that he experienced any restrictions or limitations in his employment with Respondent # 1 following the placement of the June 2001 stints until his October 1, 2001, compensable injury.

A review of the medical in the record reflects that one of the medications provided to the claimant following his October 1, 2001, compensable injury and surgery was Vioxx. As previously noted, in an April 29, 2002, chart note, Dr. Kenneth Tonymon provided the claimant some Vioxx samples relative to the treatment of the compensable injury. (CX1, p8) Claimant acknowledged that following the June 2001 placement of three stints, in September of 2001 he had two more stints put in.

The evidence in the record reflects that the claimant suffered numerous injuries prior to the October 2001 compensable injury in the employment of Respondent # 1, however, he denies that the same impacted that his ability to work. While employed as a police officer, in either 1972 or 1973, the claimant suffered injuries when he was assaulted by three individuals. Claimant's injuries included a broken left shoulder and collar bone from the baseball bat assault. Claimant was off work for ten (10) days following the assault, and, returned to work on light duty for approximately six (6) weeks. The claimant underwent surgery as a result of the injuries sustained in the baseball bat assault, which included the placement of a steel pin in the collar bone. Claimant

maintains that he did not have any restrictions or problems following his recovery from the injuries and surgery.

In 1975 the claimant suffered a gunshot wound from a twenty-two caliber pistol, while a police officer. The testimony in the record further reflects that the claimant suffered injuries to his left arm as a result of a motor vehicle accident. The claimant underwent surgery relative to the fracture in the left arm which required the placement nine (9) steel pins in both his upper and lower arm. Claimant denies that he experienced any kind of continuing limitations or problems with the left arm following the injury and surgery. The claimant later returned to full duties after recovering from the injuries.

The testimony further reflects that in late 1992 or early 1993 while employed by Cloud Lumber Company the claimant suffered an injury to his right shoulder which resulted in surgery to repair a torn rotator cuff. Following his recovery from the rotator cuff surgery the claimant returned to driving trucks. It was at that time that the claimant secured employment with the Respondent # 1, December 1998. The claimant denies that he suffered any restrictions on his physical activity as a result of the prior injuries or diagnosed diseases prior to his October 1, 2001, injury in the employment of Respondent #1.

The claimant maintains that he has been rendered totally and permanently disability from engaging in gainful employment since the October 1, 2001, compensable injury. In the alternative, the claimant maintains, that if not permanently and totally

disabled from engaging in gainful employment, he has suffered substantial loss of earning capacity, far in excess of the 11% anatomical impairment rating as a result of the October 1, 2001 compensable injury.

Respondents # 1 deny that the claimant has been rendered permanently totally disabled or experienced permanent partial disability in excess of the anatomical impairment. In the alternative, Respondents # 1 assert that any wage loss disability suffered by the claimant in excess of the anatomical impairment is the product claimant's preexisting injuries and impairments combining with the most recent injury such that the Second Injury Fund would be liable for the payment of same.

Respondent # 2, the Second Injury Fund, maintains that the claimant's functional disability is the product of the October 1, 2001, injury and surgery. Further, Respondent # 2 maintains that the claimant cannot demonstrate that he is permanently and totally disabled.

After thorough consideration of all the evidence in this record, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 1, 2001, the relationship of employee-employer-carrier existed among the claimant and Respondents # 1.

3. On October 1, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$410.00/\$308.00 for total/permanent partial disability.

4. On October 1, 2001, the claimant sustained an injury arising out of and in the course of his employment.

5. Appropriate temporary total disability benefits have been paid relative to the claimant's October 1, 2001, compensable injury.

6. The claimant's healing period ended December 27, 2002.

7. The claimant has a permanent physical impairment in the amount of 11% to the body as a whole as a result of the October 1, 2001, compensable injury.

8. When the claimant's age, education, work experience and permanent restrictions and limitations are considered the evidence preponderates that claimant has suffered a loss of earning capacity in the amount of 70% in excess of his anatomical impairment.

9. The claimant's present disability status is the product of the October 1, 2001, compensable injury alone. Respondent # 2 has no liability in this claim.

10. The Respondents # 1 shall pay all reasonable hospital and medical expenses arising out of the injury of October 1, 2001.

11. Respondents # 1 have controverted the payment of permanent disability benefits in excess of the claimant's 11% permanent physical impairment.

CONCLUSIONS

The compensability of the October 1, 2001, injury of the claimant in the employment of Respondent # 1 is not disputed. At issue before the Commission at this juncture is the claimant's entitlement to permanent disability benefits in excess of the acknowledged 11% anatomical impairment, which has been paid by Respondent # 1. The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of a injury having been sustained subsequent to the effective date of the afore provision.

The claimant enjoyed a long, continuous, and varied employment history prior to October 1, 2001. The evidence discloses that the claimant worked almost thirty years in the law enforcement field, and worked as a truck driver for a substantial period of time. The claimant has also worked in factories and on farms. The claimant is a high school graduate who has two years of college. Further, the claimant was in the military for three years, in Special Forces and suffered a wound while serving in Viet Nam.

As recited above, the claimant has suffered numerous injuries, to include gunshot wounds, injuries growing out of a motor vehicle accident, and on-the-job injuries. The afore has resulted in the placement of a steel pins in the claimant's left shoulder and left arm. The claimant has also undergone rotator cuff surgery to the right shoulder as a result of a work-related injury. There is no evidence in the record to reflect that the afore injuries impacted the claimant's ability to earn wages once he recovered from same. The record does not reflect the presence of a permanent partial disability rating relative to the

claimant's prior work-related injuries.

It is undisputed that the claimant suffered from pre-existing diseases to include a diagnosis of diabetes in 1992 and coronary artery disease in 2001. Nevertheless, the claimant was successfully employed in job duties entailing heavy physical activity prior to October 2001. The claimant successfully passed DOT physicals and was employed as a truck driver at the time of his compensable injury of October 1, 2001. Although the claimant did undergo surgery for the placement of stints relative to his arteries in June 2001, and apparently September 2001, he was gainfully employed by Respondent # 1 as a truck driver from December 1998 through October 2001.

As previously noted, the compensability of the claimant's October 1, 2001, compensable injury in the employment of Respondent # 1 is not disputed. Further, the medical clearly reflects that the claimant's October 1, 2001 compensable injury resulted in surgery and a subsequent anatomical impairment in the amount of 11% to the body as a whole. The injury was to the claimant's lumbar spine. The claimant has undergone substantial medical treatment relative to the compensable injury of October 1, 2001, as well as a Functional Capacity Evaluation. The afore has resulted in permanent restrictions on the claimant's physical activities with respect to lifting, sitting, standing, bending, stooping, and squatting.

While it is not disputed that there has been a change in the character of the claimant's pre-existing diabetes and coronary artery disease since the October 1, 2001,

compensable injury, the evidence preponderates that the claimant's current disability status is the product of the October 1, 2001, compensable injury alone. The permanent restrictions placed on the claimant by his treating and/or examining physicians as well as the restrictions generated as a result of the Functional Capacity Evaluation are geared toward addressing residuals of the October 1, 2001, compensable injury to the claimant's lower back.

The evidence discloses that the claimant cooperated with Respondents # 1 relative to job placement assistance. The claimant submitted resumes and applications to job leads furnished by the job placement personnel, however, was unable to secure employment as a result of same. The claimant did secure employment with the Arkansas Bo Weevil Eradication Program, however residuals of his compensable injury were such that he was unable to continue the employment. The claimant candidly acknowledged that prior to suffering the April 2004 heart attack he was unable to continue performing the job with the Bo Weevil Eradication Program.

The evidence preponderates that when the claimant's age, education, permanent restrictions and limitations are considered, he has suffered a loss of earning capacity in the amount of 70% over and above the anatomical impairment as a result of the October 1, 2001 compensable injury. The claimant has limited mobility, lifting ability, and flexibility. Further, the claimant is unable to remain in one position for a substantial period of time, be it sitting, standing, or lying down. Respondents # 1 have controverted

the claimant's entitlement to permanent disability benefits in excess of the anatomical impairment of 11% to the body as a whole.

In order to establish liability for Respondent # 2, the Second Injury Fund, three hurdles must be overcome. First, the employee must have suffered a compensable injury at his present place of employment. In the instant claim, the parties stipulated that the claimant suffered a compensable injury on October 1, 2001, relative to his low back. Second, prior to the injury the employee must have had a permanent partial disability or impairment. In the instant claim, the evidence is replete with evidence that the claimant suffered prior work-related injuries relative to his right rotator cuff, left shoulder, left upper extremity. However, there is no evidence to reflect that the afore impacted the claimant's earning capacity. To the contrary, the evidence discloses that the claimant resumed unrestricted employment activities following his recovery from the afore injuries.

Further, the evidence discloses that the claimant was diagnosed with diabetes in 1992. There is no evidence to disclose that the afore impacted the claimant's earning capacity. In June 2001 the claimant underwent surgery for the placement of a stents in his arteries and again in September 2001. Nonetheless, the claimant remained gainfully employed by Respondent #1 following the afore procedures. There is no evidence to reflect that the same impacted the claimant's earning capacity.

Finally, the disability or impairment must have combined with the most recent

compensable injury to produce a current disability status. Mid-State Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1998). The evidence preponderates that the claimant's current disability status is a product of the October 1, 2001, compensable injury alone. As such, Respondent # 2 does not have liability in this claim.

AWARD

Respondents # 1 are hereby ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$308.00 to correspond with the claimant's permanent partial disability of 81% to the body as a whole, which includes the claimant's anatomical impairment and loss of earning capacity. Respondents #1 may claim credit for sums heretofore paid toward the discharge of the aforementioned obligation. Said sums accrued shall be paid in a lump without discount.

Respondents # 1 are further ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus expenses, including medical related travel, growing out of the claimant's compensable injury of October 1, 2001.

The maximum attorney's fees are herein awarded to the claimant's attorney pursuant to Arkansas Code Annotated §11-9-715.

This award shall bear interest at the legal rate pursuant to Arkansas Code Annotated §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

ANDREW L. BLOOD
Administrative Law Judge