

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211780

KENNETH NEESE	CLAIMANT
C BEAN TRANSPORT	NO. 1 RESPONDENT
COMPENSATION MANAGERS, INC. INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

OPINION FILED APRIL 16, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

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

Respondents No. 1 represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 19, 2004, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 7, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on July 11, 2002.

4. Medical expenses have been paid by Respondents No. 1 to about April 2003.

5. The claimant is entitled to the maximum compensation rate for 2002.

6. Respondents No. 1 have accepted and are paying a 15 percent impairment rating.

7. The Second Injury Fund has accepted a 25 percent disability above the claimant's 15 percent impairment rating.

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

1. Additional medical.

2. Additional temporary total disability from April 2003 to September 18, 2003.

3. Wage loss over the 15 percent impairment rating and the 25 percent functional disability.

4. Extent of the Second Injury Fund's liability.

5. Attorney's fees to include a fee on the 15 percent impairment rating paid by Respondents No. 1 and the 25 percent disability accepted by the Second Injury Fund.

In regard to the foregoing issues the claimant contends that he is entitled to temporary total disability benefits from the date they were terminated in April until September 18, 2003. The claimant contends that Dr. Capocelli's impairment rating does not end the claimant's healing period. Rather, the impairment rating

was assessed in order to show that the claimant's permanent impairment will be at least 15 percent. The claimant's temporary total disability benefits were terminated by the insurance carrier and as a result the claimant's treating surgeon, Dr. Capocelli, was requested to express an opinion in regard to the claimant's permanent impairment without addressing whether the claimant has in fact reached the end of his healing period. The claimant contends that he was still under active medical treatment when the respondents terminated his benefits and when the impairment rating was assessed. The claimant contends that a permanent impairment rating was faxed to the insurance company on May 19, 2003, and that if they had not initiated payment in regard to that impairment rating within fifteen (15) days of their receipt of that rating they have controverted all permanent disability in this case. The claimant contends that any temporary total disability benefits not previously paid have been controverted because the respondents arbitrarily ended the claimant's temporary total disability payments while the claimant was still under active medical treatment. The claimant contends that he is entitled to temporary total disability benefits through at least September 18, 2003. The claimant contends that he is entitled to additional medical treatment as recommended by Dr. Capocelli during his deposition on September 30, 2003. Said recommended treatment involves physical therapy as well as chronic pain management at Health South. The claimant further contends that he is entitled to wage loss over the

15 percent impairment accepted by Respondents No. 1 and the 25 percent disability accepted by Respondent No. 2.

In regard to the foregoing issues Respondents No. 1 contend that they have paid all benefits which the claimant is entitled.

In regard to the foregoing issues Respondent No. 2 contends that it has accepted 25 percent functional disability in this claim and it is their position that due to Respondents No. 1's delay in supplying requested discovery and the parties settlement negotiations, the Second Injury Fund has not controverted this claim. It further contends that pursuant to the December 2003 agreed order, Respondent No. 1 is paying out the 15 percent as of October 1, 2003. The Fund further contends that Respondents No. 1 will pay out its rating on January 15, 2005, at which time the Second Injury Fund will assume payment of its 25 percent functional disability liability. The Fund requests the parties to promptly advise if the January 15, 2005, payout date does not correspond with their calculations. The Second Injury Fund contends that the claimant is not permanently and totally disabled or entitled to additional wage loss.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. Respondents No. 1 submitted the deposition of Dr. Capocelli marked Respondents No. 1's Exhibit No. 1. Respondent No. 2 submitted documentary evidence marked Respondent No. 2's Exhibit No. 1, a letter from the Second Injury Fund marked Respondent No.

2's Exhibit No. 2 and the deposition of the claimant marked Respondent No. 2's Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant's wife, Tonya Renee Neese, testified that she and the claimant had been married for four years. Mrs. Neese agreed that in April 2003 her husband was still under active medical treatment when his temporary total disability checks stopped. Mrs. Neese testified that she has been very involved in her husband treatment program and has taken him to almost ever one of his doctor's appointments as well as made numerous telephone calls on her husband's behalf concerning his medical care. Mrs. Neese testified that her husband started receiving disability payment again in the middle of September 2003. Mrs. Neese agreed that the claimant has undergone surgery since his injury and that his activity level and their life together has greatly changed since his compensable injury. This witness testified that her husband cannot ride in the car for any length of time, sit at their children's school activities, he has problems sleeping, he is more irritable, depressed and their marital life has been affected. Mrs. Neese testified that when his disability checks stopped in April 2003 the respondent also stopped paying for any of the claimant's prescription medications and they have been having to pay for his medicine out of their own pockets. Mrs. Neese testified that there was an order on their account at the pharmacy setting forth, "No work comp charges per Michelle at C Bean." Mrs.

Neese testified that even though the claimant's disability payments were started back up in September 2003, the claimant's prescription medication has not been approved and they are still having to pay for these themselves. Mrs. Neese testified that the claimant is still under active medical treatment with Dr. Brackman and Dr. Howell.

On cross examination by Respondent No. 2, Mrs. Neese testified that due to transportation problems and the distance for the claimant to drive for his physical therapy this treatment plan became ineffective. Mrs. Neese agreed that the claimant has not done anything to improve his condition other than take medications since his surgery. Mrs. Neese agreed that she was present following the claimant's surgery when he was seen by Dr. Capocelli and reported that he was having difficulty with balance and numbness in his legs. Mrs. Neese testified that after examination Dr. Capocelli could not come up with any objective reasons as to why the claimant would still be experiencing these problems. Mrs. Neese testified that she was aware that her husband had had a prior back injury in the early 90s but she did not know him then so she was not familiar with what his symptoms were at that time. Mrs. Neese testified that she knew that her husband had had a previous surgery and that it had been settled but he had returned to work and at the time they met he was a truck driver.

The claimant testified that he began working for the respondent in January 2000 as a truck driver. The claimant testified that he sustained his compensable injury while he was

delivering freight to Whirlpool. The claimant testified that he also drove for the claimant throughout the country and when needed he had to assist with unloading. The claimant testified that he would often have to sit as much as ten hours at a time while driving and the weights of the different items he would have to unload would vary greatly but could be as much as a couple hundred pounds. The claimant testified that driving the over the road trucks required him to climb in and out of his rig as well as to climb over his rig in order to check it out for maintenance.

The claimant testified that as a result of his July 2002 compensable injury he underwent low back surgery performed by Dr. Capocelli and that his injury had been accepted as compensable by the respondent. The claimant testified that the respondent contacted him and told him that he was not in compliance, therefore, his workers' compensation benefits were terminated sometime in April 2003. The claimant testified that he had attempted to do everything that was asked of him by his physicians. The claimant testified that as a result of his injury he went from a productive healthy person to someone who is very limited. The claimant testified that he is not able to sit more than twenty minutes at a time noting that he had been moving around the hearing room in order to ease his discomfort. The claimant testified that he also can lift maybe up to ten pounds and that due to his problems with sleeping because of his pain he is depressed and irritable. The claimant testified that he is wearing a TENS unit which was recommended to him by Dr. Brackman and he is using an old

one because workers' comp has stopped paying for any of his medical treatments. The claimant testified that Dr. Capocelli had referred him to Dr. Brackman. The claimant testified that he has had problems with his pain medications and other medications prescribed by his various doctors and that even with these medications he is still having to use his TENS unit.

The claimant testified that he was forty-five years old, had gone through the ninth grade and currently has had problems reading due to his medication which makes things fuzzy and hard for him to focus. The claimant testified that before working for the respondent he had worked for USA Truck as well as CCC Express as a long haul truck driver. The claimant testified that prior to that he was on disability due to back problems which he experienced back in 1991 or 1992 and had to undergo back surgery. The claimant testified that before this first back surgery he had worked in the construction business doing sheet metal work as a welder. The claimant testified that currently his pain and discomfort would prevent him from working a full eight hours due to his need to lay down to alleviate part of his pain.

On cross examination by respondent No. 1, the claimant agreed that he had been convicted of a felony. The claimant also agreed that while driving for the respondent, although he might drive a ten-hour stretch at a time, he could take bathroom breaks or any other kind of break as needed. The claimant testified that on an average he worked for the respondent five days a week testifying that depending on the schedule he was out four to six days each

week with an average of five. The claimant was asked about his earlier back injury and the claimant testified that this matter settled for a lump sum in 1992 or 1993 and he did not begin truck driving until 1997. The claimant testified that he lived off of his social security disability as well as his wife at the time was working. The claimant testified at that time he was drawing around \$1,100.00 per month for his social security disability. The claimant was asked if he has applied for social security at this time and he responded, "No, Sir." The claimant was asked if he does not go back to work if he was planning to file for social security and he responded, "Yes, Sir. My plans are that I'm going to get better at some point and go back to work." The claimant was asked if he had any other claim in his life time for injuries and he responded yes. The claimant explained that he was in a truck wreck in which the other driver was killed. The claimant testified that as a result of this wreck he had a laceration over his eye and some numbness in his forehead. The claimant testified that he received about \$7,000.00 in this settlement as well as his medicals. The claimant testified that this accident occurred in 1999 when he was working for CCC Express. The claimant testified that this trucking company went out of business and that is when he went to work for USA Truck.

Respondent No. 2 cross examined the claimant asking him about his GED. The claimant testified that he got his GED while in the Navy and also has been to truck driving school. The claimant testified that he received a certificate from truck driving school

and also has received schooling in jet mechanic work while in the service. The claimant was asked if he was a certified welder and the claimant responded no that he never was certified. The claimant testified that at the time of his 1991 back injury he was a supervisor with a sheet metal company supervising a crew from one to four people. The claimant testified that this job involved welding, estimating and installing sheet metal and fabrication. The claimant testified that when he worked as a field supervisor he would have a crew from two up to twenty depending on what was needed for the job that day. The claimant agreed that he did look over the other employees time cards for accuracy but he did not figure their benefits. The claimant testified that while he was with CCC Express he was a trainer working with new drivers. The claimant testified that besides instructing the student driver, he also had daily paperwork. The claimant testified that all truck drivers have daily paperwork. The claimant testified that he did not quit physical therapy but he did tell the therapist that it was painful and he could not do it but he still kept going. The claimant testified that he is taking his medications and trying to get his pain to a point where he can return to physical therapy and get better. The claimant testified that he has not attempted to return to work nor has he looked into any type of retraining stating that he does not feel that he has gotten to the point where he can do either one of those things. On recross examination by Respondents No. 1, the claimant testified that he is receiving temporary total disability checks in the amount of \$575.00 every

two weeks and has been so receiving since September 2003. The claimant indicated that he thinks he is entitled to vocational rehabilitation when he reaches the point that he is able to undergo that type of retraining.

There is a report from Central Case Management dated April 10, 2003 where it is indicated that the case manager is having problems with Dr. Capocelli's office as to being notified of the claimant's appointments. This same note indicates that the claimant's surgery has not relieved the claimant's complaints of burning leg pain and the case manager sets forth that if they are not given timely notice of the claimant's next appointment they will not approve or authorize payment of Dr. Capocelli's bill. On May 7, 2003, Dr. Capocelli assessed the claimant with a 15 percent whole body impairment rating. There is a letter from the claimant's attorney to the respondents dated May 19, 2003, forwarding them a copy of Dr. Capocelli's rating for the claimant as well as notifying them by letter of the rating. Dr. Capocelli writes on September 18, 2003, that the claimant is status post lumbar fusion since January 2003 and he last saw the claimant in March 2003. The doctor notes that at that March appointment he felt that the claimant had significant pain magnification and though his x-rays looked quite good his symptoms certainly prompted the need for further physical therapy. The doctor notes that the claimant has reported that he had problems with physical therapy in that it elevated his pain and that according to the claimant as well as the claimant's wife, he has made very little progress and continues to have significant low

back pain with some radiation down the right leg with associated numbness in that leg. Dr. Capocelli notes that the claimant is doing very little at home and really does not want to pursue any further therapy because the claimant reports that it hurts. Dr. Capocelli notes that the claimant does have a 15 percent whole body impairment based on his two level procedure second operation, status post fusion with some brief residual rigidity and that in regards to his maximum medical improvement the doctor does not think that the claimant is at MMI at this point and the doctor feels that the claimant will require a significant period of time and treatment to reach maximum medical improvement. Dr. Capocelli writes that, in his opinion, this will best be served by the claimant being seen by a chronic pain specialist and that he will not at this time issue final work restrictions and feels that this should be done by whatever physician is handling his pain treatment.

Heather Naylor, a vocational rehabilitation consultant for Rehabilitation Management, Inc., writes on February 4, 2004, that she has reviewed the depositions of the claimant as well as Dr. Capocelli, the interrogatories and the medical records from Dr. Capocelli in the claimant's case. Ms. Naylor writes based on the review of the records that it is her opinion that the claimant could return to work in certain light/sedentary jobs noting that the claimant is 45 years old and could be expected to work another twenty years until his usual retirement age. Ms. Naylor writes that although the claimant lacks significant transferable job

skills to the light sedentary job categories, it is her opinion that he could be expected to return to the work force in unskilled/semiskilled occupations at an entry level that would require a short training period or a short amount of on the job training to perform these skills. This consultant had previously set forth approximately eight possible jobs which the claimant might look into such as cashier, meter reader, gate guard, valet, etc.

Dr. Capocelli in his deposition taken on September 30, 2003, explained that his statement concerning the claimant exhibiting significant pain magnification was in fact symptom magnification not just pain magnification. Dr. Capocelli stated that there were more issues than just the pain. Dr. Capocelli stated that, "I felt that there was more symptoms to his subjective description than I was seeing on the examination." Dr. Capocelli also testified that from a surgical or neurological perspective he felt he had nothing more to offer the claimant but in terms of physical medicine and rehabilitation, chronic pain management or chronic rehabilitative management, he felt there were things the claimant still could work on or be treated for. The doctor was asked if the claimant would benefit from pain management based on what he has seen so far and Dr. Capocelli responded, "I believe that he has potential to benefit from chronic pain management." Dr. Capocelli testified that he does believe that the claimant has symptoms related to his compensable injury but he just feels that the claimant's interpretation of his symptoms are magnified. Dr. Capocelli stated

that when he first saw the claimant on March 19, 2003, the claimant had not reached maximum medical improvement and was still unable to work at that point. Dr. Capocelli testified that his notes reflect that on April 21, 2003, he received a note from the claimant's physical therapist indicating that the claimant's workers' comp case had been closed, therefore, no additional physical therapy was authorized by the carrier. Dr. Capocelli set forth that the claimant had indicated that he was unable to pay for physical therapy independently. Dr. Capocelli stated that when he last saw the claimant on September 18, 2003, he thought that the claimant should have an ongoing treatment plan of physical therapy and or physical medicine and rehabilitation as well as pain management and that was still his recommendation as of the date of this deposition. Dr. Capocelli also explained that when he uses the term rigidity he uses that term synonymous with spasms. The doctor was asked if he believed that the claimant remained in his healing period until he was seen in September 2003 and Dr. Capocelli responded, "I believe so." The doctor went on to agree that in his medical opinion, within a reasonable degree of medical certainty, the claimant remained unable to engage in gainful regular employment during that period of time. Dr. Capocelli stated that he would assess the claimant with restrictions of no lifting more than twenty pounds with no bending, squatting or climbing. Dr. Capocelli agreed that these limitations were placed on the claimant as a result of his job related injury of July 2002. Dr. Capocelli further agreed that the 15 percent whole body impairment rating

which he had assessed the claimant was a result of his job related injury. The doctor then explained again that, in his opinion, the claimant had reached maximum neurosurgical improvement but believed that he would profit from additional medical treatment. Dr. Capocelli stated that additional treatment would not necessarily improve the claimant's functional capacity but over time he may have some improvement in his all over pain level and his ability to tolerate working. Dr. Capocelli stated that in his opinion the claimant would never be able to work more than a light duty type job.

After a complete review of this record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. Dr. Capocelli's report of September 18, 2003, and in his deposition he sets forth recommendations for ongoing pain management for the claimant. Dr. Capocelli does express concerns about the claimant's enthusiasm about his treatment program, however, the doctor clearly sets forth that the claimant is in need of additional medical treatment for his compensable injury. Neurologically, Dr. Capocelli had nothing further to offer the claimant but did recommend ongoing pain management. I also find that the claimant is entitled to temporary total disability from April 2003 to September 18, 2003. Dr. Capocelli, in his report of September 18, 2003, discusses the claimant's surgery and recommended follow up treatment. Dr. Capocelli sets forth that the claimant had difficulty in tolerating the recommended physical

therapy and preceded with recommendations to treat his ongoing pain with medications until such time that the claimant's pain control would allow him to undergo physical therapy. In the case managers note of April 10, 2003, it clearly sets forth that Dr. Capocelli refused to state that the claimant was at maximum medical improvement and was recommending further appointments and treatment with a return visit on May 22, 2003. In Dr. Capocelli's deposition he states that the claimant remained in his healing period until he was seen in September 2003 and even stated, within a reasonable degree of medical certainty, that the claimant remained unable to engage in employment during the period of time prior to September 2003. Therefore, the respondents should pay temporary total disability to this claimant from April 2003 to September 18, 2003.

I further find, based on this entire record, that the claimant is entitled to additional wage loss in the amount of 5 percent over and above the 25 percent disability which the Second Injury Fund has accepted and the 15 percent impairment which Respondents No. 1 have accepted. This additional 5 percent wage loss disability is based on the claimant's lack of transferrable job skills, his limited education and his physical impairment. Dr. Capocelli, in his deposition and reports, has set forth that the claimant cannot return to his former employment but would only be able to engage in light to sedentary type work. The rehabilitation counselor, in her report, has essentially agreed with Dr. Capocelli's assessment as to the claimant's job limitations. Therefore, the Second Injury

Fund should pay an additional 5 percent wage loss to this claimant over and above the 25 percent which it had previously accepted.

The claimant's attorney has contended that he is entitled a fee on the 15 percent impairment which Respondents No. 1 has now accepted as well as on the 25 percent disability which the Second Injury Fund stipulated it was liable for at the beginning of the hearing. The claimant's attorney notified Respondent No. 1 in May 2003 that Dr. Capocelli had rated the claimant with a 15 percent impairment rating to the body as a whole and it was not until December 2003 that the respondents agreed that they would accept and pay the 15 percent impairment to this claimant. The Second Injury Fund acknowledged that they had been joined as a party in this case on August 5, 2003. The Second Injury Fund participated in the deposition of Dr. Anthony Capocelli on September 30, 2003. The Second Injury Fund acknowledged receipt of all discovery information by letter to Respondents No. 1 on January 9, 2004. It was not until February 12, 2004, that the Second Injury Fund accepted 25 percent functional disability in this claim. Based on this information as well as the entire record, I find that the Second Injury Fund controverted this claimant's entitlement to disability over and above his 15 percent impairment rating on which they should be required to pay an attorney's fee.

FINDINGS & CONCLUSIONS

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

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on July 11, 2002.

4. Medical expenses have been paid by Respondents No. 1 to about April 2003.

5. The claimant is entitled to the maximum compensation rate for 2002.

6. Respondents No. 1 have accepted and are paying a 15 percent impairment rating.

7. The Second Injury Fund has accepted a 25 percent disability above the claimant's 15 percent impairment rating.

8. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. See discussion above.

9. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from his last benefit check in April 2003 through September 18, 2003. See discussion above.

10. The claimant has proven by a preponderance of the evidence that he is entitled to additional wage loss in the amount of 5 percent over and above his impairment rating of 15 percent and the 25 percent disability which the Second Injury Fund has accepted. See discussion above.

11. The Second Injury Fund is liable for an additional 5 percent wage loss disability based on this claimant's limited

education, limited transferrable job skills and his physical impairment. Also see discussion above.

12. The claimant's attorney is entitled to a controverted fee on the 15 percent impairment which Respondents No. 1 controverted but subsequently accepted. The claimant's attorney is also entitled to the maximum statutory attorney's fee on the 30 percent disability which the Second Injury Fund is responsible for paying. Respondents No. 1 are also responsible for payment of the maximum statutory attorney's fee on the temporary total disability benefits awarded herein. See discussion above.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury which Respondents No. 1 should pay.

The claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability from his date of last payment of benefits in April 2003 through September 18, 2003, to be paid by Respondents No. 1.

The Second Injury Fund is found liable for an additional 5 percent disability over and above the claimant's 15 percent impairment rating and the 25 percent wage loss disability which the Second Injury Fund accepted.

Respondents No. 1 shall pay the maximum statutory attorney's fee on the temporary total disability benefits awarded herein as well as on the 15 percent impairment rating of the claimant.

The Second Injury Fund shall pay the maximum statutory attorney's fee on the 30 percent disability for which they have been found liable.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE