

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F211719

DENNIS WATSON, Employee	CLAIMANT
SOUTHERN TRANSIT, INC., Employer	RESPONDENT #1
ARKANSAS TRUCKING ASSOCIATION, Self-Insured Fund	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED NOVEMBER 23, 2004

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondent #1 represented by MARK MCCARTY, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On October 4, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on July 28, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the time of the hearing the parties agreed to the following stipulations:

1. Claimant suffered a compensable injury to his left foot on October 6, 2002.
2. Claimant earned an average weekly wage of \$560.13 which would entitle him to compensation at the rate of \$373.00 for temporary total disability benefits and \$280.00 per week for permanent partial disability benefits.

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

1. Compensability.
2. Temporary total disability from April 1, 2004 through a date yet to be determined.
3. Alternatively, claimant's entitlement to permanent disability benefits including the

7% impairment rating and wage loss.

4. Attorney fee.
5. Second Injury Fund liability.

After stipulating that claimant suffered a compensable injury to his left foot on October 6, 2002, the only remaining issue of compensability involves an alleged injury to the claimant's back. In addition, claimant also clarified his temporary total disability request to include the dates of September 25, 2003 through May 20, 2004.

The claimant contends that in 1998 he underwent a laminectomy at L5-S1 by Dr. Joe Paul Alberty and subsequently a 10% permanent partial rating was given to the body as a whole. In 1995 the claimant was treated by Dr. Cheyne for a recurrent disc and a 20% rating was given which Dr. Alberty disagreed with and awarded a 10% permanent partial impairment rating. Subsequently the claimant suffered the current injury arising on October 6, 2002 wherein he injured his left foot, ankle, and back. On May 20, 2004 Dr. Luke Knox rated the claimant at 7% to the body as a whole. The claimant also suffers from a pre-existing post-traumatic stress disorder. As a result of the pre-existing conditions and this recent injury, the claimant is entitled to permanent partial disability, or alternatively, suffers impairment over and above the 7% anatomical rating for which either the respondent or the Second Injury Fund should be liable. Further, the claimant is entitled to a statutory attorney's fee.

Respondent #1's amended contentions are set forth in their amended pre-hearing questionnaire which is included in the hearing transcript as Commission's Exhibit Number 2.

Respondent #2's contentions are set forth in their pre-hearing questionnaire which is included in the hearing transcript as Commission's Exhibit Number 3.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the

testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The parties' stipulation that claimant suffered a compensable injury to his left foot on October 6, 2002 is hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$560.13 which would entitle him to compensation at the rate of \$373.00 for temporary total disability benefits and \$280.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back on October 6, 2002.

4. Claimant has met his burden of proving by a preponderance of the evidence that his back problems in February 2003 are a compensable consequence of the October 6, 2002 injury.

5. Respondent is liable for any unpaid reasonable and necessary medical treatment provided in connection with claimant's compensable back injury.

6. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits for his compensable injury.

7. Claimant has failed to prove by a preponderance of the evidence that he has suffered any permanent impairment as a result of his compensable injuries. Having failed to prove that he suffered permanent impairment, claimant is not entitled to wage loss benefits.

8. The Second Injury Fund has no liability in this claim.

FACTUAL BACKGROUND

The claimant is a 58-year-old high school graduate with approximately 14 hours of college credit. The claimant was honorably discharged after approximately two years of service in the Army. Claimant was discharged 10 days early because of health problems caused after he was struck by five exploding mortar rounds which caused shrapnel wounds throughout his body. As a result of that incident the claimant developed post-traumatic stress disorder which he has battled throughout his life. As a result of this incident the claimant has been drawing some level of disability benefits from the Veteran's Administration.

After claimant's military service, his primary jobs have been in the trucking industry. Claimant testified that within the last five years he has primarily been hauling within a 500 to 600 mile radius of Fort Smith. In addition to working as a truck driver, the claimant also worked in the office of a trucking company where he was responsible for dispatching, hiring and firing of drivers, maintenance records, and supervision of the shop.

The claimant has a history of back problems beginning in 1988 when he awoke with severe low back pain and pain in his left leg. As a result of those complaints the claimant underwent surgery which was performed by Dr. Alberty for a herniated disc at the L5-S1 level in March 1988. No permanent impairment rating was assigned to claimant at that time. Claimant initially returned to work performing office work but was eventually released by Dr. Alberty to return to driving between Fort Smith, Tulsa, and Oklahoma City. Dr. Alberty indicated that claimant could perform this type of work once or twice a week on a temporary basis and that claimant should wear a lumbar support and not load or unload his truck.

Claimant's next round of medical treatment involving his back occurred in March 1991 when he sought medical treatment from Dr. Alberty after awakening with acute back pain radiating into his leg. Dr. Alberty's notes indicate that claimant's pain was similar to

1988 and his treatment for claimant included the wearing of a back support and medication. Dr. Alberty's report of March 18, 1991 indicates that claimant's condition is 50 percent better. He indicated that claimant should continue his medication and return for treatment as needed.

Claimant suffered a work-related injury to his back in 1995 while working at J & S Trucking. Claimant was treated for that injury by Dr. Cheyne. Dr. Cheyne in a report of June 15, 1995 diagnosed claimant's condition as acute lumbar strain with possible radiculopathy. Dr. Cheyne ordered physical therapy and took claimant off work. Dr. Cheyne subsequently ordered an MRI scan which was initially denied because claimant's employer did not carry compensation insurance. However, claimant did undergo a CT scan which revealed narrowing of the lateral recesses at the L5-S1 level. Dr. Cheyne in his medical report of July 10, 1995 indicated that he saw nothing of a surgical nature. Dr. Cheyne in a report of August 14, 1995 indicated that a bone scan was completely normal and recommended that claimant obtain a second opinion from an orthopaedist and follow through with lumbar epidural steroid injections.

Claimant received the second opinion from Dr. Axelsen. Dr. Axelsen, in a report dated August 28, 1995, indicates that claimant suffers from probable left lumbar radiculopathy. Dr. Axelsen recommended that claimant continue with a work hardening program and undergo an MRI scan. At some point the claimant did undergo the MRI scan and according to Dr. Axelsen's report of September 28, 1995, no abnormalities or surgical indications were shown. The MRI did reveal a small central disc bulge at the L5-S1 level, but it was not causing any significant problems. Dr. Axelsen recommended that claimant continue conservative care with Dr. Cheyne. In a report dated October 12, 1995, Dr. Cheyne indicated that claimant was at maximum medical improvement. He released the claimant to return to work with a permanent 20-pound weight restriction with no repetitive bending, lifting, or twisting. Dr. Cheyne opined that claimant had a permanent physical

impairment rating in an amount equal to 5% for the lumbar disc protrusion. The evidence also indicates that claimant subsequently was evaluated by Dr. Alberty who opined that claimant should have been assigned a permanent physical impairment rating in an amount equal to 10% following his surgical procedure in 1988.

Although claimant's employer in 1995, J & S Trucking, did not have workers' compensation insurance, claimant nevertheless filed a claim for workers' compensation benefits and one of the issues at that time was claimant's entitlement to wage loss and Second Injury Fund liability. In an opinion filed February 8, 1999, Administrative Law Judge Elizabeth Danielson found that claimant was entitled to permanent partial disability benefits based upon wage loss in the amount of 15% over and above his 5% impairment rating for his 1995 injury and 10% impairment rating for his 1988 injury. Judge Danielson's opinion was affirmed by the Full Commission on February 19, 1999, and this decision was affirmed by the Arkansas Court of Appeals on October 25, 2000.

Claimant next sought medical treatment for his back following a fall on ice in 1999. Claimant primarily received medical treatment from the VA. The evidence indicates that claimant wrote a letter at that time believing that he had two herniated discs in his back and requesting surgery. Shortly after this time the claimant went to work for respondent #1 on October 3, 2000 driving a truck.

Claimant suffered a compensable injury while working for respondent #1 on October 6, 2002. Claimant was in the process of climbing down from his truck when he slipped and fell approximately four and a half to five feet to the ground. This fall resulted in claimant fracturing his left foot. Claimant was placed in a cast and after approximately four weeks was hospitalized and diagnosed with deep vein thrombosis by Dr. Weisse. While claimant received medical treatment from Dr. Weisse with regard to his deep vein thrombosis, claimant's primarily treating physician with regard to his foot was Dr. Martimbeau.

As a result of claimant's injury he had been given crutches for walking. In February 2003 the claimant was attempting to negotiate a step at his home with his crutches when he became entangled with the crutches and fell. Claimant testified that a step struck him across the back and resulted in a great deal of pain. As a result, Dr. Martimbeau continued to treat claimant for his left foot injury and also treated him for back pain as well. Dr. Martimbeau's treatment for claimant's back injury included cortisone injections, medication, physical therapy, and an MRI scan. The MRI scan revealed no disc herniation but did reveal narrowing of the disc space at the L5-S1 level.

Claimant was released by Dr. Weisse for his deep vein thrombosis on July 22, 2003. Dr. Weisse's medical report of that date indicates that claimant would have to take anti-platelet agents for the rest of his life, use elastic stockings, and elevate his leg periodically.

Dr. Weisse indicated that when claimant returned to work he would have to stop occasionally and exercise his lower extremity. On September 23, 2003 Dr. Martimbeau stated that claimant had reached maximum medical improvement with respect to his foot and back injuries. Dr. Martimbeau opined that claimant has suffered no permanent disability with respect to his foot injury and indicated that claimant should return to work with the restrictions given to him by Dr. Weisse.

Claimant subsequently sought medical treatment from Dr. Luke Knox who ordered a myelogram. After his review of the myelogram, Dr. Knox indicated that he saw no pathology that would require surgery. However, he did assign the claimant a permanent physical impairment rating in an amount equal to 7% to the body as a whole. Respondent #1 accepted claimant's left foot injury as compensable and paid compensation benefits. In addition, respondent #1 has paid most if not all of the medical treatment claimant received in connection with his back injury. However, both respondent #1 and the Second Injury Fund now contend that claimant did not suffer a compensable injury to his back. In addition to the issue of compensability, claimant contends that he is entitled to additional

temporary total disability benefits and permanent partial disability benefits.

ADJUDICATION

The first issue for consideration involves compensability of an injury to claimant's back. As previously noted, claimant did suffer a compensable injury in the form of a fracture to his left foot when he fell on October 6, 2002. Claimant testified that he did suffer from some back pain at the time of that fall. Indeed, the emergency room report from St. Edward's dated October 6, 2002 indicates that claimant complained of having injured his tailbone during that fall. However, there were no objective findings noted at the time of that evaluation and the medical reports subsequent to October 6 but prior to February 2003 do not indicate claimant received any medical treatment for an injury to his back. Given this evidence, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back when he fell on October 6, 2002.

However, I find that claimant's back problems beginning in February 2003 are a compensable consequence of his October 6, 2002 injury.

The determination of whether a causal connection exists is a question of fact for the Commission. *Jeter v. B.R. McGintey Mechanical*, 62 Ark. App. 53, 968 S.W. 2d 645 (1998). The test is whether there is a causal connection between the two episodes. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W. 3d 1 (2000). In addition, there must be objective findings of a compensable consequence. *Barnes v. Alma School District*, Full Commission Opinion filed July 3, 2000 (E711749, E905201).

In this particular case, the claimant had been prescribed crutches as a result of his left foot fracture. While claimant was attempting to negotiate a step at his home with those crutches he fell and landed with the step striking him across the back. According to claimant's testimony he had immediate back pain at that time. Indeed, the medical

evidence reflects a history of claimant reporting that injury to his treating physicians. Dr. Martimbeau's medical report of February 10, 2003 indicates that claimant was complaining of back pain after falling with his crutches. Likewise, Dr. Weisse in his report of February 13, 2003 notes that claimant has injured his back after falling off his crutches. The February 10, 2003 report of Dr. Martimbeau indicates that muscle spasm was present at the time of his evaluation of the claimant.

Based upon the foregoing evidence, I find that a causal connection exists between the claimant's back problems in February 2003 and his original compensable injury. Here, claimant's back problems in February 2003 occurred as a result of claimant's use of crutches which had been prescribed for his compensable injury. I also note that this compensable consequence has been established by objective findings in the form of muscle spasms observed by Dr. Martimbeau at the time of his evaluation of claimant on February 10, 2003.

Accordingly, I find that claimant has met his burden of proving by a preponderance of the evidence that his back problems beginning in February 2003 are a compensable consequence of his October 6, 2002 injury.

Having found that claimant's back problems in February 2003 are a compensable consequence of his October 6, 2002 injury, respondent #1 is liable for payment of all unpaid reasonable and necessary medical treatment provided in connection with claimant's compensable back condition.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning September 25, 2003 and continuing through May 20, 2004. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case,

I find that claimant has failed to prove by a preponderance of the evidence that he remained within his healing period or that he suffered a total incapacity to earn wages subsequent to September 23, 2003.

As previously noted, claimant was being treated by Dr. Weisse for his deep vein thrombosis. On July 22, 2003 Dr. Weisse released claimant from his care and indicated that claimant could return to work with some limitations. After that date claimant continued to be evaluated by Dr. Martimbeau for his left foot and back injuries. However, Dr. Martimbeau on September 23, 2003 wrote a report indicating that claimant had reached maximum medical improvement with no other specific treatment required. Dr. Martimbeau noted that claimant had suffered no permanent disability as a result of his left foot injury. Dr. Martimbeau indicated that claimant could return to work with restrictions previously given by Dr. Weisse.

As previously noted, the claimant sought another opinion from Dr. Knox. However, there is no indication that claimant remained within his healing period or that he suffered a total incapacity to earn wages between the time he was released by Dr. Martimbeau and the time Dr. Knox assigned an impairment rating on May 20, 2004. Dr. Knox's medical reports do not indicate that claimant was totally incapacitated from working during this period of time.

Accordingly, based upon the medical opinions of Dr. Weisse and Dr. Martimbeau which I find to be credible and entitled to great weight, I find that claimant had reached maximum medical improvement as a result of his compensable injuries as of his release by Dr. Martimbeau on September 23, 2003. Therefore, claimant is not entitled to temporary total disability benefits subsequent to that date.

The next issue for consideration involves claimant's contention that he is entitled to permanent partial disability benefits including the 7% impairment rating assigned by Dr. Knox and wage loss.

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 meet his burden of proving by a preponderance of the evidence that he suffered any permanent disability as a result of his compensable foot or back injury.

In support of his contention that he is entitled to permanent partial disability benefits claimant relies upon the impairment rating of 7% assigned by Dr. Knox in his report of May 20, 2004. In contrast to the opinion of Dr. Knox is the opinion of Dr. Martimbeau, claimant's primary treating physician. As previously noted, in his report of September 23, 2003 Dr. Martimbeau stated that claimant had suffered no permanent disability with respect to the fracture of his left foot. Furthermore, in a letter dated September 23, 2004, Dr. Martimbeau indicated that claimant had suffered no anatomical impairment as a result of either the foot injury of October 6, 2002 or the back injury in 2003.

Dennis Watson has no anatomical permanent partial impairment rating related to his work injury on 10-06-02 or from his fall and back injury in 2003.

Thus, while Dr. Knox has assigned claimant a 7% impairment rating, it was the opinion of Dr. Martimbeau that claimant did not suffer any permanent impairment as a result of the left foot or back injury. Based upon the circumstances presented in this case, I find that Dr. Martimbeau's opinion is entitled to greater weight. First, Dr. Martimbeau was the claimant's primary treating physician who treated him on a number of occasions. On the other hand, claimant saw Dr. Knox on only two occasions. Furthermore, in a letter dated August 25, 2004, Dr. Knox stated that the findings upon which he based his impairment rating might have pre-existed the claimant's fall in February 2003. Dr. Knox indicated that he would have to assume that claimant's current complaints are related to the fall and not to any pre-existing condition.

Given all of this evidence, I find that the opinion of Dr. Martimbeau is entitled to

greater weight than that of Dr. Knox under these circumstances. Therefore, I find that claimant has failed to prove by a preponderance of the evidence that he suffered any permanent impairment as a result of his compensable injury.

Having failed to prove that he suffered any permanent impairment, claimant is not entitled to any benefits for wage loss. In order to be entitled to wage loss benefits a claimant must prove that he has suffered a permanent impairment. *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W. 3d 657 (2003).

Since no permanent disability benefits are being awarded for wage loss, the Second Injury Fund has no liability in this claim.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back as a result of the fall on October 6, 2002. However, claimant has proven by a preponderance of the evidence that his back problems beginning in February 2003 are a compensable consequence of the October 6, 2002 injury. Respondent #1 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable back condition. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits subsequent to September 23, 2003. Claimant has also failed to prove by a preponderance of the evidence that he suffered any permanent impairment as a result of his compensable injury; therefore, claimant is not entitled to any benefits for wage loss. Finally, the Second Injury Fund has no liability for compensation benefits.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE