

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. FI 10772

THURMAN WILLIAMS		CLAIMANT
ARKANSAS ELECTRIC CO-OP, INC.		RESPONDENT
CROCKETT ADJUSTMENT, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED SEPTEMBER 27, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

Respondents No. 1 represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 20, 2004, in Fort Smith, Arkansas. The deposition of Dr. Joseph Queeney was taken on December 15, 2003, and has been admitted as Claimant's Exhibit No. 2.

A pre-hearing order was entered in this claim on May 5, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the hearing, the additional stipulation concerning the Second Injury Fund's liability was added (Stipulation No. 5). This resulted in some alteration of the fourth issue set out in the pre-hearing order. Finally, without objection, the claimant withdrew the second issue, concerning his entitlement to additional temporary total disability benefits. A copy of the pre-hearing order with the foregoing amendments noted thereon, has made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted

- I. On all relevant dates, the relationship of employee-self insured employer-third party administrator existed between the parties.

2. The prior Opinion of May 15, 2002, has become final and is res judicata of all issues raised and addressed therein.
3. The respondents have paid all benefits awarded in the prior Opinion through December 15, 2003.
4. The respondents have accepted and paid permanent partial benefits for a permanent physical impairment of 2% to the body as a whole.
5. Ark. Code Ann. §11-9-525 is applicable to this claim and the Second Injury has accepted liability for a 25% permanent partial disability to the body as a whole.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to the additional medical services recommended by Dr. Tackett.
2. The claimant's entitlement to permanent disability benefits for permanent "functional" or wage loss disability.
3. Extent of Second Injury Fund liability.
4. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

- (a) The claimant contends that Dr. Tackett, one of the authorized treating physicians, has recommended an evaluation by Dr. McCarty (sic) and that the respondents have refused to accept liability for that evaluation. The respondents should be directed to authorize an evaluation by Dr. McCarty(sic) since the evaluation is within the change of referral.
- (b) The claimant contends that the extent of his permanent disability should be determined and that his permanent disability is greatly in excess of the 2% impairment rating assessed by Dr. Queeney.
- (c) The claimant contends that he has an 8% permanent impairment as a result of a pre-existing back condition and that the effects of his pre-existing condition plus the effects of his compensable injury combined to caused him to be disabled to an extent greatly in excess of what his disability would have been had he only had the compensable injury. Accordingly, the claimant contends that the Second Injury Fund has some liability in this case.

(d) The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondent employer-carrier contends:

"It is the contention of the respondents #1 that the claimant has been provided all appropriate benefits to which he is entitled. Specifically, respondents #1 have paid benefits pursuant to the Full Commission Opinion which includes temporary total disability benefits at the rate of \$225.00 per week and permanent partial disability benefits at the rate of \$169.00 per week. Respondents #1 are unaware of any additional benefits to which the claimant is entitled. Specifically, the claimant's treating physician has indicated he has reached maximum medical impairment and has issued an impairment rating which has been paid by respondents #1. Respondents #1 assert that the claimant does not have wage loss disability and alternatively if it is found that he has wage loss disability, it would be the responsibility of the Second Injury Fund due to a combination of the claimant's pre-existing condition with his August 2001 work related injury. "

In regard to these issues, the Second Injury Funds contends:

"Second Injury Fund concedes that Ark. Code Ann. §11-9-525 is applicable to the present claim and accepts liability for a "combined disability" of 25% to the body as a whole. The Second Injury Fund denies that the claimant has experienced any combined disability in excess of 25% to the body as a whole."

## DISCUSSION

### ADDITIONAL MEDICAL SERVICES

\_\_\_\_\_The first issue to be addressed is the claimant's entitlement to additional medical services, as recommended by Dr. Tackett in his report of August 15, 2003. The burden rests upon the claimant to prove that the recommended medical services represent "reasonably necessary medical services," as that term is used in the Act.

In order to represent "reasonably necessary medical services," the disputed medical services must be necessitated by or connected with the compensable injury. These services must also have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

Dr. Tackett's reason for his referral of the claimant to Dr. McCarthy is not readily ascertainable from the evidence presented. This referral was made when the claimant visited Dr. Tackett on August 15, 2003. In his office notation of that date, Dr. Tackett notes that the claimant

saw him to “discuss back surgery.” At the time of this visit, Dr. Tackett also diagnosed the claimant’s back difficulties as being attributable to lumbar disc disease. At this point, it must be noted that Dr. Tackett has been involved in the treatment of the claimant’s back difficulties, beginning with his hunting accident (in January of 2001), and continuing resulting surgery in March of that year (as well as his back difficulties following the compensable injury in August of 2001).

The medical records show that the claimant has been evaluated and treated for his compensable back injury by Dr. Joseph Queeney, a board certified neurosurgeon. Dr. Queeney appears to have provided the claimant with all appropriate conservative treatment modalities for his compensable injury, including oral medication, injections, and physical therapy. In December of 2001, Dr. Queeney informed the claimant that the only remaining treatment modality was in the form of a lumbar fusion. At that time, the claimant declined further surgical intervention. At the hearing, the claimant testified that he did not want to undergo any further surgical intervention.

Dr. McCarthy is a certified orthopaedic surgeon. However, there is no indication that he has anything to offer, other than the various types of treatment provided or recommended by Dr. Queeney.

If the purpose of the evaluation by Dr. McCarthy is to investigate the possibility of surgical intervention of the claimant’s back difficulties, it would be a futile gesture and clearly unnecessary. The medical evidence shows that the claimant is currently receiving long term pain medication for his chronic back pain. It further appears that this is the only remaining conservative treatment modality for the claimant’s difficulties. More aggressive treatment modalities appear to have been previously attempted with no indication of lasting success. Thus, if the purpose of the evaluation of Dr. McCarthy is to develop a conservative program of treatment for the claimant’s back difficulties, such an evaluation would appear to be duplicative and unnecessary.

If the purpose of the evaluation by Dr. McCarthy is for treatment of the claimant’s pre-existing and progressive degenerative changes, then, such treatment would not be necessitated by or related to the claimant’s compensable injury. Thus, it would not represent reasonably necessary

medical services within the meaning of Ark. Code Ann. § 11-9-508.

In summary, I find that the claimant has failed to prove that the recommended evaluation by Dr. Richard McCarthy, an orthopedic surgeon in Little Rock, Arkansas, constitutes reasonably necessary medical services for his compensable injury. The claimant currently has access to the services of Dr. Joseph Queeney, who is at least equally competent to Dr. McCarthy to provide the claimant with any further appropriate treatment for his compensable injury.

II. THE EXTENT OF “FUNCTIONAL” OR “WAGE LOSS” DISABILITY AND THE LIABILITY FOR BENEFITS ATTRIBUTABLE THERETO UNDER ARK. CODE ANN. § 11-9-525

As previously noted, the Second Injury Fund concedes that Ark. Code Ann. § 11-9-525 is applicable to the present claim. Further, the Fund admits that it is liable for compensation for a permanent partial disability of 25% to the body as a whole. This would be in addition to the 2% permanent physical impairment paid by the respondent employer.

The claimant contends that his combined impairment and disability exceeds this 27% to the body as a whole. The burden rests upon the claimant to prove this fact.

The medical evidence shows that the claimant has an 8% permanent physical impairment, as a result of the injuries he sustained in the fall while rabbit hunting in January of 2001 (Deposition of Dr. Queeney, page 33). In his deposition, Dr. Queeney assessed a permanent physical impairment of 2% to the body a whole, for the additional permanent damage caused by the compensable injury in August of 2001 (D. 34). There is no evidence of any other permanent physical impairment, work related or otherwise.

I find the assessments of impairments, made by Dr. Queeney, to be accurate and correct. Thus, the claimant is currently experiencing a “combined” permanent physical impairment of 10% to the body as a whole. Pursuant to the provisions of Ark. Code Ann. § 11-9-525, the respondent employer is liable for the 2% permanent physical impairment attributable to the claimant’s compensable injury. Neither the respondent employer nor the Second Injury Fund is liable for any benefits attributable to the pre-existing permanent physical impairment of 8% to the body as

whole.

In regard to the degree or percentage of the actual permanent “disability” (loss of wage earning capacity) produced by the combined effects of both of the claimant’s back injuries, the medical evidence shows that he was initially permanently restricted by Dr. Queeney from engaging in any employments requiring lifting in excess of 35 pounds. This was prior to the compensable injury in August of 2001. The evidence shows that even with this restrictions the claimant was able to maintain his employment with the respondent. Thus, at the time of his compensable injury, he was experiencing no actual wage loss or “functional” disability. However, it is apparent from Dr. Queeney’s deposition that the claimant continues to be medically restricted from lifting over 25 pounds.

The claimant testified that he now has additional difficulty maintaining any one position for very long at a time (i.e. sitting, standing, walking, etc). He further testified that he continues to experience some degree of chronic pain that requires the use of a TENS unit, stretching exercises, and occasional narcotic pain medication. Clearly, the claimant’s inability to maintain a posture or position for extended periods of time and his occasional use of a TENS unit and narcotic pain medication would be reasonably expected from the type of permanent injuries he sustained. These permanent injuries would also be reasonably expected to prevent him from bending or twisting at the waist on more than an occasional basis or maintaining a bent over or twisted posture. However, the claimant is able to drive, hunt, and fish.

The record reveals the claimant to be of a relatively young age (41). Although he has a limited education (8<sup>th</sup> grade), he appears to be of average intelligence and his medication does not appear to interfere with his cognitive abilities in any way. He also testified that he had some skill in general maintenance and welding.

The claimant’s testimony shows that he has a somewhat limited work history. His longest period of employment was bending stainless steel in a manufacturing plant, which lasted for approximately 10 years. His other employments have consisted of factory work, construction

work, general maintenance work, and his period of employment with this respondent.

His testimony reveals that he currently receives social security disability benefits on himself and his two children. He further stated that he had not made any attempt to obtain any type of employment since his compensable injury. He is currently staying home with his young child.

The respondent employer obtained the services of Rehabilitation Management, Inc. to conduct a labor market survey in the area of the claimant's residence. This survey is contained in Respondent's Exhibit No. 2. Unfortunately, it appears that this survey was performed based upon the assumption that the claimant's only physical restriction or limitation was no lifting over 35 pounds. However, as previously noted, the greater weight of the credible evidence indicates that the claimant's physical restrictions are more extensive than this single limitation. Some of the potential employments identified in this labor market survey would fall within the claimant's qualification and meet his physical restrictions. However, some of these positions (particularly those identified with Cloyes Gear) would likely exceed his physical limitations by requiring prolonged standing and some bending or twisting at the waist. Some of these positions (specifically, those at Night Light Company), could also possibly violate the claimant's physical limitations in regard to prolonged sitting. I would also note that the sales position at the Night Light Company was further indicated to be "seasonal."

However, based upon the evidence presented and this Commission's knowledge of the job market in the area of the claimant's residence, there are undoubtedly a sufficient number of potential employments for which the claimant would be qualified and which would be within his physical limitations and restrictions to provide him with a reasonable expectation of obtaining regular gainful employment. However, the claimant simply appears to be unmotivated, likely in light of the fact that he is now receiving social security disability benefits to obtain regular gainful employment.

The claimant's attorney would seem to imply, during the hearing, that any potential employer would be less likely to hire the claimant due to the fact that back surgery had been

recommended, but had not been performed. Clearly, this situation could, in and of itself, make an employer reluctant to hire the claimant. However, the outstanding possibility of this surgery remains simply because the claimant has, to date, refused any surgical intervention. The claimant cannot be compensated for any increase in his disability caused by his own voluntary actions.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the actual anatomical impairment resulting from the claimant's compensable injury of August of 2001, is in the amount of 2% to the body as a whole. This represents the compensation liability of the employer, under Ark. Code Ann. § 11-9-525(b)(4).

I further find that the greater weight of the credible evidence proves that at the time of the claimant's compensable injury in August of 2001, he was experiencing a permanent partial disability of 8% to the body a whole, which is based solely upon permanent physical impairment. The evidence presented shows that the claimant's permanent injury, in January of 2001, was not producing any actual permanent "functional" or wage loss disability, at the time of the claimant's current compensable injury. Finally, I find that the claimant's current combined degree or percentage of disability and impairment is in the amount of 35% to the body as a whole. When the claimant's pre-existing disability or impairment of 8% to the body as a whole and the impairment produced by his compensable injury of 2% to the body as a whole, is subtracted from this combined amount, it leaves a "balance" of 25% to the body a whole. Pursuant to Ark. Code Ann. § 11-9-525(b)(4), and the Second Injury Fund is liable for compensation for this "balance" of 25% to the body as a whole.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. During August of 2001, the relationship of employee-self insured employer existed between the parties.
3. During August of 2001, the claimant sustained a compensable injury to his low back or lumbar spine.

4. During August of 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$225.00 for total disability and \$169.00 for permanent partial disability.
5. The respondent is liable for all authorized reasonable and necessary medical services provided to the claimant for his compensable injury. All such medical expenses incurred to date have apparently been paid.
6. The claimant has failed to prove by the greater weight of the credible evidence that the medical services recommended by Dr. Tackett, in the form of an evaluation by Dr. Robert McCarthy, constitutes reasonably necessary medical services for this compensable injury. Thus, the respondent is not liable for the expense of such medical services.
7. The claimant's healing period from the effects of his compensable injury had ended by at least the date of the deposition of Dr. Queeney (December 15, 2003).
8. The claimant has sustained a permanent physical impairment of 2% to the body as a whole, as the result of his compensable injury of August of 2001.
9. Ark. Code Ann. §11-9-525 is applicable to the present claim.
10. The actual anatomical impairment resulting from the claimant's compensable injury of August of 2001, is 2% to the body as a whole. The degree or percentage of disability attributable to all injuries or conditions existing at the time of the claimant's compensable injury is in the amount of 8% to the body as a whole. The claimant's combined disability and impairment is in the amount of 35% to the body as a whole.
11. Pursuant to the provisions of Ark. Code Ann. §11-9-525(b)(4), the respondent employer is liable for compensation for the permanent physical impairment of 2% to the body as a whole caused by the claimant's compensable injury of August of 2001. No compensation is awardable for the claimant's pre-existing permanent impairment of 8% to the body as a whole. The Second Injury Fund is liable for

compensation for the “balance” of permanent partial disability of 25% to the body as a whole.

12. The respondent employer has controverted the claimant’s entitlement to an evaluation by Dr. McCarthy, as recommended by Dr. Tackett, and had previously controverted this claim in its entirety.
13. The respondent Second Injury Fund has controverted the claimant’s entitlement to any permanent partial disability benefits from the Fund in excess of 25% to the body as a whole
14. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on the permanent partial disability benefits herein awarded against the respondent employer.

#### ORDER

The respondent employer shall pay to the claimant permanent partial disability benefits equivalent to a permanent partial disability of 2% to the body as a whole. The respondent employer is entitled to credit for any such benefits voluntarily paid.

The respondent Second Injury Fund shall pay to the claimant permanent partial disability benefits equivalent to 25% permanent partial disability to the body as a whole. The respondent Fund shall be entitled to credit for all such benefits voluntarily paid.

The respondent employer continues to be liable for all reasonably necessary medical services required by the claimant for his compensable injury. This liability is subject to the medical fee schedule established by this Commission. However, the respondent employer shall not be liable for the expense of any evaluation of the claimant by Dr. Robert McCarthy.

The respondent employer shall pay to the claimant’s attorney the maximum statutory attorney’s fee on the permanent partial disability benefits herein awarded from said respondent. One-half of this fee is the obligation of the respondent. The remaining one-half of this fee is to be withheld from these benefits.

The claimant's request for an evaluation, at the respondent's expense, by Dr. Robert McCarthy and his request for permanent partial disability benefits in excess of those being voluntarily paid by the respondent employer and the Second Injury Fund must be and hereby is denied for the reasons heretofore set forth in this Opinion.

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.

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MICHAEL L. ELLIG  
Administrative Law Judge