

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412580

COLONEL AMOS		CLAIMANT
GRIFFIN INDUSTRIES, INC.		RESPONDENT
GREAT AMERICAN ALLIANCE INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT
DEATH & PERMANENT DISABILITY TRUST FUND	NO. 3	RESPONDENT

OPINION FILED AUGUST 31, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in  
Springdale, Washington County, Arkansas.

Claimant represented by MARK FREEMAN, Attorney, Fayetteville,  
Arkansas.

Respondents No. 1 represented by CAROL WORLEY, Attorney, Little  
Rock, Arkansas.

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

Death & Permanent Disability Trust Fund represented by JUDY RUDD,  
Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 20, 2005,  
in Springdale, Arkansas. A pre-hearing order was initially entered  
in this claim on March 22, 2005. Subsequently, the Second Injury  
Fund of the State of Arkansas was added as a party. Also,  
subsequent to the pre-hearing conference, various changes and  
amendments were made in the stipulations and the issues. A copy of  
the pre-hearing order with these 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:

1. On July 29, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$425.00 for total disability and \$319.00 for permanent partial disability.
3. On July 29, 2002, the claimant sustained compensable injuries to his C-spine, right shoulder, back, and penis.
4. There is no dispute, at present, over the payment of medical expenses for the above injuries.
5. There is no dispute, at present, over the payment of temporary disability benefits.
6. The healing period ended on August 9, 2003.
7. The respondents #1 have paid permanent partial disability benefits for a permanent physical impairment of 5% to the body as a whole for the compensable cervical injury and 5% to the body as a whole for the compensable penile injury, but now deny that either injury resulted in any permanent physical impairment.

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

1. The claimant's entitlement to permanent partial disability benefits for permanent physical impairment and the extent of permanent physical impairment.
2. The extent of permanent functional disability for wage loss, including permanent total disability.
3. Second Injury Fund liability.

4. whether the respondent employer/carrier is entitled to credit for amounts paid for permanent physical impairment against the limit provided by Ark. Code Ann. §11-9-502.
5. Applicability and the constitutionality of Ark. Code Ann. §11-9-522.

In regard to these issues, the claimant contends:

“The claimant was originally injured in 1991, known as AWCC Claim No. E107968, when he suffered a contusion to his right knee. He was subsequently injured on July 29, 2002, known as AWCC Claim No. F412580, when he injured his neck, shoulder, and back. He was again injured in 1994, known as AWCC Claim No. E406898, when he suffered a hernia requiring subsequent surgery. He has received medical treatment and most recently a five percent (5%) impairment rating for sexual dysfunction. The claimant has been found disabled by the Social Security Administration. The claimant contends that he is for all intents and purposes permanently and totally disabled, or in the alternative, has suffered substantial wage loss.”

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

“Respondents contend that all appropriate benefits have been and are continuing to be paid with regard to this claim. The respondents now deny that the claimant has sustained any permanent physical impairment as a result of his compensable injuries and controvert his entitlement to any wage loss disability.”

In regard to these issues, the Second Injury Fund contends that it does not have any liability in this claim.

In regard to these issues, the Death & Permanent Total Disability Trust Fund contends:

“Respondent #1 must first pay permanent partial disability in the form of the anatomical ratings for the claimant’s compensable injury before payment of permanent total disability benefits. Additionally, respondent #1 is not entitled to credit against its \$75,000.00 maximum for payment of the claimant’s permanent partial anatomical ratings for the compensable injury.”

#### DISCUSSION

##### I. PERMANENT PHYSICAL IMPAIRMENT

The respondents initially paid permanent partial disability benefits for a permanent physical impairment of 5% to the body as a whole that was assessed for the claimant’s compensable cervical injury and an additional 5% to the body as a whole for permanent physical impairment that was assessed as a result of the claimant’s compensable penile injury. However, the respondents now deny that the claimant would be entitled to permanent benefits for any permanent physical impairment for either of these compensable injuries. The respondents specifically contend that the assessments of permanent physical impairment that were made by Dr. Moffitt are not supported by or based upon objective and measurable physical findings, as required by Ark. Code Ann. §11-9-704(c)(1)(B).

In order to be entitled to any permanent partial disability benefits for permanent physical impairment, the claimant must prove by the greater weight of the credible evidence the existence of permanent physical impairment that is supported by objective and measurable physical findings, Ark. Code Ann. §11-9-704(c)(1)(B). The claimant must further prove that the degree of permanent physical impairment can be calculated in a manner that conforms to

the official rating guide of the Commission (at the present time, this guide is the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition), Ark. Code Ann. §11-9-522(g). In determining the existence or extent of permanent physical or anatomical impairment, no consideration can be given to complaints of pain, Ark. Code Ann. §11-9-102(16)(A)(ii). Finally, the claimant must prove by the greater weight of the credible evidence that the compensable injury was the "major cause" (more than 50% of the cause) of the permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

Although the claimant sustained multiple injuries, in the employment related accident or incident of July 29, 2002, the dispute over his entitlement to permanent physical impairment involves only two of these injuries. In addressing this issue, these two injuries will be discussed separately.

The first of these is the compensable injury to the claimant's cervical spine. The claimant has received extensive evaluations and testing directed toward his cervical complaints. The various objective tests performed on the claimant's cervical spine have revealed a number of physical defects involving this area. These included multiple extensive osteophytes or bony spurring of the vertebra, to the extent that neural foramina are compromised at the C3-4 level on the left and C-6 level on the right. He was also noted to have disc bulging at both these levels. However, the medical evidence indicates that these defects were degenerative in nature and pre-existed the claimant's employment related fall on

July 29, 2002. The medical reports and records of Dr. James Blankenship, a neurosurgeon, indicated that he clearly had difficulty in determining the actual physical cause of the claimant's various cervical complaints and that the complaints voiced by the claimant were not consistent with any discal or neurological impingement. Throughout the claimant's course of treatment the only working diagnosis for his cervical injury appears to be that of a "mechanical" cervical strain or sprain.

The medical evidence further shows that the claimant's cervical difficulties appear to have significantly improved with conservative treatment. On April 1, 2003, he was noted by Dr. Blankenship to have only "minimal" neck pain. It must also be noted that throughout the claimant's course of treatment for his cervical difficulties, his repeated physical examinations have failed to record the observation of any "objective findings", such as muscle spasms, muscle atrophy, swelling, or other muscular abnormalities involving his cervical spine.

The basis for the 5% permanent physical impairment that was assessed for the claimant's cervical difficulty by Dr. Moffitt is found in his narrative report of August 9, 2003. In this report, Dr. Moffitt states:

"Based upon the AMA Guides to the Evaluation of Permanent Impairment, fourth edition, I would assign Mr. Amos a diagnostic related equivalent cervical thoracic category II. With this classification the history and findings are compatible with a specific injury and include intermittent or continuous muscle guarding observed by a physician. I think that this would be the most accurate category to describe Mr. Amos' current situation. With

this category comes a 5% whole person impairment rating.”

The method of rating referred to by Dr. Moffitt, is found on page 104 of the American Medical Association’s Guides to the Evaluation of Permanent Impairment, Fourth Edition. This DRE cervicothoracic category II is indicated to represent a minor impairment. In order to fit into this category, the claimant’s history and findings must be compatible with a specific injury and include intermittent or continuous “muscle guarding” that is observed by a physician, non uniform loss of range of motion, or non verifiable radicular complaints. To fall under this category, there must be no “objective evidence” of radiculopathy or loss of structural integrity.

Clearly, the claimant has a history of a specific injury. He also has non uniform loss of range of motion and has exhibited “non verifiable” radicular complaints. There is also no objective evidence of any radiculopathy or loss of structural integrity of the claimant’s cervical spine. Clearly, the mere fact that the claimant sustained a specific injury, has exhibited non uniform loss of range of motion of the cervical spine, and has exhibited non verifiable radicular complaints and would not represent “objective findings,” as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i) and as used in Ark. Code Ann. §11-9-704(c)(1)(B).

Therefore, the only possible “objective finding” to support Dr. Moffitt’s rating would be the “intermittent or continuous muscle guarding observed by a physician.” If the “muscle guarding”

referred to by Dr. Moffitt reflects that the claimant has merely been observed to hold his neck in a rigid manner and to resist movement of his cervical spine, such actions would clearly come under the claimant's voluntary control and would not meet the Act's definition of an "objective finding." If, on the other hand, Dr. Moffitt is using the term "muscle guarding" as a synonym for muscle spasms, then his conclusion that such muscle spasms or guarding has been observed by a physician is not supported by the current medical record. As previously mentioned, there is no record in the medical reports (including those of Dr. Moffitt) of the observation of any cervical muscle spasms. Clearly, such a relevant observation would have been noted.

Dr. James Blankenship, a board-certified neurosurgeon and the claimant's prior primary treating physician for his cervical difficulties, has not assessed any degree of permanent physical impairment for the claimant's compensable cervical injury. The claimant was also evaluated by Dr. Carl Kendrick, an orthopaedic surgeon. Following this evaluation Dr. Kendrick opined:

"It is my opinion that he (the claimant) is markedly exaggerating his pain and his lack of function. He had a potentially dangerous accident but was blessed only with a strain to his shoulder and a strain to his neck which could possibly cause some aggravation of his pre-existing arthritic condition and that he certainly should have responded to the therapy that he has been prescribed. I feel that he has reached his maximum improvement and I think the only findings that I can obtain are subjective. Therefore, there is no permanent disability related to this case."

After consideration of all the evidence presented, it is my

opinion the claimant has failed to prove that his compensable cervical injury, on July 29, 2002, was the "major cause" of any degree of permanent physical impairment, which would be supported by "objective findings." In reaching this opinion, I am aware of the assessment of permanent physical impairment made by Dr. Moffitt. However, this assessment of permanent physical impairment is in conflict with his prior report of June 9, 2003 (wherein he indicated that the claimant has suffered no permanent impairment). The opinion of Dr. Moffitt is also contrary to the opinion of Dr. Kendrick, which I find to be entitled to greater weight and credit. Dr. Kendrick is an orthopaedic surgeon with particular expertise in the area of medicine associated with cervical injuries and conditions. On the other hand, Dr. Moffitt is essentially a general practitioner. Dr. Kendrick's opinion would also appear to be supported by the fact that no permanent physical impairment was assessed by Dr. Blankenship, a neurosurgeon, and the claimant's initially treating physician for the cervical injury. Finally, I would note that Dr. Moffitt's assessment of permanent physical impairment for the claimant's cervical injury does not appear to be "supported by objective findings," as required by the Act.

The next matter to be addressed concerns the claimant's entitlement to permanent benefits for permanent physical impairment that would be attributable to his admittedly compensable penile injury. Again, the burden rests upon the claimant to prove the existence of such impairment in the manner required by the Act.

The medical evidence indicates that the claimant initially

complained of the injury to his penis, when he consulted Dr. Carl Duncan, apparently his family physician, on August 29, 2002. At that time, the claimant was complaining of decreased erections since a fall, approximately a month before. The claimant alleged that he somehow "hit his penis" when he fell. However, on physical examination there was no indication of any "objective findings" to support the claimant's complaints of erectile dysfunction or even to indicate the presence of trauma to the claimant's penis (bruising, swelling, etc.).

The medical evidence indicates that the claimant was subsequently seen for the compensable injury to his penis by Dr. M. R. Wilson of the Northwest Arkansas Urology Associates, P.A. At the time of his initial evaluation by Dr. Wilson, the claimant was complaining of erectile dysfunction and curvature of his penis. He gave a history that in the fall on July 29, 2002, he landed astraddle across the arm of a bucket attached to the truck from which he had fallen. He indicated that this had resulted in direct trauma to his groin and penile shaft that produced immediate pain and bruising along the scrotum and the distal half of his penis. He also indicated that immediately following this incident he noticed a small amount of blood in his urine, but that this cleared up in a few days. He also stated that he was not able to have any erections for several months following the accident because of the onset of severe pain with the start of any erection. However, the claimant acknowledged that he did not bother to consult a physician for approximately a month for this injury and that by that time the

symptoms of blood in his urine and bruising of his penis and scrotum had resolved.

None of Dr. Wilson's reports or records note any "objective findings" to verify the claimant's complaints of abnormal curvature of his penis or erectile dysfunction. The only visible possible abnormality noted by Dr. Wilson was a "very minimal induration or plaque like debris along the ventral aspect" of the phallus. Dr. Wilson expressly stated that he observed no visible deformity of the claimant's penis in the flaccid position. It appears that Dr. Wilson's request for photographs of the abnormal curvature of the claimant's penis were never provided by the claimant.

In regard to the claimant's alleged erectile dysfunction and abnormal curvature of his penis, Dr. Wilson stated that this could "conceivably" be due to an injury sustained in the fall on July 29, 2002. However, he also states that this could also be due to Peyronie's disease, which would be unrelated to the fall. Dr. Wilson consistently reiterates that while these alleged deficits could "conceivably" be due to an injury sustained in the employment related fall, he cannot so state with any certainty. Dr. Wilson assessed no degree of permanent impairment

Once again, the basis for the assessment of a permanent physical impairment, due to the claimant's alleged erectile dysfunction, is the report from Dr. Moffitt, dated August 9, 2003. In this report Dr. Moffitt stated:

"Based on Mr. Amos' history and his visit with the urologist, I feel that he has a Class I permanent impairment of his penis. In this category sexual functioning is possible but

there are varying degrees of difficulties with erection, ejaculation, or sensation. This class of impairment allows the evaluator to assign a 0-10% impairment rating. Mr. Amos is assigned a 5% impairment rating of the body as a whole for this category. This is based upon the fact that he is able to continue to function sexually and is not having any pain. His main problem is that he is having a curvature. He states that his erections are only partial, but the urologist is not sure whether or not this is due to the injury or whether he is having erectile dysfunction from other causes. He is treating him with Viagra.”

There is simply no “objective findings” in the record to support the claimant’s allegations of erectile dysfunction or abnormal curvature of his penis. All of the aspects of the claimant’s erectile dysfunction are based solely on the claimant’s statements.

Even if such erectile impairment exists, the greater weight of the evidence presented fails to prove that the compensable injury of July 29, 2002, played any causal role in this alleged deficit and certainly fails to prove that it was the “major cause” of this alleged loss.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that his compensable penile injury was the “major cause” of any degree of permanent physical impairment that is supported by “objective findings.”

## II. THE EXTENT OF PERMANENT FUNCTIONAL DISABILITY, INCLUDING PERMANENT TOTAL DISABILITY

The claimant has failed to prove by the greater weight of the credible evidence that he is entitled to any benefits for permanent

physical impairment attributable to his compensable injuries. Since he has not established his entitlement to benefits for permanent physical impairment, he cannot be awarded any permanent benefits for functional disability or loss of wage earning capacity, Wal Mart Stores, Inc. v. Connell, 340 Ark. 475; 10 S.W. 3<sup>rd</sup> 727 (2000).

### III. SECOND INJURY FUND LIABILITY

As the claimant has not proven his entitlement to any permanent disability benefits for his compensable injuries of July 29, 2002, the Second Injury Fund can have no liability in this claim, Ark. Code Ann. §11-9-525(b)(1) and (3). At this point, any claim against the Fund must be denied.

### IV. RESPONDENT EMPLOYER-CARRIER'S ENTITLEMENT TO A CREDIT FOR AMOUNTS PAID FOR PERMANENT PHYSICAL IMPAIRMENT AGAINST THE LIMIT PROVIDED BY ARK. CODE ANN. §11-9-502

As the claimant has failed to prove that his entitled to any permanent disability benefits, including permanent total disability benefits, Ark. Code Ann. §11-9-502 would be inapplicable to the present claim. No discussion of this issue is merited at the present time.

### V. APPLICABILITY AND THE CONSTITUTIONALITY OF Ark. Code Ann. §11-9-522(f)

Again, as the claimant has failed to prove that his entitled to any permanent disability benefits for his compensable injuries of July 29, 2002, it becomes unnecessary to address the applicability and constitutionality of Ark. Code Ann. §11-9-522(f). No further discussion of this issue is merited, at the present

time.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On July 29, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On July 29, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00 for total disability and \$319.00 for permanent partial disability.
4. On July 29, 2002, the claimant sustained compensable injuries to his cervical spine, right shoulder, back, and penis.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services for these compensable injuries at the respondent's expense. All such medical expenses have or will be paid, subject to the medical fee schedule established by this Commission.
6. There is no dispute, at the present time, over the payment of temporary total disability benefits. All such benefits accruing to date have been paid.
7. The claimant has failed to prove by the greater weight of the credible evidence that his compensable injuries to his neck (cervical spine) and penis were the "major cause" of any degree of permanent physical impairment

that would be supported by “objective findings.” Thus, he would not be entitled to any permanent benefits for permanent physical impairment attributable to these compensable injuries.

8. As the claimant has failed to prove that he is entitled to any permanent benefits for permanent physical impairment, he would not be entitled to any permanent benefits for permanent functional disability or loss of wage earning capacity, including permanent total disability benefits.
9. As the claimant has failed to prove that his current injuries have resulted in any degree of permanent impairment or permanent disability, Ark. Code Ann. §11-9-525 would be inapplicable to the present claim and the Second Injury Fund can have no liability.
10. As the claimant has failed to prove that he is entitled to benefits for permanent total disability, the Death & Permanent Disability Trust Fund of the State of Arkansas can have no liability in this claim.
11. The respondent employer-carrier has controverted the claimant’s entitlement to any permanent benefits for either permanent physical impairment or permanent functional disability, i.e. loss of wage-earning capacity for the compensable injuries to his neck or cervical spine, and to his penis.
12. The Second Injury Fund has controverted the claimant’s

entitlement to any benefits from the Fund.

13. The Death & Permanent Disability Trust Fund has controverted the claimant's entitlement to any benefits from said Fund.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the present claim for permanent disability benefits for both permanent physical impairment and permanent functional disability, (i.e. loss of wage-earning capacity) for the claimant's compensable cervical and penile injuries, including his request for permanent total disability benefits.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge