

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F311695

DEXTER GARY, EMPLOYEE	CLAIMANT
MAVERICK TRANSPORTATION, INC., EMPLOYER	RESPONDENT NO. 1
LIBERTY MUTUAL FIRE INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JUNE 7, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 9, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, the Second Injury Fund, represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3, the Death and Permanent Total Disability Trust Fund, waived appearance at the hearing, as its issues were not ripe for consideration.

A hearing was held on March 9, 2005, to determine whether claimant is permanently and totally disabled or, in the alternative, whether claimant is entitled to

wage loss disability experienced over and above the admittedly compensable 6 percent impairment rating accepted by respondents No. 1. Other issues include whether the Second Injury Fund or the Death and Permanent Total Disability Trust Fund bear any liability in this case.

The parties stipulated to the existence of the employee-employer relationship on October 23, 2003, when claimant sustained a compensable injury to the lumbar area of his lower back. It was further stipulated that claimant was earning sufficient wages to entitle him to weekly indemnity benefits of \$440.00 for temporary total disability and \$330.00 for permanent partial disability benefits. The parties additionally stipulated that claimant reached the end of his healing period, having reached maximum medical improvement on February 16, 2004, with a 6 percent impairment rating to the body as a whole, which was accepted and has been paid by respondents No. 1.

Claimant contends that he has been rendered permanently and totally disabled or, in the alternative, that he is entitled to a determination with respect to the extent of wage loss disability he has experienced over and above the admittedly compensable 6 percent impairment rating. Claimant contends that benefits in excess of that rating have been controverted for purposes of attorney's fees. Claimant reserves the right to pursue any additional benefits to which he may otherwise be entitled.

Respondents No. 1 contend that claimant sustained an admittedly compensable injury to his lower back on October 23, 2003, and that all benefits were paid, including the 6 percent impairment rating. Respondents No. 1 contend that respondent No. 2, the Second Injury Fund, would have liability for any wage loss disability benefits, to the extent that they exist, because the claimant had prior lumbar and cervical problems that resulted in surgeries to both of those regions in 1986 and 1987. Respondents No. 1 contend that those prior problems have combined with his current injury to make disabilities which are greater than that which would have resulted from the October 23, 2003, injury alone. Therefore, respondents No. 1 contend that, pursuant to Ark. Code Ann. § 11-9-525 and Commission Rule 24, the Second Injury Fund would have liability for any wage loss.

With regard to claimant's contention that he is permanently and totally disabled, respondents No. 1 contend that, in the event claimant is found to be permanently and totally disabled and respondents No. 1 are found liable, respondents No. 1 would then be entitled to a credit against its \$75,000.00 maximum for payment of claimant's permanent partial anatomical ratings for the compensable injury.

Respondent No. 2, the Second Injury Fund, contends that respondents No. 1 have the burden of proof, not the Fund, of showing any Second Injury Fund liability by a preponderance of the evidence and that Respondents No. 1 cannot do so in this case. Respondent No. 2 contends that while the evidence may show prior conditions

of the neck and low back, *i.e.*, a cervical fusion and a chymopapain injection of long standing, the proof will show that claimant completely recovered from those conditions and completely regained his wage-earning capacity. Respondent No. 2 contends that there is no medical evidence of any combination of disabilities or impairments.

Respondent No. 3, the Death and Permanent Total Disability Trust Fund, being implicated only in the event that the claimant is found to be permanently and totally disabled, contends that respondents No. 1 must first pay permanent partial disability in the form of anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits. Additionally, respondent No. 3 contends that respondents No. 1 would not then be entitled to a credit against its \$75,000.00 maximum for payment of claimant's permanent partial anatomical ratings for the compensable injury. As stated above, respondent No. 3 waived its appearance at the hearing in this matter, as the issues involving it were not ripe at that time.

STATEMENT OF THE CASE

Claimant is a fifty-five-year-old highschool graduate, who testified that since highschool he has worked primarily as a welder or welder inspector and a truck driver. He testified that he had worked for respondent-employer since 2000. Claimant testified that he was a flatbed, long-haul truck driver for respondent-

employer on October 23, 2003, when he sustained an admittedly compensable injury to his lower back.

Claimant testified that he was swapping trailers with another driver in Beaver, Ohio, on the date of injury. As he was attempting to put a kingpin lock on the fifth wheel in order to secure the trailer, he had to squat underneath the trailer to push it up so that it would lock. When he started to get up after locking the trailer, he testified that he could not stand up – he was just bent over. He testified that, since that time, he has had severe pain and problems with his back and has required medical attention and treatment.

Claimant first saw Dr. Jodi Fox, who ordered an MRI that showed an anterior disc herniation at L2-L3 to the right of midline, as well as areas of stenosis at L3-L4 and L4-L5 due to facet degeneration and ligamentous hypertrophy. Dr. Fox referred claimant to a neurosurgeon, Dr. Harold Cannon. Dr. Cannon indicated a work-related injury to claimant's lumbar area and ordered four to six weeks of physical therapy.

Medical records indicate that claimant attended his prescribed physical therapy faithfully. However, during the course of the therapy, he developed incontinence and the back pain began to radiate across his back and into his buttocks and legs. On January 2, 2004, Dr. Fox's notes indicate that claimant, although being compliant with physical therapy, had received no relief. She notes that claimant was completely functional prior to his injury and is "very motivated to return to previous level of

function.” He requested a second opinion, other than Dr. Cannon’s, so Dr. Fox referred him to Dr. McComis, an orthopaedic surgeon.

Dr. McComis noted that the physical therapy ordered by Dr. Cannon had made matters worse for claimant. Dr. McComis ordered a lumbar epidural steroid injection, which was performed by Dr. Michael McFadden on January 19, 2004. Dr. McComis’s notes of January 29, 2004, state that claimant did not believe the epidural injection really helped him; however, Dr. McComis noted, “Patient by exam doing better following his epidural.” Dr. McComis set claimant up for “McKenzie exercises” and ordered him back in two weeks.

On January 30, 2004, claimant followed up with Dr. Fox. Her notes of that date state that he was there since being reevaluated by the neurosurgeon following the epidural injection. She notes, in part, as follows:

He states that his condition has changed little. Was told by neurosurg[eon] that *surgery would not benefit him* and to *consider applying for disability*. He states that *case manager over his work comp case agrees*. He mentally feels some relief as to his uncertain future in the work force.

[Emphasis added.]

On February 16, 2004, Dr. McComis’s notes state as follows:

PLAN: At this time I do not feel that there is anything else that I have to offer to him. I am going to place him at maximum medical improvement. His PPI is based on DRE level 1 which will be 6% whole body. He has

current restrictions of lifting only 10 pounds and discharged from our practice.

[Emphasis in original.] Claimant admits that Dr. McComis gave him a ten-pound lifting restriction. However, claimant maintains that Dr. McComis also told claimant he could do whatever he felt like doing.

On February 27, 2004, Dr. Fox opined in a letter that claimant is no longer able to work. Her letter states:

Dexter Gary has been recently injured causing sufficient disability that *he is no longer able to work*. During this time, he has been battling depression due to this stress and psychological challenge of adjusting to different lifestyle. Because of this change, Dexter has been increased on his Celexa to 40mg per day. *I strongly believe that this is due to his injury.*

[Emphasis added.]

Claimant testified that prior to the October 23, 2003, injury, he was taking 10mg per day of Celexa. Claimant further testified that he had high blood pressure and diabetes prior to the injury, but he was able to control those conditions with diet and exercise. He testified that since the 2003 injury, he has been forced to take medication for those conditions, as he can no longer exercise. Further, he testified about multiple medications he has been prescribed and continues to have to take daily for pain and to help him sleep and cope, including time-released morphine twice daily, since the 2003 injury. He testified that respondents No. 1 have paid for all of his medication, with the exception of his blood pressure and diabetes medication.

Claimant admits that he was working for Acadian Contractors as a pipe fitter/welder in November of 1986, when he sustained herniation injuries to his neck and lower back. Because of the injury to his neck, he required neck surgery and injection. He was off work for a period of time following the surgery and then returned to working full capacity in November of 1988. Claimant admitted that he was released with a 10 percent impairment rating for his neck injury and a 10 percent rating for his back injury in 1988 and that his treating physician gave him a ten-pound lifting restriction. However, he maintains that that doctor, like Dr. McComis, told him he could do whatever he felt like doing, as long as it did not bother him. He testified that he returned to working full capacity after that.

He testified that he has had no problems with his back or neck since returning to work in 1988 that would require him to miss work or seek medical attention, until the October 23, 2003, back injury. He testified that he is a “hard worker” and, because of that, he does get aches and pains from time to time but that he would rarely even have to take even a Tylenol prior to his October 23, 2003, injury. During cross-examination at the hearing of this matter, the following colloquy occurred between counsel for respondent No. 2 and claimant:

Q I asked you on Page 45 of your January 12th of ‘05 deposition the problems you were having, and you said back pain. That’s on Page 45. And then I asked you this question: “And do you feel like all of that pain came from your October 23rd of ‘03 work-related injury?”

And what was your answer to that?

A That would have been yes.

Q Right.

A Yes, sir.

Q And do you still feel that way today?

A Yes.

Q And if this employer is paying for all of the pain medications you're taking now, would that be, in your mind, consistent with the fact that they acknowledge that the pain you're having is coming from that last injury?

A If they're paying for the medication.

Q Okay. And you've already told us several times in your deposition and otherwise that your neck is not keeping you from doing any job you've ever done, is it?

A No.

Q And your diabetes is not keeping you from doing any job you've ever done?

A No.

Q And your high blood pressure that's under control also is not keeping you from doing anything you've ever done?

A No. I could pass a DOT [Department of Transportation] physical were it not for my back.

Q *Right. And so the only thing that's keeping you from working today is that October 23rd of '03 injury that you sustained at Maverick, is that correct?*

A *Yes.*

Tr. at pp. 86-87 (emphasis added).

Claimant testified that he was making \$44,000.00 per year while working for respondent-employer and that he was on the verge of a raise when his injury occurred, as well as an increase in pay for mileage. He testified that although respondent-employer does have light duty work to offer, *he* was offered nothing after his injury. He was not even offered vocational rehabilitation, which he testified he would have wanted. Instead, he testified that he was terminated by respondent-employer and now does not even have health insurance. Claimant expressed a high desire to be working, rather than unable to work. When asked if he would still like to be working for respondent-employer, claimant responded, "Oh, that drives me nuts. I can't tell y'all, you know, I wouldn't wish this on nobody that they are not able to work, you know."

Claimant's wife testified that they have been married for twelve years. They have four children together who live with them, ranging in age from twenty-one-months to nine years old. They live on fifty-three acres, although only five acres requires mowing. Claimant was the sole wage-earner for the family and used to also do all of the mowing and helped with work around the house; now, he cannot, and his wife and eldest son have to take care of that. Both he and his wife testified that he

was an avid outdoorsman before his injury, enjoying camping with his family, hunting and chopping firewood. Now, he cannot do any of that.

They testified that he cannot hold his baby while standing up. His wife testified that they can no longer enjoy a sex life, as it is too painful for claimant. He is very depressed and moody, and he cries frequently. He testified that he cannot even walk more than 100 yards without requiring the use of a cane. He sometimes attempts to cook a short meal for the family, but cannot get through it without having to sit down while cooking. He testified that if he attempts to do most anything he did before, he will be “down” for a few days, following.

FINDINGS OF FACT

1. All of the stipulations agreed to by the parties herein are accepted as fact;
2. Claimant sustained previous injuries in 1986 to his neck and back for which he was given a 20 percent total impairment rating;
3. Claimant recovered completely from his previous injuries and had returned to full wage-earning capacity between November 1988 and October 23, 2003, when he sustained the compensable injury at issue in this case while working for respondent-employer;
4. Claimant is not, at present, permanently and totally disabled;

5. Claimant has sustained a 64 percent wage loss disability over and above the 6 percent impairment rating accepted herein by respondents No. 1;
6. The record fails to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or impairment to yield greater disability than that arising from the back injury sustained on October 23, 2003, alone; therefore, the Second Injury Fund bears no liability in this case;
7. As respondents No. 1 accepted claimant's October 23, 2003, injury as compensable, claimant is entitled to, at respondents No. 1's expense, any and all medical benefits not previously paid, as well as future medical expenses, and any and all mileage not previously reimbursed by respondents No. 1;
8. Respondents No. 1 have controverted any amount of wage loss disability over and above the 6 percent impairment rating.

DISCUSSION

In regard to wage loss disability, claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522 (Repl. 2002), which states in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in

addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant totally and permanently disabled based upon wage-loss factors. *See Whitlatch v. Southland Land & Development*, CA 03-736 (Ark. App. 1-21-2004); *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Here, although the claimant does suffer from depression as a result of his injury, he clearly wishes he was able to return to work. In fact, he credibly expressed

a high motivation to do so. He, in fact, testified that he would have accepted vocational rehabilitation, but it was never offered to him.

Claimant testified that he is unable, at present, to even work around the house or yard, due to his high level of pain as well as the effects of his medication, which impedes him from even driving. Moreover, claimant is a fifty-five-year-old highschool graduate, who has only worked in manual-labor jobs. In this examiner's opinion, while there may be some jobs which claimant would otherwise be able to attempt, the severe level of pain with which he lives daily, coupled with his age, education, and lack of experience in any field other than manual labor, conspire against him to enable him to ever return to the workforce in any *full-time*, meaningful capacity, with the ability to earn the salary he earned before his October 23, 2003, compensable injury.

It is this examiner's opinion that claimant has met his burden of proving by a preponderance of the credible evidence that he is entitled to wage loss disability experienced over and above the impairment rating.

In regard to Second Injury Fund liability, the Arkansas Supreme Court set forth a tripartite test for Second Injury Fund liability in *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). The test requires that:

1. The employee must have suffered a compensable injury at his present place of employment.

2. Prior to that injury the employee must have had a permanent partial disability or impairment.

3. The disability or impairment *must have combined with the recent compensable injury to produce the current disability status.*

[Emphasis added.] See also *Patterson v. Insurance Department*, 343 Ark. 255, 33 S.W.3d 151 (2000).

In this instant case, the record fails to show that claimant's previous injuries combined with his work injury of October 23, 2003, to produce his current disability status. In fact, none of his treating physicians opined that his previous injuries were combined with his 2003 injury to produce his current disability status. Claimant himself testified that prior to his October 23, 2003, injury, he missed no work because of his previous injuries after 1988 and received no further treatment for his previous injuries. He testified that after 1988, he was at full wage-earning capacity. He opined on cross-examination that, but for his October 23, 2003, back injury, he could pass a DOT physical and would be able to work at his old job.

Based on these findings, it is this examiner's opinion that the record simply fails to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or impairment to yield greater disability than that arising from the back injury sustained on October 23, 2003, alone. As such, the Second Injury Fund bears no liability in this case.

AWARD

Respondents No. 1 are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents No. 1 are directed to pay the claimant's attorney, Mr. Gary Davis, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge