

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304405

ALBERT JUNGE	CLAIMANT
TEMPLE INLAND PAPERBOARD	RESPONDENT NO. 1
ESIS INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JANUARY 31, 2005

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

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

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

Respondent No. 2 represented by TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on in this case on November 14, 2004, in Fort Smith, Arkansas.

A Prehearing Order had previously been entered in the claim on September 14, 2004. This Prehearing Order initially provided that the respondents had accepted liability for a permanent physical impairment of at least 14% to the body as a whole.

Prior to the commencement of the hearing, the respondents announced that they would stipulate to the presence of a permanent physical impairment of 17% to the body as a whole and accepted liability for permanent partial disability benefits attributable to this degree of permanent physical impairment. A copy of the Prehearing Order, with this amendment noted thereon was made Commission's Exhibit No. 1 to the

hearing. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time.

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 February 7, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
3. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
4. On February 7, 2003, the claimant sustained a compensable injury to his right shoulder.
5. There is no dispute, at present, over the payment of medical expenses.
6. There is no dispute, at present, over the payment of temporary disability benefits.
7. The claimant's healing period ended or about January 20, 2004.
8. The respondent employer-carrier has accepted liability for and is paying permanent partial disability benefits for a permanent physical impairment of at least 17% 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 extent of permanent physical impairment resulting from the compensable injury.
2. The extent of permanent functional disability or wage loss, including permanent total disability.
3. Second Injury Fund liability.
4. Whether the respondent employer-carrier is entitled to credit for payment of permanent partial anatomical disability benefits against its \$75,000 maximum liability under Ark. Code Ann. §11-9-502(b)(1).
5. Whether the claimant is limited to 260 weeks of benefits under Ark. Code Ann. §11-9-522(f).
6. Whether Ark. Code Ann. §11-9-522(f) is unconstitutional.

In regard to these issues, the claimant contends:

"The claimant contends that he is permanently and totally disabled as a result of the effects of his admittedly compensable injury and his pre-existing conditions. The claimant contends that the Second Injury Fund has liability for a portion of his permanent disability because of the pre-existing diabetes and Parkinson's disease that continue to independently cause disability. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

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

"Respondent No. 1 contends that all appropriate benefits have been and are continuing to be paid with regard to this claim by Respondent Carrier. In the event the claimant is found entitled to additional indemnity benefits, it is Respondent's position that the Second Injury Fund should

be liable for payment of such benefits. In light of this, the Fund is being joined at this time as a party respondent. Because the claimant is seeking permanent and total disability benefits, Respondent also contends that the Death and Permanent Total Disability Trust Fund should be put on notice with regard to this claim pursuant to Rule 28 of the Rules of the Arkansas Workers' Compensation Commission. Notice is being provided to them at this time of claimant's assertion of permanent and total disability."

In regard to these issues, Respondent No. 2, Second Injury Fund contends:

"The Second Injury Fund denies any liability and controverts the claimant's entitlement to any benefits under A.C.A. §11-9-525."

In regard to these issues, Respondent No. 3, Death and Permanent Disability Trust Fund contends:

"Pursuant to A.C.A. §11-9-525 (b) (1), Second Injury Fund liability must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits.

Respondent No. 1 must pay permanent partial disability in the form of the anatomical ratings for the claimant's compensable injury before payment of any permanent total

disability benefits. Additionally, Respondent No. 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. SECOND INJURY FUND LIABILITY

The first issue to be addressed concerns the potential liability of the Second Injury Fund in the present claim. This question is controlled by the provisions of A.C.A. §11-9-525.

This subsection provides various necessary prerequisites for its application. First, the claimant must be experiencing some degree of permanent physical impairment or disability at the time of the compensable injury.

The evidence shows that, at the time of the claimant's compensable injury, he was suffering from various physical maladies. These included hypertension, Type II diabetes, and Parkinson's disease. The medical evidence indicates that, since its discovery in 2002, the claimant's hypertension has been well controlled. In early 2002, the claimant was diagnosed as suffering from Type II (adult onset) diabetes. The medical evidence shows that this condition has, since its discovery, also been well controlled with diet and medication. In December 2002, the claimant was diagnosed as suffering from early mild Parkinson's disease. The medical evidence too shows that through, at least February 21, 2003, this condition was also fairly well controlled with medication.

There has been no medical evidence to indicate that, at the time of the claimant's compensable shoulder injury, these pre-existing conditions had produced any degree of permanent physical impairment. There is also no evidence that, at the time of the claimant's compensable shoulder injury, these conditions had produced any

adverse impact on the claimant's earning capacity, so as to result in permanent "disability."

Therefore, it is my opinion that the record fails to prove that the claimant was experiencing any "impairment or disability," at the time of his compensable shoulder injury. Thus, the provisions of A.C.A. §11-9-525 would not be applicable to the present claim.

In reaching this decision, I recognize that the claimant's testimony indicates that he now has substantial physical limitations due to his Parkinson's disease. Clearly, Parkinson's disease is a progressive condition and cannot at the present time be stopped even by medication and appropriate treatment. There is no doubt that it will progress to the point where it will become significantly disabling and may have, at the time of the hearing, already progressed to the point where it was producing some degree of permanent disability. However, for the purposes of the application of A.C.A. §11-9-525, the controlling time is the date of the compensable injury. I simply do not find that the greater weight of the credible evidence shows that the claimant's Parkinson's disease was, at that time, producing any degree of rateable permanent impairment or permanent disability.

## II. PERMANENT PHYSICAL IMPAIRMENT

The next issue is matter of the degree or percentage of permanent physical impairment that has been produced by the claimant's compensable shoulder injury. This issue is controlled by various provisions of the Act. A.C.A. §11-9-704 (c) (1) (B) provides that the existence and extent of permanent physical impairment must be "supported by objective and measurable physical or mental findings." Objective physical findings are defined by A.C.A. §11-9-102 (16) (A) (i) as the independent observation of physical findings that cannot come under the voluntary control of the claimant. A.C.A. §11-9-522 (g) requires that any assessment of permanent physical

impairment must be made in a manner that conforms to the official rating guide of this Commission which (at the present time) is the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. A.C.A. §11-9-102 (16) (A) (ii) prohibits any consideration of pain in determining the existence and extent of permanent physical impairment. A.C.A. §11-9-102 (16) (B) requires that any medical opinions addressing the existence and extent of permanent physical impairment must be stated "within a reasonable degree of medical certainty." A.C.A. §11-9-102 (4) (F) (ii) (a) requires that the claimant prove that his compensable injury was the "major cause" of any impairment or disability sustained. The term "major cause" is defined by A.C.A. §11-9-102 (14) (A) as more than 50% of the cause. Finally, applicable case law provides that it is the obligation of this Commission, and not any medical expert, to determine the existence and specific percentage of permanent physical impairment in a manner that complies with all of the foregoing requirements of the Act.

The only expert medical opinion on the issue of the existence and extent of permanent physical impairment is found in two reports by Dr. William Sherrill, an orthopedic surgeon and the claimant's primary treating physician. In his first report, dated January 20, 2004, Dr. Sherrill appears to assign a 31% permanent physical impairment to the claimant's right upper extremity. He goes on to state that this consists of an 11% permanent physical impairment of the upper extremity, based upon a loss of range of motion and an "additional" 20% permanent physical impairment of the upper extremity for a loss of strength. In a subsequent report, dated August 10, 2004, Dr. Sherrill opines that the claimant has experienced a permanent physical impairment of a "total" of 20% to the upper extremity, as a result of the compensable injury. He states that this degree of impairment is based upon the loss of range of motion, previously described, and his observation of the abnormal tissue of the rotator cuff at the time of his two corrective surgeries.

Clearly, these reports of Dr. Sherrill are directly contradictory. In his report of January 20, 2004, he clearly states that the claimant has experienced a permanent physical impairment of 11% to the right arm for loss of range of motion (as measured by the Physical Therapy Department) and an "additional" 20% permanent physical impairment of the right upper extremity, due to a loss of strength. No specific mention is made in this report of any rating based upon abnormal tissue of the rotator cuff. However, in his report of August 10, 2004, he states that he did not intend to assign a 31% permanent physical impairment to the upper extremity and that he only intended to assess a permanent physical impairment of 20% to the upper extremity, as a result of all of the effects of the compensable injury. He indicates that he arrived at this conclusion by assigning an 11% permanent physical impairment of the upper extremity for a loss of range of motion and an additional 9% permanent physical impairment to the right upper extremity due to the "attenuated tissue" of the claimant's rotator cuff that he observed during his two corrective surgeries. In light of these conflicting and inconsistent reports of Dr. Sherrill, I find that both of these reports are not "stated within a reasonable degree of medical certainty," as required by the Act.

There is also no indication whether the loss of range of motion which forms the basis for the 11% permanent physical impairment assessment, represents a measurement of the "active" or "passive" range of motion of the claimant's right shoulder. While "passive" range of motion may be an objective finding, "active" range of motion clearly is not. It cannot be simply presumed that the loss of range of motion, on which Dr. Sherrill bases his assessment of the 11% permanent physical impairment was "passive" range of motion. Thus, the evidence fails to show that Dr. Sherrill's opinion in regard to this degree of permanent physical impairment is based upon objective findings, as required by the Act.

Dr. Sherrill's assessment of an "additional" 20% of permanent physical impairment (report of August 10, 2004) based upon a loss of strength is clearly not based upon "objective findings." Thus, the assessment of permanent physical impairment would not comply with the requirements of the Act.

Dr. Sherrill's assessment of a 9% permanent physical impairment to the right upper extremity, based upon his visual observation of the attenuated tissue comprising the claimant's right rotator cuff at the time of the surgery, would satisfy the requirement of A.C.A. §11-9-704 (c) (1) (B). However, the current rating guide adopted by this Commission contains no provisions for assessing permanent physical impairment based upon the observation of a attenuated tissue of a joint. Thus, this assessment of permanent physical impairment would not comply with the requirements of A.C.A. §11-9-522 (g).

The Commission's current rating guide does provide one method for assessing the degree of permanent physical impairment for the claimant's compensable injury that would be based solely upon "objective findings" and with no consideration of pain. Page 61 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, provides that permanent physical impairment may be based solely upon the fact that an arthroplasty or surgical reconstruction of a joint has been performed. Under Table 27 on Page 61 of this guide, it assigns a 24% permanent physical impairment to the upper extremity for an arthroplasty or surgical reconstruction of the shoulder joint. In the present case, the medical evidence shows that the claimant has undergone two arthroplasties or surgical reconstructions of his right shoulder joint by Dr. Sherrill, solely as a result of the effects of his compensable injury. Thus, the compensable injury would be the "major cause" of any impairment these surgeries produced.

At this point, it must be noted that the respondents have accepted liability for and are paying the claimant permanent partial disability benefits for a permanent physical impairment of 17% to the body as a whole. Clearly, the assessment of permanent physical impairment to the body as a whole is appropriate, as the claimant's compensable injury is to an unscheduled member (i.e., shoulder joint). Dr. Sherrill's assessment of a 31% permanent physical impairment to the "upper extremity" would only transpose to a permanent physical impairment of 19% to the body as a whole (Table 3, Page 20, American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition). Dr. Sherrill's assessment of permanent physical impairment of 20% to the upper extremity would extrapolate to only a permanent physical impairment of 12% to the body as a whole. Under Table 27, the recommended permanent physical impairment of 24% to the upper extremity for a single arthroplasty would only extrapolate to a 14% permanent physical impairment to the body as a whole. (The Guides give no specific degree of impairment for a second procedure).

After consideration of all of the evidence presented, it is my opinion that the greater weight of the credible evidence reflects that the 17% permanent physical impairment to the body as a whole that has been accepted by the respondents correctly reflects the permanent physical impairment experienced by the claimant as a result of his compensable right shoulder injury of February 7, 2003, and two corrective surgeries.

### III. PERMANENT FUNCTIONAL DISABILITY FOR LOSS OF WAGE EARNING CAPACITY

The next issue concerns the existence and extent of any permanent functional disability for loss of wage earning capacity that has been caused by the claimant's

compensable injury. The resolution of this issue is controlled by the provisions of A.C.A. §11-9-522 and (in the event of permanent total disability), §11-9-519.

The evidence shows that the claimant is 63 years old. He has a high school diploma and at least three years of college in the field of Business Administration. The claimant is a retired Air Force officer and a trained pilot. He has considerable experience in middle to high level management positions in both the Air Force and the private sector. At the hearing, he appeared highly intelligent and personable.

The greater weight of the credible evidence shows that, solely as a result of his compensable right shoulder injury, the claimant has experienced significant physical restrictions and limitations on his potential employment positions. He is restricted from any employments requiring the use of his right hand or arm at or above shoulder level. The range of motion of his right shoulder joint has been significantly limited. He has also been restricted from engaging in any employment activities that would require him to perform any repetitive or strenuous activity with his right upper extremity. He is prohibited from lifting objects weighing more than five pounds, even below the shoulder level. The significance of these restrictions is increased by the fact that the claimant is right handed.

When the restrictions imposed upon the claimant's employment activities, solely by the effects of his compensable right shoulder injury, are considered in light of his age, education, prior work experience, and all other relevant factors, I find that the claimant has failed to prove by the greater weight of the credible evidence that his compensable right shoulder injury has rendered him permanently totally disabled. In reaching this decision, I recognize that, at the present time, the claimant may actually be permanently totally disabled. However, the claimant's compensable shoulder injury would not be the "major cause" of such permanent total disability. Rather, this degree of disability would be the result of the additional restrictions and limitations caused

by the progression of the claimant's Parkinson's disease, since the occurrence of his compensable injury. This increase in the disabling effects of his Parkinson's disease cannot be considered in assessing the permanent functional disability produced by his compensable right shoulder injury, as it has occurred subsequent to his compensable injury. When only the physical restrictions and limitations imposed by the claimant's compensable right shoulder injury are considered in light of the claimant's extensive prior management experience, his level of formal education, and his level of intelligence, there would still remain available to him sufficient potential employment positions to offer him a reasonable expectation of obtaining regular gainful employment.

However, it is apparent that the physical restrictions and limitations that result from the claimant's compensable right shoulder injury would prevent him from continuing in the employment position he held at the time of his compensable injury. These restrictions would also prevent him from performing numerous other employment positions for which he would otherwise be qualified. There is no doubt that the number of the claimant's potential employments has been significantly reduced solely as the result of the effects of his compensable right shoulder injury. The number of middle to upper level management positions, for which he would remain physically qualified, would be few in number and difficult to obtain as a new employee. The more numerous lower level management, which would be within the claimant's physical restrictions, would likely be at wages substantially less than those the claimant was earning as a machine operator at the time of his compensable injury.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that he has experienced a significant degree of permanent functional disability or loss of wage earning capacity, solely as a result of the effects of his compensable right shoulder injury. I find this degree of permanent functional

disability to be in the amount of 28% to the body as a whole. Thus, the claimant would be entitled to permanent partial disability benefits of 45% to the body as a whole, which would include both the permanent physical impairment of 17% to the body as a whole and the permanent functional disability of 28% to the body as a whole.

### III. REMAINING ISSUES

Based upon my finding that the claimant has failed to prove that he has been rendered permanently totally disabled, as the result of the effects of his right shoulder injury, it becomes unnecessary to address any of the other issues or arguments raised in claim. Specifically, these include the issue of whether the respondent is entitled to credit for payment of permanent partial anatomical disability benefits against its \$75,000.00 maximum exposure under A.C.A. §11-9-502 (b) (1), whether the claimant is limited to 260 weeks of benefits under A.C.A. §11-9-522 (f), and whether or not A.C.A. §11-9-522 (f) is constitutional. I would note that A.C.A. §11-9-522 (f) is expressly limited only to "permanent total disability." Under the rules of strict interpretation, this subsection cannot be assumed to also extend to permanent partial disability. However, the permanent partial disability herein awarded would only span 202.5 weeks.

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 7, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
3. On February 7, 2003, the claimant earned wages sufficient to entitle him to the maximum weekly compensation benefit

in effect at that time (i.e., \$440.00 for total disability and \$330.00 for permanent partial disability).

4. On February 7, 2003, the claimant sustained a compensable injury to his right shoulder.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services at the respondents expense.
6. There is no dispute, at the present time, over the payment of temporary disability benefits, and all such benefits accruing to date has been paid.
7. The claimant's healing period from the effects of his compensable injury ended on or about January 20, 2004.
8. The claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled as a result of the effects of his compensable injury.
9. The greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent physical impairment or permanent disability at the time of his compensable injury on February 7, 2003. Thus, A.C.A. §11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability in this case.
10. The claimant has experienced a permanent partial disability of 45% to the body as a whole, solely as a result of the effects of his compensable injury of February 7, 2003. This includes permanent partial disability attributable to

permanent physical impairment in the amount of 17% to the body as a whole and permanent partial disability attributable to permanent functional disability or loss of wage earning capacity in the amount of 28% to the body as a whole.

11. The respondent employer and carrier have controverted the claimant's entitlement to any permanent disability benefits in excess of a permanent partial disability of 17% to the body as a whole.
12. The respondent, Second Injury Fund, has controverted the claimant's entitlement to any benefits from said Fund.
13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all controverted permanent partial disability benefits here in awarded.

#### ORDER

The respondent employer-carrier-third party administrator will pay to the claimant permanent partial disability benefits equivalent to a 45% permanent partial disability to the body as a whole and will be entitled to credit for all such benefits previously paid.

The respondent employer-carrier-third party administrator will pay to the claimant's attorney the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded, which are in excess of 17% to the body as a whole. One half of this attorney's fee is to be paid by these respondents in addition to such benefits. The remaining one half of this attorney's fee to be withheld by these respondents from such benefits.

Any and all claims made herein against the Second Injury Fund of the State of Arkansas should be and hereby are dismissed.

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