BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F101628

JAMES MCEUEN, Employee	CLAIMANT
PACKAGED ICE, INC., Employer	RESPONDENT #1
RELIANCE NATIONAL INDEMNITY COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY BANK FUND	RESPONDENT #2

OPINION FILED APRIL 5, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by PHILIP WILSON, Attorney, Little Rock, Arkansas.

Respondent #1 represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On March 16, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 10, 2005, and a pre-hearing order was filed on January 11, 2005. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The relationship of employee-employer-carrier existed between the claimant and respondent #1 on July 24, 2000.

3. The claimant sustained a compensable injury on July 24, 2000.

4. The claimant reached maximum medical improvement on August 4, 2003.

5. The claimant was earning an average weekly wage of $525.00 which would

entitle him to compensation at the weekly rates of $350.00 for total disability benefits and $263.00 for permanent partial disability benefits.

6. Respondent #1 has accepted and paid permanent partial disability benefits based upon a 12% impairment rating.

At the time of the hearing respondent #1 contended that it was entitled to a credit for overpayment of compensation benefits in the amount of $4,698.00. Counsel for claimant indicated that his initial review of the evidence would lead him to conclude that respondent was entitled to this credit. Given the limited time claimant's counsel had to review the evidence, I agreed to allow him an additional period of time to confirm his agreement. By letter dated March 17, 2005, I indicated that if I did not hear from claimant's counsel by April 1, 2005, I would assume that claimant did agree that respondent is entitled to a credit for overpayment in the amount of $4,698.00. Having not heard from claimant's counsel by April 1, 2005, the parties are in agreement that respondent is entitled to a credit for overpayment in the amount of $4,698.00.

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

1. Extent of claimant's disability, including wage loss.

2. Whether respondent #1 is entitled to credit for payment of permanent partial disability against its $75,000.00 maximum liability pursuant to §11-9-502(b)(1).

3. Attorney fee.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "The claimant is 59 years of age and although the claimant went to the 10th grade in school, all of his classes were in Special Education. The claimant has worked two years in his entire lifetime. He works in the ice business his entire life except for six years he worked in the tire business. Since the 10th grade the claimant was constantly lifting weights between 50 to 100 pounds on a regular basis. The claimant is a functional illiterate."

Respondent #1's contentions as set forth in its pre-hearing questionnaire are as follows: "Respondents contend that all appropriate benefits have been paid and are continuing to be paid with regard to this claim. The claimant is not permanently and totally disabled. In the event the claimant is deemed to be permanently and totally disabled, it is respondent's position that the Death & Permanent Total Disability Trust Fund should be responsible for permanent disability benefits above and beyond respondent carrier's $75,000.00 liability limit."

Respondent #2's contentions as set forth in its pre-hearing questionnaire are as follows: "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."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 10, 2005, and contained in a pre-hearing order filed January 11, 2005, are hereby accepted as fact.

2. By agreement of the parties, Respondent #1 is entitled to a credit for overpayment of benefits in the amount of $4,698.00.

3. Claimant has met his burden of proving by a preponderance of the evidence that as a result of his compensable injury he is permanently totally disabled.

4. Respondent #1 is not entitled to credit for payment of permanent partial disability benefits against its $75,000.00 maximum pursuant to A.C.A. §11-9-502(b)(1).

5. Respondent #1 has controverted claimant's entitlement to permanent total disability benefits.

FACTUAL BACKGROUND

______The claimant is a 59-year-old man who has worked in the ice business for approximately 30 years. Claimant initially began working in the ice business in the Little Rock and Hot Springs area before he was sent by Arctic Ice to Springdale. Arctic Ice was eventually purchased by respondent #1. Claimant performed various job duties for Respondent #1 including the loading of ice, delivering ice, and working as a salesman. Claimant's job duties also included delivering ice to special events such as craft fairs, county fairs, and rodeos. Claimant was responsible for delivering ice boxes and filling those boxes with ice.

On July 24, 2000 the claimant was delivering ice to an event in Bella Vista and was in the process of loading ice into the ice box when he suffered an injury to his low back. Following this injury the claimant initially sought medical treatment from Dr. Kyle who performed surgery on August 28, 2000 to repair a disc rupture at the L5-S1 level. Dr. Kyle subsequently retired and claimant began seeking treatment from Drs. Runnels and Knox. Shortly after claimant's first surgery he developed increased pain and Dr. Runnels suspected a re-herniated disc at the L5-S1 level. According to the medical report of Dr. Knox dated November 27, 2000, the MRI scan confirmed an L5-S1 rupture. As a result, claimant underwent a second surgical procedure at the L5-S1 level on March 23, 2001. This surgery was performed by Dr. Knox.

Despite claimant's second surgical procedure, he continued to have additional problems. Dr. Knox diagnosed claimant's condition as mild lateral recess stenosis at the

L5-S1 level, but did not feel that the condition was sufficient to warrant surgery. Dr. Knox indicated that if claimant continued to have difficulty he might have to consider fusing the L5-S1 level.

Apparently in the fall of 2001 the claimant moved from Northwest Arkansas to Beebe and began receiving treatment from Dr. Baskin. Dr. Baskin's treatment was conservative, consisting of epidural steroid injections, medication, and physical therapy. Those therapies were not beneficial and as a result Dr. Baskin referred claimant to Dr. Bruffett, neurosurgeon. Dr. Bruffett ordered a discogram to determine the exact level of claimant's continued problems. That discogram revealed that claimant's problems were attributable to the L5-S1 level and Dr. Bruffett performed a fusion at that level on July 12, 2002.

The medical records indicate that after the fusion surgery claimant's back condition initially improved. However, claimant subsequently developed increased back pain. Dr. Bruffett assessed a hardware failure as the source of claimant's continued back complaints and performed a second surgical procedure to remove the failed hardware. After the operation to remove the failed hardware claimant developed a post-operative back infection. This resulted in another surgical procedure to clean out the infection and obtain cultures. Dr. Bruffett ordered claimant to undergo physical therapy with a progression to work hardening. Finally, in August 2003 Dr. Bruffett ordered a functional capacities evaluation which revealed that claimant was capable of performing work at the "light" level of activity. By report dated August 11, 2003, Dr. Bruffett stated that claimant had reached maximum medical improvement and assigned a permanent physical impairment rating in an amount equal to 12% to the body as a whole.

Respondent #1 has paid claimant permanent partial disability benefits in an amount equal to 12% to the body as a whole. Claimant has filed this claim contending that he is permanently totally disabled as a result of his compensable injury.

ADJUDICATION

Permanent total disability is defined as the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." A.C.A. §11-9-519(e)(1). Furthermore, the burden of proof is on the employee to prove the inability to earn any meaningful wage in the same or other employment. A.C.A. §11-9-519(e)(2). In determining the extent of a claimant's loss in wage earning capacity, the Commission may take into account various factors including the percentage of permanent physical impairment, the employee's age, education, work experience, and any other factors reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled as a result of his compensable injury.

As previously noted, claimant was assigned a permanent physical impairment rating in an amount equal to 12% to the body as a whole following five surgical procedures. Claimant's most recent treating physician, Dr. Bruffett, ordered a functional capacities evaluation which was performed on August 8, 2003. That functional capacities evaluation indicated that claimant was capable of performing work at the "light" level. The evaluation indicates that an individual capable of performing light duty work can occasionally lift 11 to 20 pounds, frequently lift 1 to 10 pounds, and no constant lifting. The evaluation indicates that claimant has the ability to sit or stand for over 30 continuous minutes, but that he is limited to occasional stooping, bending, crouching, climbing stairs, and kneeling. The evaluation also indicates that claimant would have to work at a position that allowed frequent positional changes throughout the day and work at or above knee level.

Ordinarily, the factors which have just been discussed would not lead one to

conclude that a claimant is permanently totally disabled. However, I believe when one considers the claimant's physical limitations with the remaining factors that claimant is permanently totally disabled.

The claimant is 59 years old and dropped out of school in the 10th grade. Furthermore, claimant testified that he was enrolled in special education classes. Claimant testified that he cannot read or write and that he failed one grade. Claimant also testified that he had previously suffered from a nervous breakdown and was sent to the Hot Springs Rehabilitation Center on two occasions. On one of those occasions claimant spent approximately 14 months learning auto mechanics. Claimant testified that he worked as an auto mechanic for Black and White Cab Company in Little Rock for approximately three months many years ago before the advent of computers in the use of auto diagnostics. Claimant also testified that he received a certificate in welding and that he on occasion did use his welding skills on the job.

Claimant has primarily performed two jobs throughout his lifetime. The first of these jobs was in the tire business where claimant worked for approximately six years. The claimant mounted tires and also worked in a recap shop.

Claimant's primary employment has been in the ice business where he has worked for approximately 30 years. Claimant testified that he began his initial work with Arctic Ice in Little Rock before being transferred to Arctic Ice of Hot Springs where he helped run a block ice plant. Claimant then went back to Arctic Ice in Little Rock before he was sent to work in Springdale. As previously noted, Arctic Ice was subsequently purchased by Respondent #1. Claimant's job duties for Respondent #1 included delivering ice, loading ice, and working as a salesman. Claimant testified that as a salesman he was capable of using some calculators, but either his wife or a helper had to do the paperwork. I believe it is clear from a review of claimant's testimony that his work as a salesman was not a typical non-physical job. If claimant did make a sale he was required to provide an ice box

and fill it with ice. Thus, while claimant did perform sales duties, his job duties were still primarily physical in nature.

While claimant testified that he believed he might be able to perform a job selling ice if he did not have to move boxes and the ice product, I note that Respondent #1 has not made such a job available to the claimant.

Claimant testified that he currently takes a number of medications for his compensable injury. Claimant testified that he has constant pain in his back and legs and that increased activity leads to increased pain. Claimant testified that he has trouble sleeping and spends approximately two-thirds of the day lying down on a couch or bed and in his easy chair. Claimant testified that he can no longer mow his yard and cannot bend over to tie his shoes.

Finally, I note that it might be argued that claimant lacks the motivation to return to work as evidenced by the fact that he has applied for social security disability and has not applied for work. I disagree. I found the claimant to be extremely motivated as evidenced by his ability to perform the jobs he has performed throughout his lifetime with his limited skills. Claimant's testimony reveals an individual who has been extremely motivated to make the best of his work situation. Furthermore, I find that the evidence reveals that claimant has been motivated subsequent to his compensable injury. The functional capacities evaluation was considered reliable with 54 of 55 consistency measures within expected limits. Furthermore, the physical therapist's report indicates that claimant was compliant with the program of physical therapy. Finally, I find it interesting to note that Dr. Bruffett in a report of July 7, 2003 and Respondent #1's case manager's report of August 26, 2003 both describe an incident wherein the claimant saw an ice delivery person making a delivery and asked that individual to let him unload bags of ice for the purpose of determining whether he was capable of returning to his prior job. The reports indicate that claimant was unable to perform this duty for an extended period of time. Nevertheless,

I believe that this demonstrates that claimant was motivated.

In summary, while claimant was assigned only a permanent physical impairment rating in an amount equal to 12% to the body as a whole, a functional capacities evaluation indicates that claimant's physical limitations are limited to "light" duty. However, the claimant has very little education having dropped out of school in the 10th grade, having been enrolled in special education, having failed one grade, and not being capable of reading or writing. Claimant's prior job skills and employment have all involved heavy manual labor. Even though claimant did some sales work for Respondent #1, he was not capable of performing the paperwork. Instead, claimant had to have help from his wife or from helpers. Claimant testified that he has constant pain in his back and legs and that increased activity causes additional pain. I find claimant's testimony regarding his physical problems to be credible and entitled to great weight. After consideration of all the relevant wage loss factors, I find that claimant has met his burden of proving by a preponderance of the evidence that he is permanently totally disabled. While claimant is physically capable of performing light duty jobs, claimant's education and his inability to read and write will severely limit his ability to earn any meaningful wages in the future.

The next issue for consideration is whether Respondent #1 is entitled to a credit for payment of permanent partial disability benefits with respect to the $75,000.00 maximum of A.C.A. §11-9-502(b)(1). That subsection states:

> For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars ($75,000.00) of <u>weekly benefits for death or permanent total disability</u> shall be paid by the employer or its insurance carrier in the manner provided in this chapter. (Emphasis added.)

Respondent contends that it is entitled to a credit for permanent partial disability benefits paid toward the $75,000.00 maximum.

This issue was initially addressed by the Arkansas Court of Appeals in *Death &*

Permanent Total Disability Fund v. Whirlpool, 39 Ark. App. 62, 837 S.W. 2d 293 (1992). In that particular case, the Death Fund contended that permanent partial disability could not be credited against the employer's obligation pursuant to A.C.A. §11-9-502(b)(1) since the statute permits credit only for benefits paid for "death or permanent total disability." The Court of Appeals relying upon Ark. Stat. Ann. §81-1313(f)(1) held that it permitted credit for payment of permanent partial disability benefits; therefore, an employer was entitled to credit for permanent partial disability benefits in determining the $75,000.00 maximum.

Subsequently, in *Nelson v. Timberline International, Inc.*, 332 Ark. 165, 964 S.W. 2d 357 (1998) the Arkansas Supreme Court in a case involving the Second Injury Fund determined that the enactment of Act 290 of 1991 repealed by implication Ark. Stat. Ann. §81-1313(f)(1). Therefore, even though the Supreme Court did not specifically overrule the decision in *Death & Permanent Total Disability Fund v. Whirlpool*, the Court did find that the statute which the Court had relied upon to have been repealed. Thus, the basis for the Court of Appeals' decision in the *Whirlpool* case no longer exists. Finally, in *Birtcher v. Arkansas Highway & Transportation Department*, Full Commission Opinion filed October 1, 1998 (E108137), the Commission noted that the respondent in that case had asserted that it was entitled to a credit for permanent partial disability benefits paid against the statutory limit of $75,000.00. The Full Commission noted that the decision in *Nelson* which supported that argument had been repealed. Therefore, the Commission found that the statute's repeal "renders moot Respondent #1's claim for a credit."

In summary, A.C.A. §11-9-502(b)(1) states that employers or their carrier must pay the first $75,000.00 of weekly benefits for death or permanent total disability. The statute does not mention a credit for permanent partial disability benefits. The provisions of the Arkansas Workers' Compensation statutes are to be strictly construed. A.C.A. §11-9-704(c)(3). While the Court of Appeals in *Whirlpool* did find that the employer was entitled

to a credit for permanent partial disability benefits paid, the basis for the Court of Appeals' decision, Ark. Stat. Ann. §81-1313(f)(1), was deemed by the Arkansas Supreme Court to have been repealed by Act 290 of 1981. Therefore, since Ark. Stat. Ann. §81-1313(f)(1) was repealed, it cannot serve as a basis for Respondent #1's entitlement to a credit for permanent partial disability benefits paid toward the statutory maximum.

In summary, I find that Respondent #1 is not entitled to a credit for permanent partial disability benefits paid towards satisfaction of the $75,000.00 maximum pursuant to A.C.A. §11-9-502(b)(1).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that as a result of his compensable injury he is permanently totally disabled. Respondent #1 has controverted claimant's entitlement to permanent total disability benefits. Respondent #1 is not entitled to a credit for permanent partial disability benefits paid in calculating its $75,000.00 maximum liability pursuant to A.C.A. §11-9-502(b)(1).

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE