

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F400715

LARRY MINER, Employee	CLAIMANT
SMITH CHEVROLET-CADILLAC CO., Employer	RESPONDENT #1
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JUNE 30, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by R. GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by BETTY DEMORY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 13, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on April 7, 2005, and a pre-hearing order was filed on that same date. 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 claimant sustained a compensable injury to his low back on January 15, 2004.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$453.00 for total disability benefits and \$340.00 for permanent partial disability benefits.
4. The claimant reached maximum medical improvement and the end of his

healing period on October 11, 2004.

5. Respondent #1 accepted and paid permanent partial disability benefits based upon a 2% rating to the body as a whole.

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

1. Whether claimant was entitled to the 2% rating given by Dr. Standefer.
2. Extent of claimant's wage loss.
3. Second Injury Fund liability.
4. Attorney fee.

The claimant contends he is entitled to permanent partial disability benefits in excess of those previously paid.

Respondent #1 contends that the claimant has been provided all appropriate benefits to which he is entitled. Specifically, Respondent #1 accepted the claimant's claim as compensable and paid medical expenses, temporary total disability benefits, and permanent partial disability benefits for a 2% impairment rating. Respondent #1 asserts that any additional disability the claimant may have would be due to his preexisting back condition and injury from 1994 at which time he received a 5% impairment rating. Alternatively, Respondent #1 asserts that if the claimant is entitled to any wage loss disability or is found permanently and totally disabled, it would be the responsibility of the Second Injury Fund.

Respondent #2, Second Injury Fund, contends that the claimant cannot prove entitlement to the 2% rating given by Dr. Standefer; claimant cannot prove entitlement to any amount of wage loss disability benefits; and Respondent #1 cannot prove the Fund has liability in this case.

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 April 7, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered permanent physical impairment as a result of his compensable injury. Therefore, claimant is not entitled to wage loss benefits.

#### FACTUAL BACKGROUND

The claimant is a 42-year-old man with a tenth grade education who has obtained his GED. In addition, claimant has received certificates in electrical and engine repair from the University of Arkansas at Fort Smith. Claimant has also undergone several additional training courses involving automotive repair. Before working for respondent #1 claimant had worked in the gas fields and for a plumbing company running a backhoe.

Claimant was hired by respondent #1 on November 12, 1995 to perform detail work. Throughout the course of his employment with respondent #1 claimant was eventually promoted to work as the detail manager and to working on the oil change/lube rack. Claimant's last job duties with respondent #1 involved suspension work and alignments which he performed for approximately seven years.

While previously employed by Burgess Plumbing the claimant suffered a work-related injury in May 1994. Claimant's primary treating physician for that injury was Dr. Albert MacDade, neurosurgeon. Dr. MacDade ordered an MRI scan which revealed lumbar spondylosis and a protrusion at the L1-2 level. It was Dr. MacDade's opinion that claimant should be treated conservatively without any surgery. Dr. MacDade also

assigned the claimant a permanent physical impairment rating in an amount equal to 5% to the body as a whole as a result of the 1994 injury and imposed work restrictions on the claimant. Claimant eventually settled that claim with Burgess Plumbing by joint petition.

While working for respondent #1 claimant suffered a second injury to his back on January 15, 2004 while pulling a crate motor across a concrete floor. Claimant was initially treated by his family physician, Dr. Kannout. At the time of his first evaluation on January 26, 2004, Dr. Kannout diagnosed claimant's condition as low back pain and muscle strain. Dr. Kannout ordered physical therapy, placed claimant on limited duty, and prescribed medication. When claimant did not respond to this conservative treatment, Dr. Kannout ordered an MRI scan and referred claimant to Dr. Standefer, neurosurgeon, for further evaluation. Dr. Standefer in his report of March 1, 2004 diagnosed claimant's condition as multi-level degenerative disc disease with disc bulging and associated mild canal stenosis at L1-2. He also stated that claimant suffered from a probable lumbar strain. Dr. Standefer recommended conservative treatment in the form of physical therapy and claimant remaining off work. At some point claimant returned to Dr. Kannout who referred him to Dr. Swicegood for steroid injections.

Claimant subsequently returned to Dr. Standefer for a follow up evaluation. In a report dated October 11, 2004, Dr. Standefer indicated that claimant's work restrictions would be the prior restrictions placed upon him by Dr. MacDade in 1994. In addition, Dr. Standefer opined that claimant had an additional 2% impairment rating. Finally, Dr. Standefer ordered another MRI scan which was performed on November 10, 2004. Following that MRI scan, Dr. Standefer authored a report dated November 18, 2004 and stated that no surgical lesions were present. Dr. Standefer indicated that there was no reason that claimant could not resume employment and that he would place no restrictions on the claimant other than those previously imposed by Dr. MacDade in 1994.

Respondent #1 accepted claimant's injury as compensable and paid compensation

benefits including temporary total disability benefits, medical benefits, and permanent partial disability benefits based upon the 2% rating assigned by Dr. Standefer. Claimant has filed this claim contending that he is entitled to permanent partial disability benefits for wage loss over and above the 2% rating. In addition, liability of the Second Injury Fund is at issue. Furthermore, the Second Injury Fund has raised as an issue the legitimacy of the 2% rating assigned by Dr. Standefer.

### ADJUDICATION

The initial issue for consideration involves whether claimant suffers from a permanent physical impairment as a result of his most recent compensable injury. Even though respondent #1 has accepted and paid benefits associated with a 2% impairment rating, that decision is not binding on the Second Injury Fund. The Second Injury Fund contends that the 2% rating assigned by Dr. Standefer is not legitimate and that claimant has not suffered any permanent physical impairment as a result of his most recent compensable injury.

Claimant has the burden of proving by a preponderance of the evidence that he is entitled to an award for permanent physical impairment. *Weber v. Best Western of Arkadelphia*, Full Commission Opinion filed November 20, 2003 (F100472). Furthermore, the determination of the existence or extent of permanent physical impairment must be supported by objective and measurable physical or mental findings. A.C.A. §11-9-704(c)(1)(B).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a permanent physical impairment as a result of his most recent compensable injury. Specifically, I find insufficient evidence of objective and measurable physical findings of permanent impairment attributable to the

most recent compensable injury.

Following Dr. Standefer's report of October 11, 2004 assigning the claimant an additional impairment rating of 2% to the body as a whole, Charlotte Flanagan, a claims specialist for respondent #1, wrote a letter to Dr. Standefer dated November 22, 2004 asking Dr. Standefer if the January 15, 2004 injury was the major cause of the additional 2% impairment rating. By letter dated December 8, 2004, Dr. Standefer replied that the 2% rating would be applicable to the January 2004 work injury. However, a subsequent and more detailed inquiry by the Second Injury Fund to Dr. Standefer reveals that he had no objective findings relating to the injury upon which to base the additional 2% rating.

In a letter to Dr. Standefer dated March 25, 2005, David Pake, the attorney for the Second Injury Fund, asked Dr. Standefer the following question: "Were you able to discern any objective and measurable findings of new physical injury after January 17, 2004 that were not present before January 17, 2004?" (Emphasis supplied.) In his reply letter of May 20, 2005, Dr. Standefer's response to that question was, "No." Dr. Standefer also indicated in response to a second question that there were no new physical findings.

Finally, Dr. Standefer was asked: "If there were not any new physical findings, was the 2% increase due to the natural progression of Mr. Miner's pre-existing (sic) degenerative disc disease, his complaints of pain, or some Dr. (sic) other factor?" (Emphasis supplied.) In response to this question, Dr. Standefer indicated that the additional 2% rating was due to continued degenerative changes.

The additional impairment rating of 2% is based upon the current *AMA Guidelines to Evaluation for Permanent Impairment*. He was previously assigned a 5% impairment rating and in reviewing the current radiographic studies and correlating these with the *AMA Guidelines*, it would appear that the 7% rating would be applicable at this point in time based upon the fact that the degenerative changes were moderate to severe.

Thus, according to Dr. Standefer's response to questioning, there were no objective

and measurable physical findings present after January 17, 2004, that were not present prior to that date which would establish that claimant suffered a permanent impairment. Furthermore, Dr. Standefer went on to indicate that the additional 2% rating assigned by him was for an increase in degenerative changes. There is insufficient evidence that these degenerative changes were caused or accelerated by the claimant's most recent injury.

In summary, from reviewing the medical reports of Dr. Kannout and Dr. Standefer, it appears that claimant suffered a lumbar muscular strain as a result of the injury which occurred in January 2004. However, according to Dr. Standefer, there are no objective and measurable findings of a new physical injury after January 17, 2004 that were not present prior to that date. While claimant did suffer from muscle spasms which were objective evidence of an injury, there is insufficient evidence that those muscle spasms were a permanent condition. Finally, Dr. Standefer indicated that the additional 2% increase in claimant's impairment rating was attributable to degenerative changes in the claimant's lumbar spine.

Based upon the foregoing evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered any permanent physical impairment as a result of his most recent compensable injury. In order to be entitled to benefits for a permanent physical impairment, claimant has the burden of proving by a preponderance of the evidence that there are objective and measurable physical findings supporting the existence or extent of physical impairment. Here, according to Dr. Standefer, no such physical findings were present other than the pre-existing degenerative changes. Therefore, claimant has not suffered any permanent physical impairment as a result of his compensable injury.

Having found that claimant has failed to prove by a preponderance of the evidence that he suffered any permanent physical impairment as a result of his most recent

compensable injury, I also find that claimant is not entitled to any benefits attributable to wage loss. In *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 116 S.W. 3d 657 (2003), the Court of Appeals held that in order to be entitled to permanent partial disability benefits for a loss in wage earning capacity, a claimant must first prove that they suffered a permanent impairment. Here, I have found that claimant has failed to meet that burden of proof; therefore, he is not entitled to any wage loss benefits.

Having found that claimant is not entitled to benefits for a loss in wage earning capacity, liability of the Second Injury Fund is moot.

#### ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered any permanent physical impairment as a result of his compensable injury. Having failed to meet that burden of proof, claimant is not entitled to benefits for a loss in wage earning capacity. Therefore, claimant's claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE