

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407236

DONALD L. MIXON, EMPLOYEE	CLAIMANT
HIGHLAND RESOURCES, INC., EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERM. TOTAL DIS. TRUST FUND	RESPONDENT NO. 3

OPINION FILED DECEMBER 28, 2005

Hearing before Administrative Law Judge J. Mark White on November 3, 2005, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Ms. Carol Worley, Attorney at Law, Little Rock, Arkansas.

Second Injury Fund represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

Death & Permanent Total Disability Trust Fund represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 7, 2005, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on August 15, 2005, and a Prehearing Order was entered that same day. A copy of the August 15, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part

of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the claimant earned an average weekly wage of \$355.94, entitling him to a compensation rate of \$237 for total disability benefits and \$178 for permanent partial disability benefits; and that this claim was the subject of a prior administrative law judge opinion, filed May 4, 2005. The stipulations, findings of fact, and conclusions of law set forth therein are incorporated herein by reference. After the entry of the Prehearing Order, the parties further stipulated that the claimant reached the end of his healing period no later than October 4, 2002; and that if the claimant is found to be permanently totally disabled, his disability began after November 14, 2004.

The parties agreed that the issues to be presented were whether additional medical treatment is reasonably necessary in connection with the compensable injury; unpaid medical bills; whether an independent medical evaluation is reasonably necessary in connection with the compensable injury; whether the claimant is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his permanent anatomical impairment rating; the

liability, if any, of the Second Injury Fund and of the Death & Permanent Total Disability Trust Fund; and controversion and attorney's fees.

The claimant contends that respondents should be ordered to pay for him to see an orthopedic specialist for medication management as recommended by Dr. Hart and Dr. Payne; in the alternative, that the Commission should consider ordering an independent medical evaluation by a doctor chosen by the Commission to determine what additional medical treatment Mr. Mixon should have in the future associated with his compensable neck and back injuries; that he is permanently totally disabled; in the alternative, that he should be awarded wage-loss disability benefits in excess of the anatomical ratings assigned; and that respondents should be ordered to pay attorney's fees as permitted by law.

Respondents No. 1 contend that all appropriate benefits have been paid with regard to this claim; that the claimant was released by Dr. Carle on February 17, 2004, to return to work in a full-duty capacity; that the claimant underwent a functional capacity evaluation which demonstrated submaximal effort; that additional medical treatment has not been recommended by any of his treating physicians; that the claimant is not entitled to further benefits, including wage-loss disability benefits; and in the event claimant is found to be entitled to wage-loss disability benefits, respondents contend that the same should be the responsibility

of the Second Injury Fund.

The Second Injury Fund contends that the claimant cannot prove he is permanently and totally disabled; that the claimant cannot prove that he is entitled to any degree of functional disability; and that respondents no. 1 cannot prove that the Second Injury Fund is liable under the facts of this case for functional disability benefits.

The Death & Permanent Total Disability Trust Fund contends that pursuant to Ark. Code Ann. § 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; that 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 Ark. Code Ann. § 11-9-502; that the Trust Fund has not controverted the claimant's entitlement to benefits; that Respondent No. 1 must first pay permanent anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits; and that Respondent No. 1 is not entitled to credit for payment of the claimant's permanent anatomical impairment rating for the compensable injury against its \$75,000 maximum liability for permanent and total disability benefits pursuant to Ark. Code Ann. § 11-9-502 (b)(1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury.
4. The claimant has failed to prove by a preponderance of the evidence that an independent medical evaluation is reasonably necessary in connection with the compensable injury.
5. The claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled.
6. The claimant has proven by a preponderance of the evidence that he has

sustained wage loss of 10% to the body as a whole over and above his anatomical impairment ratings.

7. The claimant has proven by a preponderance of the evidence that his 2002 compensable low back and neck injuries are the major cause of his wage-loss disability.
8. The respondents have failed to prove by a preponderance of the evidence that any of the claimant's pre-existing conditions combined with his compensable injury to produce his current disability status.
9. The Second Injury Fund therefore has no liability herein.
10. Respondents No. 1 have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant sustained compensable injuries to his low back and neck on January 22, 2002, when the forklift he was driving was rear-ended by a pick-up truck. A detailed history of the claimant's medical treatment and progress after the initial injury may be found in the prior Opinion filed in this claim on May 4, 2005, which Opinion was admitted into evidence herein as Commission Exhibit No. 2. The transcript of that prior hearing has been admitted into evidence as well.

Since the entry of the Opinion on May 4, 2005, the claimant has seen two doctors: Dr. Michael Payne and Dr. Thomas Hart. Dr. Payne prescribed medication and recommended that the claimant see a spine specialist. Dr. Hart reiterated his recommendation of a discogram, and in the alternative recommended that the claimant return to Dr. Ted Saer for a surgical evaluation.

The claimant was also seen by a vocational rehabilitation counselor, Bob White. In his written assessment of August 31, 2005, White wrote,

I don't believe [the claimant] is capable of holding a job, I doubt any employer would hire him and at age 47 with a 9th grade education, unless Dr. Hart can help him make significant medical progress, I doubt he will ever work again.

White testified in his deposition that he did not think that the claimant was permanently totally disabled. He did think, however, that the claimant could not return to a full-time job on a permanent basis in his present condition. He testified the claimant would be "competing for entry level and skilled jobs, probably at minimum wage seven [sic] or eight dollars an hour."

At the hearing, the claimant testified that his back "hurts all the time." He described the pain as a severe burning pain running from his back down into both legs, worse on the right. He testified that he is sometimes unable to turn his neck, and that he has pain running from his neck into his right shoulder. He also testified

that his right arm and hand are frequently numb.

At several points in the course of his treatment, the claimant has unsuccessfully attempted to return to work with the respondent-employer. On his most recent attempt, he tested positive for marijuana use and as a result was terminated by the respondent-employer.

II. Adjudication

A. Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The claimant has seen and been evaluated by multiple doctors – apparently more than a dozen – and only two have recommended additional treatment, Dr. Hart and Dr. Payne. Dr. Hart continues to maintain that a discogram is necessary, but a discogram was found in the prior opinion not to be reasonably necessary. Dr. Hart now recommends that the claimant be sent back to Dr. Edward Saer for a “surgical evaluation,” but Dr. Saer has already seen the claimant, and already

opined that he is not a surgical candidate. Dr. Hart also recommends consideration of a minimally invasive technique such as nucleoplasty, but the claimant has already been evaluated for such techniques by Dr. Sunder Krishnan, and Dr. Krishnan found that no further treatment was necessary.

Dr. Payne has prescribed medication and recommended evaluation by a “spine specialist,” but it does not appear Dr. Payne was aware of the multiple spine specialists who have evaluated the claimant’s condition and opined that no further treatment is indicated.

The following is a partial list of the specialists whom the claimant has seen: Dr. Warren Long (July 2004), Dr. P. B. Simpson (March 2004), Dr. Scott Carle (February 2004), Dr. Sunder Krishnan (April 2003), Dr. Edward Saer (March 2003), Dr. John Wilson (October 2002), and Dr. Jay Lipke (June 2002). These specialists have all thoroughly evaluated the claimant and exhausted all treatment options. Compared to the collective weight of the opinions offered by the claimant’s many other physicians, I cannot find that Dr. Hart’s or Dr. Payne’s recommendations alone are sufficient to meet the claimant’s burden of proof. I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury.

The Workers’ Compensation Act grants the Commission power to order

physical examination or treatment by a physician of the Commission's choosing at a location reasonably convenient to the claimant. ARK. CODE ANN. § 11-9-511. The granting of an IME is not automatic; the threshold question is whether it is reasonable and necessary. *King v. Willow Oaks Acres*, A.W.C.C. E903202 (Jan. 25, 2001).

The claimant seeks an independent medical evaluation (IME) to determine what additional treatment is appropriate. But as discussed above, there is insufficient evidence to show that any additional treatment is reasonably necessary. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that an independent medical evaluation is reasonably necessary in connection with the compensable injury.

B. Permanent Benefits

The claimant contends that he is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519 (e). The claimant bears the burden of proving that he is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical

impairment rating, the Commission may consider “such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.” ARK. CODE ANN. § 11-9-522 (b)(1). These “other matters” may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, 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 claimant is 47 years of age with a 9th grade education. He worked for the respondent-employer for twenty-seven years as a forklift driver. Prior to that he worked as a truck driver. Though he has driven forklifts throughout his tenure with the respondent-employer, he testified that he also had supervisory experience, supervising as many as fifteen employees at a time. A functional capacity evaluation performed July 2, 2002, determined the claimant was capable of performing medium-level work, and the FCE test indicated an unreliable effort by the claimant. An evaluation performed by Dr. Warren Long on July 23, 2004, determined the claimant was capable of performing light-duty work, though it too indicated some aspects of the claimant's effort were unreliable.

After reviewing the evidence herein, including the testimony of Bob White,

I am not convinced that the claimant is unable to earn any meaningful wages. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. However, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 10% to the body as a whole over and above his anatomical impairment ratings. Because I so find, the issues regarding the liability of the Death & Permanent Total Disability Trust Fund are moot.

There is no evidence that the claimant's prior disabilities have had any permanent effect on his ability to work. Even though he had back and neck problems prior to his compensable injuries, there is no evidence that these prior problems substantially impaired his ability to work. I find that the claimant has proven by a preponderance of the evidence that his 2002 compensable low back and neck injuries are the major cause of his wage-loss disability.

C. Second Injury Fund Liability

The Second Injury Fund exists to protect employers of handicapped workers so that the employers will not be held liable "for a greater disability or impairment than actually occurred while the worker was in his or her employment." ARK. CODE ANN. § 11-9-525(a)(1). Three elements must be proven to establish the liability of the

Second Injury Fund. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Though the claimant has some pre-existing conditions, I can find no evidence in the record that these prior conditions have any material effect on his current ability to work. I find that the respondents have failed to prove by a preponderance of the evidence that any of the claimant's pre-existing conditions combined with his compensable injury to produce his current disability status. I therefore conclude that the Second Injury Fund has no liability herein.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to wage-loss disability benefits in the amount of 10% to the body as a whole over and above his anatomical impairment ratings. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge