

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F306423

BILL NEAL, Employee	CLAIMANT
NABHOLZ CONSTRUCTION COMPANY, Employer	RESPONDENT #1
ST. PAUL INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JUNE 7, 2005

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

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

Respondent #1 represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On May 2, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 7, 2005, and a pre-hearing order was filed on March 8, 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 claimant suffered a compensable injury to his back while working for respondent on July 28, 2001.
3. Claimant earned sufficient wages to entitle him to compensation at the rate of \$407.00 for temporary total disability benefits and \$305.00 for permanent partial disability benefits.
4. Respondent #1 has accepted liability for permanent impairment in an amount

equal to 2% to the body as a whole.

5. The Second Injury Fund has accepted liability for compensation benefits and has agreed to pay claimant permanent disability benefits in an amount equal to 35% to the body as a whole.

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

1. Claimant's entitlement to additional temporary total disability benefits from February 11, 2003 through May 27, 2003.

2. Claimant's entitlement to permanent partial disability benefits in excess of the 2% accepted by respondent #1 and in excess of the 35% accepted by the Second Injury Fund.

3. Attorney fee.

The claimant contends that he re-entered his healing period and is entitled to temporary total disability benefits beginning February 11, 2003 and continuing through May 27, 2003. Claimant also contends that his permanent impairment is greater than the 2% accepted by respondent #1. Claimant contends that he suffered a recurrent herniated disc and according to the AMA Guides this would entitle him to an impairment of 7% to the body as a whole as reflected in Dr. Blankenship's letter of January 24, 2003. Claimant also contends that he has suffered a loss in wage earning capacity greater than the 35% accepted by the Second Injury Fund. Finally, claimant seeks a controverted attorney fee on temporary total disability benefits, on the 2% rating accepted by respondent #1, and on all other unpaid disability benefits.

Respondent #1 contends that claimant is not entitled to any additional temporary total disability benefits and that claimant's permanent impairment equals 2% to the body as a whole, not 7%.

The Second Injury Fund contends that claimant is not entitled to any permanent partial disability benefits for loss in wage earning capacity in excess of the 35% previously

accepted.

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 March 7, 2005, and contained in a pre-hearing order filed March 8, 2005, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits.

3. Claimant has failed to prove by a preponderance of the evidence that his permanent impairment exceeds the 2% previously accepted by respondent #1 or that he has suffered a loss in wage earning capacity in excess of the 35% accepted by the Second Injury Fund.

#### FACTUAL BACKGROUND

The claimant is a 65-year-old man with an eighth grade education who obtained his GED in the early 1990s. Claimant's primary jobs throughout his lifetime have included heavy equipment/machinery repair and welding.

The claimant's prior medical history indicates that he suffered a work-related injury to his back in 1989 which resulted in surgery at the L5-S1 level. In addition, claimant also underwent carpal tunnel surgery in the late 1990s.

Claimant testified that he worked for respondent #1 for seven and a half to eight years. Claimant's job duties with respondent #1 included heavy and light equipment

repair, machinery repair, and welding. The parties stipulated that on July 28, 2001 the claimant suffered a compensable injury to his low back while working for the respondent employer. Claimant testified that on that date he was thrown into the air when a concrete slab broke, causing him to land on his side and injure his low back. Following his compensable injury the claimant has been treated by several physicians, primarily Drs. Danks, Blankenship, and Cannon.

Claimant was initially examined by Dr. Danks on September 11, 2001. In a report dated almost two weeks later on September 25, 2001, Dr. Danks noted that an MRI performed in 2000 shows an area at L5-S1 which was consistent with a possible recurrent disc. As a result, Dr. Danks ordered a repeat MRI scan. Following that MRI scan Dr. Danks in a report dated September 21, 2001, stated that the claimant has "epidural fibrosis in the later recess of L5-S1 with facet hypertrophy, and a mild synovial cyst pressing on the S1 nerve root." Dr. Danks did not recommend surgery, but instead referred claimant to Dr. Cannon for possible epidural steroid injections. Dr. Danks noted that claimant was to return to see him as needed.

Claimant was evaluated by Dr. Cannon on October 4, 2001, and was assessed with several conditions. These included degenerative disc disease, epidural fibrosis at L5-S1, right L5-S1 radiculopathy, facet joint atrophy, synovial cyst/facet joint atrophy, and sciatica. Dr. Cannon's report of that date indicates that he will set up epidural steroid injections.

More than one year later the claimant was evaluated by Dr. Blankenship, neurosurgeon. Dr. Blankenship in a report dated September 18, 2002 indicated that claimant suffered from post-laminectomy syndrome. Dr. Blankenship indicated that claimant had a disc out in a lateral position but due to claimant's complaints he believed that the cause was neuropathic, not compressive. Dr. Blankenship recommended no surgery, but prescribed an aggressive exercise program and medication. Dr. Blankenship continued to treat claimant conservatively and in a report dated December 10, 2002 noted

that claimant was 80 to 90 percent better than before therapy. Dr. Blankenship indicated that he wanted to wean claimant off medication and that claimant should contact his office if he had a marked exacerbation of pain; otherwise, no return visits were scheduled.

In a letter dated January 24, 2003 Dr. Blankenship stated that claimant had reached maximum medical improvement as of December 10, 2002. Dr. Blankenship also assigned the claimant a permanent physical impairment rating in an amount equal to 7% to the body as a whole based upon the AMA Guides.

On February 11, 2003 claimant returned to Dr. Blankenship complaining of burning pain in his right foot. Dr. Blankenship prescribed medication and scheduled a functional capacities evaluation. In a report dated March 11, 2003, Dr. Blankenship noted that the claimant had a slight response to medication but no significant changes. Dr. Blankenship still recommended no surgery and indicated that claimant should discuss long-term maintenance with Dr. Cannon. Dr. Blankenship also indicated that a dorsal column stimulator might be considered.

In a report dated April 10, 2003, Dr. Cannon indicated that he had a conversation with the claimant and his case worker about a trial spinal cord stimulator. Claimant agreed to proceed with the trial and the spinal cord stimulator was inserted on May 12, 2003. Claimant returned to Dr. Blankenship following that insertion procedure on May 27, 2003. Dr. Blankenship noted that the claimant had a good result with the stimulator but the claimant did not want a permanent implant. Dr. Blankenship stated that the claimant had a lifting restriction of 50 pounds and that he should follow the restrictions contained in the functional capacities evaluation. Dr. Blankenship noted that sedentary activity may create more pain than activity that involves some walking. Dr. Blankenship stated that even though he felt that claimant had a recurrent disc herniation at L5-S1, surgery was not warranted. In addition, Dr. Blankenship also assigned the claimant an impairment rating in an amount equal to 2% to the body as a whole.

Respondent #1 accepted claimant's injury as compensable and paid some compensation benefits including medical benefits. Respondent #1 also accepted a permanent physical impairment rating in an amount equal to 2% to the body as a whole as assigned by Dr. Blankenship on May 27, 2003. Subsequently, the Second Injury Fund was also made a party to this claim and it accepted liability for permanent disability benefits in an amount equal to 35% to the body as a whole based upon a loss in wage earning capacity.

Claimant has filed this claim contending that he is entitled to temporary total disability benefits beginning February 11, 2003 and continuing through May 27, 2003. Claimant also contends that his permanent impairment is 7% to the body as a whole, not the 2% accepted by respondent #1. Claimant also contends that he has suffered a loss in wage earning capacity in an amount greater than the 35% accepted by the Second Injury Fund. Finally, claimant requests a controverted attorney fee on temporary total disability benefits, the 2% rating accepted by respondent #1, and any other unpaid compensation benefits.

#### ADJUDICATION

The initial issue for consideration involves claimant's contention that he is entitled to temporary total disability benefits from February 11, 2003 through May 27, 2003. The claimant's injury is an unscheduled injury; therefore, in order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). While I do find that claimant re-entered his healing period as of February 11, 2003, I find insufficient evidence that claimant was totally incapacitated from earning wages as of that date.

On January 24, 2003, Dr. Blankenship wrote a letter indicating that claimant had reached maximum medical improvement as of December 10, 2002. Following that report, claimant returned to Dr. Blankenship on February 11, 2003 complaining of a burning pain in his right foot. Dr. Blankenship prescribed additional medication, scheduled an FCE, and eventually referred claimant to Dr. Cannon who inserted a spinal cord stimulator. Given this evidence, I find that claimant did re-enter his healing period as of February 11, 2003 when he sought additional medical treatment from Dr. Blankenship.

Even though claimant re-entered a healing period beginning on February 11, 2003, I find insufficient evidence indicating that claimant suffered a total incapacity to earn wages as of that date. First, I note that since the time of the claimant's injury on July 28, 2001 he had continued to work for the respondent with an agreement that he could lie down as needed. Following his compensable injury claimant continued to work for the respondent from the date of his injury until he was laid off in January 2003. While medical reports mention the fact that claimant is laid off from work, those medical reports do not indicate that claimant is totally incapacitated from earning wages subsequent to February 11.

In conjunction with this issue, I note that claimant completed an application for unemployment benefits on January 21, 2003 indicating that he could begin working immediately. As a result of that application claimant began receiving unemployment compensation benefits in February 2003 and continued to receive those benefits until November 2003 at the rate of \$282.00 per week. Furthermore, in April 2003 the claimant applied for and began receiving retirement benefits at the rate of \$917.00 per month.

In summary, even though the claimant may have re-entered his healing period as of February 11, I find insufficient evidence that claimant was totally incapacitated from working subsequent to that date. Obviously, the claimant was unable to work the day of the out-patient procedure when the spinal cord stimulator was implanted, but based upon claimant's testimony that he did not miss any work from the date of his injury through

January 2003, claimant has never received temporary total disability benefits because he has not been off work. Therefore, even if claimant suffered a total incapacity to earn wages on the date of the out-patient procedure, according to A.C.A. §11-9-501(a) compensation benefits are not allowed for the first seven days of disability. Accordingly, even though the claimant re-entered his healing period as of February 11, 2003, claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages with the exception of the day the spinal cord stimulator was implanted. This one day was not sufficient to entitle claimant to compensation benefits pursuant to A.C.A. §11-9-501(a).

The next issue for consideration involves claimant's contention that his permanent impairment equals 7% to the body as a whole, not the 2% as accepted by respondent #1.

Dr. Blankenship assigned both a 7% and a 2% impairment rating. In his letter of January 24, 2003, Dr. Blankenship assigned the claimant a permanent physical impairment rating in an amount equal to 7% to the body as a whole. Dr. Blankenship stated that the claimant had a recurrent disc herniation at L5-S1 which would entitle him to a rating of 7%.

Following claimant's additional complaints and the insertion of a spinal cord stimulator, Dr. Blankenship in a report dated May 27, 2003 changed his rating pursuant to the AMA Guides to find that claimant had a 2% rating to the body as a whole as a result of his most recent injury.

First, I believe it is unclear as to whether the claimant suffered a recurrent herniated disc which was causally related to the July 28, 2001 injury. This is based on Dr. Danks' report of September 25, 2001. In his report of that date Dr. Danks noted that he reviewed an MRI scan which was performed in 2000 which showed an area at L5-S1 which was consistent with a possible recurrent disc. This was before claimant's compensable injury. Second, even if one assumes that the claimant had a recurrent disc, Dr. Blankenship in his most recent report of May 27, 2003 attempted to rate claimant's overall condition with

consideration given to the claimant's prior back injury and subsequent surgery. According to Dr. Blankenship's report and Table 75 of the AMA Guides, a surgically treated lumbar disc without residual signs or symptoms results in an impairment rating in an amount equal to 8% to the body as a whole. According to Dr. Blankenship's report and Table 75, multiple operations with or without residual symptoms only result in an additional 2% impairment. In this particular case, claimant did not even undergo a surgical procedure following the July 28, 2001 injury.

I believe that Dr. Blankenship's interpretation of Table 75 of the AMA Guides is correct. Following claimant's original low back injury and surgery, he suffered a permanent physical impairment equal to 8% to the body as a whole. That same rating is not assigned anew at 8% each and every time an injury occurs to that same level. This is reflected in Table 75 which assigns only an additional 2% rating for a second operation to that same level. Finally, I believe it is important to note that Dr. Blankenship's report of May 27, 2003 regarding the assignment of a permanent rating is more detailed than the discussion in his letter of January 24, 2003. Further, the rating in May 2003 occurred after the insertion of the spinal cord stimulator and improvement in claimant's condition.

In short, I find that the opinion of Dr. Blankenship stated in his report of May 27, 2003 is credible and entitled to great weight and also consistent with Table 75 of the *AMA Guides, Fourth Edition*. Accordingly, based upon that evidence, I find that claimant suffered a permanent physical impairment as a result of his compensable injury in the amount of 2% to the body as a whole which was previously accepted by Respondent #1.

The next issue for consideration involves claimant's contention that he is entitled to wage loss in excess of the 35% previously accepted by the Second Injury Fund. Pursuant to A.C.A. §11-9-522 when considering claims for loss in wage earning capacity the Commission may take into account in addition to the percentage of permanent physical impairment various factors including the claimant's age, education, work experience, and

other matters reasonably expected to affect their future earning capacity.

In this particular case, the claimant is a 65-year-old man with an eighth grade education who obtained his GED in the early 1990s. Claimant's prior work experiences have primarily involved heavy equipment/machinery repair and welding. Prior to working for respondent #1 seven and a half to eight years claimant performed the same type of job function for REB Industries, Howard's Hydraulic, and Neff Welding Company.

As previously noted, the claimant has undergone no surgery as a result of his July 28, 2001 injury. Claimant continued to work for respondent from the date of his injury until he was laid off in January 2003. Dr. Blankenship assigned the claimant a 50-pound lifting restriction and indicated that he should follow the limitations set forth within the functional capacities evaluation. The claimant underwent the functional capacities evaluation on February 18, 2003. That evaluation indicated that claimant could perform some tasks of a welder but not others. The evaluation indicated that claimant could perform work as a welder if there were lifting restrictions and freedom to move around as needed. The report also indicated that claimant would benefit from performing that work only part time or occasionally. Claimant should not perform that type of work on a daily basis. On the other hand, claimant could perform work in the light physical demand level and some work in the medium physical demand level.

Following claimant's layoff by respondent #1 he attempted to make some contacts with regard to returning to work. Claimant was not hired by an employer but instead performed various odd jobs for which he earned approximately \$2,000.00. Claimant testified that the jobs he tried to get were machinery and mechanical types of jobs which he had always performed. Claimant testified that he has not looked for jobs outside of welding/construction. This is significant because according to the functional capacities evaluation claimant is limited in his ability to perform those types of jobs and should be looking for other types of employment. The Second Injury Fund's acceptance of a loss

in wage earning capacity in an amount equal to 35% to the body as a whole reflects an acknowledgment that claimant will no longer be able to return to his prior job duties. However, claimant has not looked for work outside of welding/construction.

Finally, I also believe it is important to note that claimant is currently drawing retirement benefits in the amount of \$917.00 per month.

In summary, according to the functional capacities evaluation claimant would only be able to return to jobs involving welding in limited circumstances. Claimant has received a lifting restriction of 50 pounds. The evaluation also indicates that claimant can perform work in the light physical to medium physical area. While claimant will not be able to return to the job he performed prior to his injury, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a loss in wage earning capacity in an amount in excess of the 35% previously accepted by the Second Injury Fund.

The final issue for consideration involves a controverted attorney fee. Since no temporary total disability benefits were awarded or additional permanent partial disability benefits, claimant's attorney is not entitled to a fee. However, claimant's attorney also contends he is entitled to an attorney fee on the 2% impairment rating previously accepted by respondent #1. With respect to this issue, I note that claimant testified that respondent #1 did not pay an impairment rating after Dr. Blankenship assigned it in January 2003. However, Dr. Blankenship in his report of January 2003 assigned an impairment rating of 7% and did not assign the 2% rating until May 27, 2003. It is unclear from a review of the evidence as to when respondent #1 accepted this 2% rating. The parties did stipulate that respondent #1 had accepted the 2% rating. Based upon the limited evidence presented on this issue, I find insufficient evidence that respondent #1 controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 2% to the body as a whole; therefore, claimant's attorney is not entitled to an attorney fee.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 11, 2003 through May 27, 2003. Claimant has also failed to prove by a preponderance of the evidence that he suffered a permanent impairment in excess of the 2% accepted by respondent #1 or a loss in wage earning capacity in excess of the 35% accepted by the Second Injury Fund. Finally, claimant's attorney is not entitled to any additional attorney fee. Claimant's claim for additional compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE