

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E014514 & E412347**

**JOHN W. PARKS, EMPLOYEE**

**CLAIMANT**

**ARKANSAS HIGHWAY & TRANSPORTATION  
DEPARTMENT, EMPLOYER**

**RESPONDENT NO. 1**

**PUBLIC EMPLOYEE CLAIMS DIV., CARRIER**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**OPINION FILED JANUARY 10, 2005**

Hearing before Administrative Law Judge J. Mark White on December 9, 2004, in Texarkana, Miller County, Arkansas.

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

Respondents No. 1 represented by Mr. William Wharton, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On December 9, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on September 20, 2004, and a Prehearing Order was entered that same day. A copy of the September 20, 2004, 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 employee-employer-carrier relationship existed at all relevant times, including July 30, 1990, and July 14, 1994; that the claimant sustained compensable injuries to his back on July 30, 1990, and to his neck on July 14, 1994; that respondents no. 1 accepted the July 30, 1990, and July 14, 1994, injuries as compensable and paid benefits; that the claimant was assigned a 5% permanent impairment to the body as a whole associated with his compensable back injury of July 30, 1990, which was accepted and paid; that the claimant sustained a 10% permanent impairment rating to the body as a whole associated with his compensable neck injury which was accepted and paid; that the claimant returned to work following the compensable injury on or about December 22, 1994, and he continued to work full-time for respondent no. 1 until April 22, 2002; that the claimant's last day of work was June 9, 2003; that the claimant has since retired from his position with respondent no. 1; and that as of July 14, 1994, the claimant earned an average weekly wage of \$420, entitling him to a compensation rate of \$267 for total disability benefits and \$200 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant

is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his assigned permanent anatomical impairment rating; the liability, if any, of the Second Injury Fund; whether the functional capacity evaluation obtained by the claimant was reasonably necessary in connection with the compensable injury; and controversion and attorney's fees.

The claimant contends that he is now permanently totally disabled, or in the alternative is entitled to wage-loss disability benefits in excess of the permanent impairment ratings assigned and paid; that he underwent a functional capacity evaluation at a cost of \$750; that the evaluation was reasonable, necessary and related and should be ordered paid; and that his attorney's fees should be paid as permitted by law.

Respondents No. 1 contend that the claimant was released to resume his regular work duties on June 2, 2003; that they have paid all benefits to which the claimant is entitled and will continue to pay for future medical treatment; and that the Second Injury Fund is liable for any permanent disability benefits to which the claimant is entitled beyond the impairment rating because the combination of his impairment and his latest injury constitute a greater impairment than the last injury considered alone and of itself.

Respondent No. 2, the Second Injury Fund, contends that there are no

objective findings underlying the impairment rating assigned for the claimant's prior injury; that the rating is therefore not valid and there is no pre-existing condition or disability to support a finding of Fund liability.

### **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 he is permanently totally disabled.
4. The claimant has proven by a preponderance of the evidence that he has sustained wage loss of 40% over and above his permanent anatomical impairment rating of 10% to the body as a whole.

5. The claimant has proven by a preponderance of the evidence that his 1994 compensable neck injury is the major cause of his wage-loss disability.
6. The respondents have failed to prove by a preponderance of the evidence that the claimant's prior impairment combined with the recent compensable injury to produce his current disability status.
7. The Second Injury Fund therefore has no liability herein.
8. The claimant has proven by a preponderance of the evidence that his functional capacity evaluation was reasonably necessary in connection with the compensable injury.
9. The respondents have controverted all benefits sought herein.

## **DISCUSSION**

### **I. History**

The claimant worked for the respondent-employer for thirty-one years as a "parts runner." His job was to drive to various destinations to pick up equipment parts and deliver them back to the district shop in Hope. He testified that his average trip was about 120 miles, though he sometimes drove 200 miles or more. On July 30, 1990, the claimant sustained a compensable injury to his low back while moving a 55-gallon drum. He was diagnosed with a back strain; though his doctors

did palpate muscle spasms at times, an MRI exam revealed no sign of injury. He missed "nine or ten weeks from work" before he was released to return to work with restrictions. He underwent no surgery and was ultimately assigned a 5% permanent anatomical impairment rating, which the respondents accepted and paid. The claimant testified, however, that he continued to experience pain in his low back into his legs from then on, and that he continued to take medication for the pain.

On July 14, 1994, the claimant sustained a compensable injury to his neck in a motor vehicle accident. An MRI exam performed August 23 revealed "mild disc degeneration with a small broad based central disc herniation" at C6-7. After conservative medical treatment the claimant was able to return to work with restrictions, and by late 1994 he had resumed his regular duties.

In the following years he was able to work but he continued to have pain in his neck and right shoulder, and he eventually developed numbness in his right arm and fingers. By April 2002, he testified, he was unable to continue working because of the pain, and he took off from work. An MRI exam performed April 30, 2002, revealed, "narrowing and posterior ridging at the C6-C7 level." A later CT exam found disc bulges at both C6-7 and C5-6.

After an EMG test he was also diagnosed with carpal tunnel syndrome and underwent a carpal tunnel release on the right, though the parties agree this

condition was unrelated to his compensable injuries. Conservative treatment failed to alleviate his neck and shoulder problems, and an MRI exam performed February 10, 2003, showed the bulging at C6-7 had grown progressively worse, producing “a large narrowing of the disc space at C6-7 with widespread disc protrusion and some spinal stenosis of moderate severity.”

On April 23, 2003, the claimant underwent surgery, an anterior cervical decompression and fusion at C6-7, by Dr. Steven Cathey. The claimant testified, and Dr. Cathey’s notes corroborate, that the surgery did help his pain and eliminated the numbness in his right fingers. Notably, when the claimant recovered Dr. Cathey placed no restrictions on him and released him to full-duty work; the claimant returned to work on June 2, 2003. Within two days, he began having increased pain as well as difficulty sleeping. He worked until June 9, when he chose to retire from the respondent-employer.

The claimant continues to take prescription medication under the direction of his personal physician. He described his current condition as follows:

I have - basically I ache from the middle of my back down into my hips. I have some sharp pains in my legs. My shoulder and neck, my neck has pain in it any time I move it.

Q. Does that pain feel exactly like the pain in your low back or is it a different feeling?

A. No, sir. It's a more steady pain. Instead of it being like an ache, it's more of a steady pain. It's sore back up in under my right shoulder blade.

Q. Do you have the same strength in your right arm as you do your left?

A. No, sir.

He testified that he is able to do some minor housekeeping tasks but that he is unable to vacuum, sweep or mop. He has a workshop where he "piddles," making birdhouses and doing other woodwork. He testified that he is able to work in his shop for only twenty or thirty minutes before he must rest. He is unable to hunt or fish anymore, and he testified that he drives as little as possible. He testified that he spends on average two or more hours per day lying down and resting.

After the surgery, Dr. Cathey assigned the claimant a 10% permanent anatomical impairment rating, which the respondents accepted and paid. Though the respondents controvert the claimant's entitlement to additional permanent disability benefits, they continue to pay for his medical treatment and medication.

## **II. Adjudication**

### **A. Permanent Total Disability & Wage Loss**

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).

To a point, the claimant exhibited a significant motivation to return to work. On three separate occasions he returned to work despite his continued complaints of back and neck pain. More importantly, he had a significant financial incentive to continue working, in that by retiring he lost the opportunity to continue in the DROP program. This is a retirement benefit whereby the claimant was able to earn his regular salary from the respondent-employer while at the same time earning retirement benefits which were deposited in an interest-bearing account. Had the

claimant continued working, in several years he would have received a substantial lump-sum payment consisting of those accrued retirement benefits. The claimant testified that he had intended to continue working for several more years but for his injury. By retiring earlier than he had intended, the claimant lost the opportunity to continue earning both his salary and his retirement benefits. Given that he no longer has this financial incentive to work, and given his testimony at the hearing as to his work capabilities, I find that the claimant is no longer motivated to return to work.

The claimant is fifty-seven years of age. He has an eleventh-grade education and no specialized vocational training, though he does still have his CDL. He worked the same job for his entire thirty-one year career with the respondent-employer; before that he worked as truck driver and as a laborer. A functional capacity evaluation performed September 28, 2004, concluded that the claimant is capable of performing work at the Light level with occasional lifting and carrying of no more than thirty pounds, and that he is limited in his ability to sit for longer than forty-five minutes. The evaluation indicated that the claimant gave a "reliable effort," was "consistent throughout the evaluation," and gave "no signs of symptom magnification or other inappropriate illness response." Dr. Young, the claimant's personal physician, opined that the claimant "cannot go back to work." I recognize that Dr. Cathey released the claimant to return to work without restriction;

however, in light of the findings of the claimant's functional capacity evaluation I cannot find Dr. Cathey's opinion in this regard to be credible.

Given the results of the claimant's functional capacity evaluation, combined with his testimony and the medical evidence, I am not convinced that the claimant is unable to earn any meaningful wages. I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. However, given his age, education, work experience, medical treatment and diagnosis, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 40% over and above his permanent anatomical impairment rating of 10% to the body as a whole.

The claimant's testimony suggests that his compensable neck injury is the primary debilitating factor of his present condition. Though he does have low back pain, he was able to continue working for more than a decade in spite of it. His carpal tunnel syndrome appears to have resolved, and the record identifies no other condition that substantially impacts his ability to work, other than his compensable neck injury. I find that the claimant has proven by a preponderance of the evidence that his 1994 compensable neck injury is the major cause of his wage-loss disability.

## **B. 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).

The claimant did have a prior permanent partial disability as evidenced by the 5% impairment rating paid by the respondents for the 1990 compensable back injury. The Second Injury Fund contends this rating was invalid for lack of objective findings, but I note that the claimant’s doctors at the time noted the presence of muscle spasms, unquestionably an objective finding. *University of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

Nonetheless, I am not convinced that the claimant’s prior low back injury has combined with his cervical injury to produce his current disability status. Notably,

the claimant was able to return to his regular-duty work after his low back injury, and he continued working for more than a decade thereafter. There is nothing in the claimant's testimony or medical evidence to show that his low back condition is worse now than it was prior to the 1994 cervical injury, and the claimant's testimony suggests that his shoulder and neck pain – that is, his cervical injury – is the primary debilitating factor in his present condition. I find that the respondents have failed to prove by a preponderance of the evidence that the claimant's prior impairment combined with the recent compensable injury to produce his current disability status. I therefore conclude that the Second Injury Fund has no liability herein.

### **C. Additional 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).

At the request of his attorney, the claimant underwent a functional capacity evaluation and paid for it himself, a cost of \$750. I find that the claimant has proven by a preponderance of the evidence that this functional capacity evaluation was

reasonably necessary in connection with the compensable injury.

### **AWARD**

The claimant has proven by a preponderance of the evidence that he is entitled to wage-loss benefits in the amount of 40% over and above his permanent anatomical impairment rating of 10% to the body as a whole; and that his functional capacity evaluation was reasonably necessary in connection with the compensable injury. 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 the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

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.**

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**HON. J. MARK WHITE**  
Administrative Law Judge