

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E706234

FRANKLIN M. RIEDY		CLAIMANT
TOMLINSON ASPHALT		RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED FEBRUARY 10, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondent No. 1 represented by LEE MULDROW, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 22, 2004, in Springdale, Arkansas. A Prehearing Order was entered in this case on February 14, 2002. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated at that time. However, the claimant continued under active medical treatment following the entry of the Prehearing Order. As a result, certain changes and additions were made in the stipulations and an addition was made in the issues to be litigated. A copy of the initial Prehearing Order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On May 7, 1997, the relationship of employee-employer-carrier existed between the parties.
2. On May 7, 1997, the appropriate weekly compensation rates are \$253.00 for total disability and \$190.00 for permanent partial disability benefits.

3. On May 7, 1997, the claimant sustained a compensable injury to his lower back.
4. There is no dispute over the payment of medical expenses or temporary total disability benefits.
5. The respondents, Tomlinson Asphalt and Zurich American Insurance, have accepted a permanent physical impairment of 17% to the body as a whole and are paying benefits accordingly.
6. The claimant's last surgery on his lumbar spine was on July 26, 2002.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The extent of permanent disability, including permanent total disability.
2. Whether the Second Injury Fund has any liability in this claim.
3. The date upon which the claimant's healing period ended.
4. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

- (a) That he has been rendered permanently totally disabled either as a result of his compensable back injury, alone, or as a result of the combined effects of his compensable injury and his pre-existing permanent head and knee injuries;
- (b) that, in the alternative, he has experienced permanent disability greatly in excess of his permanent impairment;
- (c) that his attorney is entitled to the maximum fee on all controverted benefits.

In regard to these issues, the respondent employer-carrier contends:

"Respondents contend claimant's disability is less than total; further, that this claim presents Second Injury Fund liability. This is predicated on the fact that claimant had a prior significant left knee injury which resulted in an assignment of 40% impairment to the left lower extremity. Also, that claimant was involved in a motor vehicle accident in which he sustained a fractured skull. Claimant has a plate in his head. Residuals from both conditions contribute to the level of claimant's current disability."

In regard to these issues, the Second Injury Fund contends:

- (1) The claimant cannot prove he is permanently and totally disabled pursuant to Ark. Code Ann. §11-9-522 and 519.
- (2) By his actions, the claimant has waived rehabilitation and refused to cooperate with a program of rehabilitation on job placement which prohibits him from receiving permanent partial disability benefits in excess of his physical impairment rating pursuant to Ark. Code Ann. §11-9-505.
- (3) The claimant's neuropsychological findings are not of a physical nature to constitute a pre-existing disability or impairment pursuant to Mid State Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W. 2d 539(1988). Additionally, the neuropsychological findings were latent pursuant to Purolator Courier v. Chancey, 40 Ark. App. 1, 841 S.W. 2d 159(1992), and therefore not a basis for a combination to prove Second Injury Fund liability, Second Injury Fund v. James River Corp. 53Ark. App. 204(1996)
- (4) With the claimant's four surgeries for the last May 20, 1997 injury, there is no combination of injuries greater than the last injury in and of itself.

DISCUSSION

I. END OF THE HEALING PERIOD

The first issue to be addressed is the date upon which the claimant's healing period ended. Under applicable law, the healing period continues until the claimant has achieved the maximum benefit of time and medical treatment for the resolution or stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or (at least) stabilized, a level whether nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended. The mere continuation of chronic symptoms, after the underlying physical damage has stabilized, is not sufficient, in and of itself, to continue the healing period. It has also long been recognized that a claimant can re-enter his healing period, if additional time or

medical treatment becomes necessary to maintain the level of healing achieved, or to further improve the physical damage caused by the compensable injury.

The issue of the duration of the healing period is effectively a medical question. Thus, the resolution of this issue rests on the greater weight of the credible medical evidence presented.

Following his compensable back injury, the claimant was initially treated by Dr. Kirk Johnson, using various chiropractic modalities. In June of 1997, the claimant came under the care of Dr. Vincent Runnels, a neurosurgeon. Dr. Runnels provided the claimant with various conservative treatment modalities. Ultimately, the claimant came under the treatment of Dr. Luke Knox, a neurosurgeon, in August of 1998. Dr. Knox performed a decompression and fusion at the L4-5 level in October of 1998. In November of 1999, Dr. Knox surgically removed the hardware from the initial surgery.

In a report dated March 14, 2000, Dr. Knox indicated that the claimant had achieved the maximum benefit of time and medical treatment in regard to the healing of his compensable injury. At that time, he assessed a permanent physical impairment of 15% to the body as a whole.

However, in May of 2000, the claimant experienced a recurrence of his radicular complaints and returned to Dr. Knox. At that time, Dr. Knox diagnosed a defect at the L3-4 level, which he opined was a compensable consequence or complication of the claimant's initial injury at the L4-5 level. Dr. Knox performed a surgical decompression at the L3-4 level, on or about December 29, 2000. I would note that although the parties introduced over 270 pages of medical reports and records, they failed to introduce the operative report from the December 29, 2000 surgery, but introduced two pathology reports on other individuals who were operated on by Dr. Knox at this same time. Thereafter, the claimant continued under active

medical treatment by Dr. Knox for this compensable consequence.

In the report dated December 4, 2001, Dr. Knox again indicated that the claimant had achieved the maximum benefit of medical treatment in regard to compensable back injury. Although the claimant had undergone another operative procedure at a second level in December of 2000, Dr. Knox restated or paraphrased his previous assessment of a permanent physical impairment of 15% to the body as a whole. It is also curious to note that in this report, Dr. Knox clearly recognized the likelihood of even further surgical intervention, but indicated that he was rating the claimant because:

"I believe it would be prudent to go ahead and close out his workers' compensation claim from the aspect of his surgery done several years ago. He has reached that point of maximum medical improvement."

It appears from the lack of an increase in the impairment rating and the foregoing statement that Dr. Knox was only indicating that the claimant has achieved the maximum benefit of time and medical treatment in regard to his initial L4-5 injury, but was not expressing any opinion concerning the physical damage caused by the subsequent compensable consequences involving the L3-4 level. The medical evidence also shows that the claimant continued under active medical treatment by Dr. Knox and ultimately underwent a surgical fusion some time in mid 2002.

Again, neither party seen fit to offer the operative report of Dr. Knox from this last surgery. However, it would appear that the surgery performed likely involved a fusion of the L3-4 and L5- S1 vertebrae as recommended by Dr. Blankenship in his report of June 25, 2002.

The medical records show that Dr. Knox again gave a permanent physical impairment rating on July 15, 2003. At that time Dr. Knox indicated the claimant would be entitled to an additional 2% for the "second" or most recent operation. However, he does not indicate that the claimant had been released from continued

treatment. In fact, he stated that the claimant was to return to his office in three months. In subsequent reports, he noted that the claimant may require a surgical removal of the "hardware" from the most recent surgical procedure.

In his report of August 25, 2003, Dr. Knox expressly addressed the matter of the end of the claimant's healing period, stating:

"I would recommend that Mr. Riedy wait until the two-year anniversary of his fusion prior to concluding that he has reached maximum medical improvement. Typically, I wait one year. However, in the case of Mr. Riedy, he has been found to have multiple problems post operatively, and, because of this, I would recommend that we wait for an extended period of time."

Finally, in his report of May 25, 2004, Dr. Knox indicated that there was a "potential" that the claimant would require further medical treatment. However, he gave no indication that the surgical fusion was not stabilized and only scheduled the claimant for routine follow up in one year. There is no indication in this report that the claimant required any further medical treatment at that time.

After consideration of the foregoing evidence, it is my opinion that the greater weight of the credible medical evidence establishes that the claimant continued within the healing period from the effects of his compensable low back injury and its subsequent compensable consequences through May 25, 2004. The greater weight of the evidence fails to show that he continued within his healing period after that date.

II. PERMANENT PHYSICAL IMPAIRMENT

The next issue is the degree or percentage of permanent physical impairment, that has been caused by the claimant's compensable injury and its subsequent compensable consequences. The respondent employer-carrier has voluntarily accepted a permanent physical impairment of 17% to the body as a whole and has instituted the payment of permanent partial disability benefits equivalent to this degree of impairment. The burden rests upon the claimant to prove the existence of any

permanent physical impairment in excess of 17% to the body as a whole.

The degree of permanent physical impairment, acknowledged by the respondent employer-carrier, is based upon the medical opinions of Dr. Knox. Dr. Knox is a qualified neurosurgeon with considerable expertise in the area of medicine associated with the claimant's difficulties. Certainly, his expert opinion is entitled to significant weight and credit. However, the Act provides that it is the duty of this Commission, rather than any physician, to calculate the degree or percentage of permanent physical impairment, in a manner that is in accord with the various provisions of the Act.

In his report of March 14, 2000, Dr. Knox assessed a permanent physical impairment of 15% to the body as a whole solely for the claimant's initial compensable injury at L4-5. He stated that he used Table 75 on page 113, of the American Medical Association's Guides to the Evaluation of Permanent Impairment, (fourth edition). Clearly, this is the official rating Guide currently adopted by this Commission, under authority of Ark. Code Ann. §11-9-522 (g). The particular method used by Dr. Knox (Table 75) gives no consideration to pain or other subjective complaints, and is the method commonly used by this Commission in assessing the appropriate degree of permanent physical impairment for specific spinal disorders.

Dr. Knox clearly believed that the claimant fell under Category IV D of Table 75, as a result of his initial compensable injury and surgery. The evidence presented would support Dr. Knox's conclusion. For individuals falling under this category, a 12% permanent physical impairment is recommended by the Guides.

In this report, Dr. Knox also assessed an additional 2% permanent physical impairment for "harvesting the bone graft." Although this procedure was not performed on the claimant's spine and was done at the same time as the claimant's initial fusion, Dr. Knox appears to consider it a "second operation," under Category IV

E 1 of Table 75. In this regard, I feel that Dr. Knox has not applied this section as it was intended. Clearly, the additional permanent physical impairment provided by Category IV E 1 and 2 were directed toward subsequent surgeries to the spine.

Finally, in this report, Dr. Knox assigned an additional 1% permanent physical impairment for the subsequent surgery to remove the "hardware" used in the fusion. This subsequent surgery would more accurately represent a "second operation" under Category IV E 1. Under the category, the claimant would be entitled to an additional 2% physical impairment to the body as a whole.

It is my opinion that Dr. Knox's initial assessment of permanent physical impairment does not conform to the Guides. I find that the appropriate degree or percentage of permanent physical impairment at that point, was 14% to the body as a whole, under Table 75, page 113 of the Guides.

In a report dated December 4, 2001, Dr. Knox offered another assessment of permanent physical impairment. He again assigned a permanent physical impairment of 15% to the body as a whole. However, as previously noted, this assessment of permanent physical impairment is extremely confusing. First, he stated that the claimant would be entitled to a 10% permanent physical impairment under Category II, of Table 75 on page 113 of the Guides. This category is reserved for surgically treated disc lesions with residual medically documented pain and rigidity. However, it does not include fusions. Thus, it would appear that Dr. Knox may have been assessing the 10% permanent physical impairment only for the surgical decompression of the L3-4 intervertebral disc on December 29, 2000. However, he then went on to state that he would assess an additional 2% permanent physical impairment for "the second opinion" (presumably, he means a second operation). In fact, the surgery on December 29, 2000 would be the third surgery to the claimant's spine. Finally, he then stated:

"In adding another percent for another operation which would be another 1% per level, with an added percentage of harvesting a bone graft for a total of 15% permanent partial disability to the body as a whole."

A more accurate following of the Guides would involve taking the initial assessment of a permanent physical impairment of 14% to the body as a whole, then adding an additional 1% for a third surgery (the L3-4 decompression), and finally adding an additional 1%, as this surgery involved an additional level (Category IV E 2). Thus, at that point, the claimant would have had a permanent physical impairment of 16% to the body as a whole, from his initial compensable injury to the L4-5 level with its two resulting surgeries and the compensable consequence to the L3-4 level with its resulting surgery.

In his report of July 15, 2003, Dr. Knox made his final assessment of permanent physical impairment. In this report he states:

"He (the claimant) is now one year status post lumbar fusion. Apparently, he had been rated from his previous surgery. From the standpoint of his new surgery, he would get 1% extra for level and 1% extra for the second operation, this being a total of 17% permanent partial disability to the body as a whole."

Again, it appears that Dr. Knox is in error in his use of the Guides. The previous surgery he was discussing would appear to be the L3-4 decompression, performed on December 29, 2000. He appears to be merely increasing the rating of 15% to the body as a whole, which he had given for this condition in his report of December 4, 2001. He appears to have totally overlooked the previous rating he had given on March 14, 2000, for the initial compensable injury and resulting surgery in the L4-5 area.

However, he does appear to be correct in his conclusion that the fourth surgical procedure (performed in mid- 2002),, which apparently consisted of a fusion of L3-4 and L5-S1, would entitle the claimant to an additional 2% permanent physical

impairment under Categories IV E1 and E 2. The claimant would be entitled to an additional 1% for the additional operation in mid 2002, and an additional 1% for the additional level at L5-S1.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant has sustained a permanent physical impairment of 18% to the body as a whole, solely as a result of his initial compensable injury and its subsequent compensable consequences with the numerous surgical procedures these have required. This degree of permanent physical impairment is based upon objective and measurable physical findings and is in no way based upon pain, loss of range of motion, straight leg raising tests, or other factors prohibited by the Act. This degree of permanent physical impairment is also calculated in a manner that conforms to the official rating Guide adopted by this Commission, specifically Table 75 on page 113.

III. SECOND INJURY FUND LIABILITY

The next issue to be addressed concerns the question of whether the Second Injury Fund of the State of Arkansas has any liability in this claim. This issue is controlled by the provisions of Ark. Code Ann. §11-9-525. Under this subsection, certain elements must be proven in order to invoke Second Injury Fund liability.

First, the claimant must have either a pre-existing disability or impairment from previous compensable injury or otherwise, at the time of the occurrence of his compensable injury. Latent conditions, which are unknown to either the claimant or the respondent employer are not to be considered as pre-existing disabilities or impairments.

The record shows that on or about December 17, 1982, the claimant sustained a compensable injury to his left knee, while working for Hackney Brothers Body Company. The claimant ultimately came under the treatment of Dr. Leopold Garbutt,

an orthopaedic surgeon. Dr. Garbutt eventually diagnosed the nature of the claimant's compensable left knee injury as a meniscal tear. This defect appears to have been surgically treated in August of 1983, by an arthrotomy and formal menisectomy. Dr. Garbutt continued to treat the claimant until April 23, 1984. At that time, he apparently released the claimant from care and assessed a permanent physical impairment of 40% to the left lower extremity. Dr. Garbutt further noted that the claimant would have permanent difficulty working in a squatted down position.

The claimant testified that, as the result of this compensable left knee injury, he was off work for two to three years. He further testified that he had significant difficulties with his left leg and "limped around" for some seven to eight years. Finally, he stated that he still periodically experienced problems with his left knee and that it prevents him from twisting or turning.

The record also shows that the claimant had previously sustained an accidental injury to his head in a motorcycle accident in 1968. This accident produced a significant fracture in the left temporal area. The evidence also shows that the claimant sustained a subsequent employment related injury, in approximately June of 1974, when he struck the left side of his head on an iron bar while attempting to get down off of a forklift.

Clearly, the claimant's initial head injury was severe. The medical reports and records that surgery show that surgery was required in 1968 to repair the fracture site. The claimant testified that at the time of the initial accident he was in a coma for "a week or two," and almost died. He stated that following this accident he experienced a loss of memory and equilibrium. The medical records note a prolonged period of continuing headaches, dizziness, visual disturbances, and black out "spells." Tests performed on the claimant, in 1974, revealed an abnormal EEG of the brain involving the left parietal and occipital regions and an abnormal brain scan with

increased activity in the left temporoparietal region. A detailed neurological evaluation, at that time, also indicated an altered mental status suggestive of organic brain damage in the area of the left temporal lobe. These abnormalities were in the same area of the prior skull fracture and subsequent blow. A second surgery was performed to repair the damage to the claimant's skull and to close the opening in the skull remaining from the initial craniectomy.

The claimant has more recently been evaluated by Dr. Betty Back-Morse, a neuropsychologist. Neuropsychological testing performed by Dr. Back-Morse was interpreted as showing the presence of organic brain damage and resulting dysfunction, primarily in the area of mental status and integrative functioning. Dr. Back-Morse further attributed this physical or organic brain damage and resulting cognitive dysfunction to the claimant's significant head and brain injury in 1968.

Unlike the claimant's prior knee injury, the medical record contains no assessment of a percentage or degree of permanent physical impairment for the claimant's prior head or brain injury and resulting mental dysfunction. However, appropriate methods for assessing the specific percentage or degree of permanent physical impairment for this loss can be found in the Commission's official rating Guide, (American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition). These recommended methods are found in Section 4.1 beginning on page 140 of the Guides. These methods are based upon objective physical findings as required by the Act.

As the Appellate Courts have pointed out; it is the duty of this Commission, not any medical expert, to ascertain the percentage or degree of permanent physical impairment. Thus, the mere lack of a medically assessed percentage or degree of impairment does not, in and of itself, prevent consideration of the claimant's prior head or brain injury in determining Second Injury Fund liability.

In Mid-State Construction Company v. The Second Injury Fund, 295 Ark. 1, 746 S.W. 2nd 539 (1988), the Supreme Court indicated that a former non work related condition would constitute an "impairment" within the meaning of Ark. Code Ann. §11-9-525, if it was of such physical quality that, were all the other elements of compensability present, it would be capable of supporting an award of benefits. A physical injury or condition is capable of supporting an award of benefits for permanent physical impairment when there are "objective" and measurable physical or mental findings upon which to base such an impairment and the appropriate degree of impairment can be ascertained by employing the Commission's official rating Guide, without consideration of pain or other statutorily prohibited factors. The injury or condition must also be the "major cause" of the resulting impairment.

In Lentz v. Service Master, 75 Ark. App. 296 (2001) the Arkansas Court of Appeals held that neuropsychological testing would be considered "objective finding," if it was further supported by other "objective" evidence of physical or organic brain damage. In the present case, there is extensive purely "objective" evidence that the claimant sustained physical or organic brain damage in the 1968 motorcycle accident. There is clear evidence that this accident resulted in a skull fracture and presumably an epidural hematoma involving the left temporal region of the claimant's brain. Tests performed approximately six years later, in 1974, further supported cerebral damage in this area. Both the general and detailed neurological examination, in 1974, and neuropsychological testing by Dr. Back-Morse noted abnormalities supportive of cognitive dysfunction in this same area.

The percentage or degree of permanent impairment, due to the cognitive dysfunction noted by Dr. Back-Morse, is ratable using the method described in Section 4.1 on page 141 and Table 2 on page 142 of the Guides. The percentage or degree of permanent impairment due to emotional or behaviorable disturbances, noted

in 1974 and again by Dr. Back-Morse, is ratable using Section 4.1c on page 141 and Table 3 on page 142.

However, after consideration of evidence presented, I do not find that the claimant has shown that he would fall under the "moderate" category of impairment. Instead, I find, under the criteria given, he would fall under the mild category of impairment.

Under Table 2 of the Guides, this category of impairment would fall between 1 and 14% to the body as a whole. Under Table 3, this category of impairment would fall between 0 and 14% to the body as whole. It is my finding that the appropriate degree or percentage of permanent physical impairment produced by the claimant's pre-existing "organic" or physical brain damage would be in the amount of 14% to the body as a whole. This would include a 7% permanent impairment for cognitive dysfunction and a 7% permanent impairment for emotional and behavioral disturbances. Had all of the other elements of compensability been met for this condition, the claimant would have been entitled to benefits under the Arkansas Workers' Compensation Act for this percentage or degree of permanent physical impairment.

The Second Injury Fund further argues that the claimant's pre-existing "organic" brain damage would represent a "latent" condition and could not be the basis for Second Injury Fund liability under Ark. Code Ann. §11-9-525(a)(3). In support of this argument, they cite the decision in Purolator Courier v. Chancey, 40 Ark. App. 1, 841 S. W. 2nd 159 (1992).

However, the claimant's pre-existing "organic" brain damage does not represent a "latent" condition under this subsection. The line of cases cited by Second Injury Fund, define a "latent" condition, as one that is present without showing itself; hidden, concealed, or dormant. The Appellate Courts have further held that an injury

or condition is "latent" until its substantial character becomes known or until the individual experiencing the injury or condition knows or should reasonably be expected to be aware of the full extent and nature of the injury or condition.

Unlike the line of cases cited by the Second Injury Fund, the claimant was fully aware that he had sustained a significant injury to his brain, prior to the compensable injury giving rise to this claim. As he testified, his motorcycle accident in 1968, caused him to be in a coma for a week or two, almost caused him to die on several occasions, and resulted in significant prolonged physical complaints. Although the tests of Dr. Back-Morse that further confirmed the presence of organic brain damage were performed after the compensable injury giving rise to this claim, the claimant either knew or should reasonably have known of the existence of such physical damage and cerebral dysfunction as early as 1974.

By that time, EEG studies revealed clear evidence of cerebral dysfunction of the previously injured portion of the claimant's brain (i.e. the left temporal region). The general and detailed neurological examination of the claimant also indicated the presence of an altered or abnormal mental state, similar to that subsequently observed by Dr. Back-Morse (Joint Exhibit No. 1, page 16).

In summary, I find that the greater weight of the credible evidence shows that the claimant was experiencing pre-existing "impairment" or "disability" at the time of his compensable back injury on May 7, 1997. Thus, the evidence satisfies the first requirement for the application of the provisions of Ark. Code Ann. §11-9-525 to the present claim and to establish liability on the part of the Second Injury Fund.

Next, it must be shown that the claimant sustained a compensable injury that has resulted in additional impairment or disability. There appears to be no real dispute in regard to this matter. All the parties have stipulated that the claimant sustained a compensable injury to his back on May 7, 1997. The evidence presented clearly

shows that this compensable injury has resulted in both substantial permanent impairment and substantial functional disability. There is no evidence to indicate that the claimant would not be entitled to benefits, under the Act, for such impairment and disability. In fact, the stipulations reveal that the respondent employer-carrier has already instituted the payment of permanent partial disability benefits for permanent physical impairment. Thus, this case clearly satisfies the second requirement for the application of Ark. Code Ann. §11-9-525 and the creation of liability on the part of the Second Injury Fund.

The final requirement is that the pre-existing disability or impairment must combine with the disability or impairment resulting from the compensable injury to produce a greater degree of disability or impairment than that which would have resulted from the last injury considered alone and of itself. Clearly, the compensable injury giving rise to this claim produced a significant amount of permanent physical impairment and further produced a significant amount of permanent functional disability or loss of wage-earning capacity. As a result of the compensable injury and its sequelae, the claimant has sustained a permanent physical impairment of 18% to the body as a whole. His multiple fusions have severely limited the flexibility of the claimant's lumbar spine. The claimant's compensable lumbar injury and its sequelae have restricted him from performing any employment positions requiring lifting over 10 pounds on more than an occasional basis, sitting longer than an hour at a time, standing longer than 15 minutes at a time, and walking more than 5 minutes at a time. The lack of mobility of the claimant's lumbar spine would severely curtail any twisting or bending at the waist.

The claimant's pre-existing brain and left knee also independently produced substantial permanent physical impairment both before and after the claimant's compensable lumbar injury. These two pre-existing conditions also independently had

a detrimental effect on the claimant's employment opportunities both before and after his compensable lumbar injuries. His pre-existing left knee injury clearly affected his ability to perform employments that required bending and twisting at the knee, and probably prolonged standing or walking. The claimant's pre-existing brain injury had an adverse impact on his verbal skills, his visual memory, his fine motor skills and coordination, and his visual motor perceptual skills. These deficits are noted not only in the neuropsychological testing by Dr. Back-Morse, but also in the claimant's various Functional Capabilities Evaluations. Dr. Back-Morse and Dr. Robert C. Leaver further observed altered mental status or psychological difficulties, due to the claimant's brain injury, that would also have a negative impact on his potential employability. These psychological difficulties would prevent him from maintaining employments requiring high manual dexterity, significant concentration, good memory, and waking under stress.

The adverse economic impact of these pre-existing mental and psychological deficits became magnified by the effects of the compensable injury. The claimant's usual occupations of heavy equipment operator/truck driver were within his physical and mental limitations from his prior brain and knee injuries. However, these types of employment are no longer available to the claimant.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence proves that the claimant's pre-existing conditions continue to independently produce impairment and functional disability after the claimant's compensable lumbar injury and are playing a role in producing the claimant's current permanent disability status. It is my further opinion that his current combined permanent disability status exceeds that which would have resulted from the claimant's compensable lumbar injury, considered alone and of itself.

IV. EXTENT OF PERMANENT DISABILITY

In fact, I find that the greater weight of the credible evidence proves that when the claimant's pre-existing disability and impairment is combined with the disability and impairment resulting from the claimant's compensable lumbar injury and its resulting complications, it has resulted in the claimant being rendered permanently totally disabled.

The claimant's permanent physical impairment of 40% to the leg for his previous left knee injury would correspond to a 16% permanent physical impairment to the body as a whole (i.e. 40% times 40%, Table 63, page 83 of the Guides). The evidence presented indicates that the claimant's previous brain injury has produced a permanent physical impairment of 14% to the body as a whole (Table 2 and Table 3, page 142 of the Guides). When these permanent physical impairments are combined with the 18% permanent physical impairment produced by the claimant's compensable lumbar injury and its sequelae, a total permanent physical impairment of 41% to the body as a whole is obtained (Combined Values Chart, page 322 of the Guides).

The claimant's prior left knee injury would, in and of itself, prevent the claimant from pursuing any employment that required strenuous or continuous use of his leg. The claimant's previous brain injury would preclude him from employments requiring the fine manipulative use of his hands and fingers, employment requiring substantial concentration, or an excellent memory. This previous brain injury would also prevent the claimant from engaging in any employment position that produced substantial mental or emotional stress. The claimant's compensable lumbar injury has prevented the claimant from truck driving, operating heavy equipment, or any employments requiring prolonged sitting, prolonged standing, substantial lifting, carrying, or holding any significant weights.

The record reveals that the claimant is 55 years old and his formal education consists of two months into the sixth grade. The claimant's previous work experience has primarily been limited to driving a forklift, operating heavy equipment, and driving a truck. This lack of variety in the claimant's prior employments is likely the result of the limitations imposed by his previous injuries, as all of the claimant's prior types of employment have fallen within the limitations imposed by these previous injuries.

When the claimant's permanent impairment and the restrictions imposed by his previous and present injuries are considered in light of his age, education, and prior work experience, the claimant's chances of obtaining regular gainful employment in the open job market are nil. The limitations from the claimant's prior knee injury would exclude him from any employments requiring any degree of walking or standing. The limitations from the claimant's compensable lumbar injury would prevent him from obtaining any employments requiring prolonged sitting, or any degree of lifting. These two injuries essentially limit the claimant to only the lightest sedentary type positions. The limitations from the claimant's previous brain injury would essentially exclude him from these remaining employments, such as clerical work, light bench work, sales, etc. His prior organic brain damage would also likely be an insurmountable stumbling block to any meaningful vocational retraining.

V. REFUSAL OF REHABILITATION

This brings up the Second Injury Fund's contention that the claimant has "waived" rehabilitation and is therefore barred from receiving benefits for functional disability in excess of his permanent impairment. I find no merit to this argument.

The "rehabilitation" referred to by the Fund, consists of the services of Dale Thomas, a "self employed" vocational consultant. Mr. Thomas testified that at the respondent's request, he met personally with the claimant, reviewed the medical report of Dr. Davis and some of these of Dr. Knox. He stated that he also talked by

phone with Dr. Back-Morse. Mr. Thomas stated that his personal interviews with the claimant took place in June of 2001 and again approximately a year later. He has apparently had no other personal contacts with the claimant after the termination of the claimant's treatment by Dr. Knox and after Dr. Knox's ultimate rating. It further appears that he has given no particular consideration to the multiple Functional Capacity Evaluations performed on the claimant, including the last Evaluation on April 15, 2004. In his testimony, he states that he has only considered the physical restrictions imposed by Dr. Knox and Dr. Davis. In actuality, his testimony indicates that his primary consideration were the restrictions imposed by Dr. Davis (T.58). Curiously, I have reviewed the report and record of Dr. Davis, dated August 16, 2004, and can find no detailed physical restrictions or limitations. Instead, Dr. Davis simply noted:

"Hopefully, he (the claimant) could have vocational rehabilitation in a job which would require sedentary or light activity, it would also be necessary for him to be able to alternate sitting or standing. Often, the absence of a high school education is a bar to vocational rehabilitation. In his case, he seems to demonstrate the skills expected from a high school graduate, so that his training would hopefully be successful. It does seem very important to him to be able to return to some work place capacity."

Mr. Thomas further testified that had he considered the various FCE's, particularly the last FCE on April 15, 2004, and it was his opinion that he would not be able to find the claimant employment in the open job market (T.63).

Mr. Thomas also described how he arrived at the "job opportunities," which he forwarded to the claimant. He stated that, in some instances, he would make "some contact" with the employer and get as much information as he could about the nature of the work, physical demands, benefits, salaries, and similar information. Other of these "job opportunities" he obtained through the records of the Arkansas Employment Security Division. In these instances, he stated that he had no real

description of the actual tasks required.

Respondent's Exhibit No. 2 sets out six of the "job opportunities" identified by Mr. Thomas and conveyed to the claimant. All of these positions are for a truck broker/dispatcher. In my experience from cases involving this type of employment, they are essentially sales and service type positions that require considerable expertise in dealing with "customers" in the shipping of their goods and in planning and organizing routing and other services necessary to accomplish the particular needs of these customers, while maximizing his employer's profits. These positions require considerable organizational skills, public relations skills, and considerable computer knowledge and ability. These positions also often involve substantial mental stress.

The evidence in the present case, does not indicate that the claimant possesses any of these necessary skills. The fact that the claimant has considerable "blue collar" experience in operating heavy equipment and driving a dump truck would no more qualify him for these "white collar" sales and service positions, than the fact that he has worn shoes all of his life would qualify him to be a shoe salesman or boot maker. The claimant's mental and psychological dysfunction, from his prior brain injury would also make it unlikely he could handle these positions. The claimant's failure to make the futile gesture of submitting an employment application for these positions would not constitute a refusal to participate in any meaningful plan of rehabilitation or more accurately re-employment assistance.

In Respondent's Exhibit No. 3, four more of these "job opportunities" are identified. Two of these positions involve the transporting of disabled individuals. Once again, from experience involving injuries to individuals in this type of employment, these positions require the "driver" to assist these disabled "clients" to and from the vans or cars, as well as to actually drive the van or car. In fact, most of

the cases that have come before me involving these positions, have involved back injuries that were sustained in providing this required assistance. Clearly, the claimant would not possess the physical abilities to assist any individuals with mobility problems.

Another of these "job opportunities," the lot attendant, indicates that one of the expected duties is the detailing of cars. Obviously, Mr. Thomas has never "detailed" a car, or he would know that this task requires extensive and strenuous use of the upper body and considerable bending and stooping.

The final listed "job opportunity" is that of a part-time job of a school bus driver. It is clearly questionable whether this position would even represent "regular" gainful employment. However, the claimant's mental and psychological limitations, due to his prior brain injury, would make him an unlikely candidate for this position. The claimant's difficulties concentrating and his susceptibility to tension and anxiety would clearly not be compatible with driving a bus load of children. This position would also require the claimant to drive a substantial distance from his home twice a day for only a part-time job. When the trip to and from the claimant's home is considered along with the time spent running his bus route, the overall sitting involved would likely exceed the limitations on his sitting and driving.

The next "job opportunity" is that of a security job. One of the primary duties of this job is listed as "patrolling the premises." Clearly, if the premises required "patrolling" for more than 5 minutes at a time, this would exceed the claimant's physical restrictions and limitations. It is also obvious that the claimant would not have the physical abilities to deal with any situations that might arise while he was "patrolling."

Next, is the position of "newspaper delivery person." Again, it is questionable that this is actually a meaningful or "regular" employment position. This position is

for only 1 to 2 hours in the very early morning and pays only \$500.00 per month (at most). This job also requires more than merely driving around in a vehicle hurling papers out the window. It requires some preparatory time that would include substantial lifting and carrying. There would also likely be numerous occasions when the claimant would be required to get in and out of his vehicle, during his 1 to 2 hour route. Such activities would exceed the claimant's physical limitations.

The final "job opportunity" was as a pizza delivery driver for Eureka Pizza. With some luck and if the claimant has a vehicle that got substantial gas mileage, he might be able to exceed the cost of his gasoline and the wear and tear on his vehicle. This too would be a questionable "regular" employment. However, in order to perform this position, he would have to get in and out of his vehicle on numerous occasions, do a considerable amount of walking, step and stair climbing, and frequent carrying of weights that could exceed his lifting restrictions.

Again, I find that the claimant's failure to actually put in employment applications with the various employers outlined in Respondent's Exhibit No. 3 does not represent a refusal of meaningful rehabilitation or re-employment. All of these positions either exceed the claimant's physical restrictions, do not actually represent regular gainful employment, or both.

In summary, I find that the claimant has not refused suitable employment offered or obtained for him by the respondent, nor has he refused to participate in realistic and meaningful rehabilitation. Thus, he would not be barred from receiving any benefits by the provisions of either Ark. Code Ann. §11-9-526 or §11-9-505(b)(3).

Pursuant to Ark. Code Ann. §11-9-525(b)(5), the respondent employer-carrier is liable on for the benefits attributable to the permanent physical impairment of 18% to the body as a whole that was the permanent physical impairment produced by the compensable injury of May 7, 1997, considered alone and of itself. The Second

Injury Fund of the State of Arkansas is liable for the remainder of the compensation that would be due and payable to the claimant for permanent total disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 7, 1997, the relationship of employee-employer-carrier between the parties.
3. On May 7, 1997, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$253.00 for total disability and \$190.00 for permanent partial disability.
4. On May 7, 1997, the claimant sustained a compensable injury to his lower back or lumbar spine.
5. There is no dispute, at the present time, over the payment of medical expenses incurred for reasonably necessary medical services for the claimant's compensable injury.
6. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits.
7. The claimant's healing period from the effects of his compensable lumbar injury ended on May 25, 2004.
8. The claimant's compensable injury of May 7, 1997, and its resulting sequelae were the major cause of a permanent physical impairment of 18% to the body as a whole.
9. At the time of the claimant's compensable lumbar injury on May 7, 1997, he was experiencing permanent physical impairment and disability from two pre-existing injuries, one to the claimant's left knee and the other to his brain. These pre-existing injuries continued to independently

produce impairment and disability following the claimant's compensable lumbar injury. The claimant's compensable lumbar injury produced additional permanent impairment and disability. The permanent impairment and disability produced by the claimant's compensable lumbar injury has combined with the pre-existing permanent impairment and disability produced by the claimant's previous knee and brain injuries to cause the claimant to be permanently totally disabled. This combined permanent impairment and disability exceeds the permanent impairment and disability produced by the claimant's compensable lumbar injury, considered alone and by itself. Thus, Ark. Code Ann. §11-9-525 (b) (5) is applicable to the present claim.

10. The respondent employer-carrier shall be liable for permanent partial disability benefits attributable to the claimant's 18% permanent physical impairment and the Second Injury Fund of the State of Arkansas shall be liable for the remainder of the compensation due and payable to the claimant for permanent total disability benefits.
11. The evidence presented fails to establish that the claimant has unreasonably or unjustifiably refused suitable employment offered or obtained for him by the respondent or has waived or refused to participate or cooperate without reasonable cause in any offered program of rehabilitation or job placement assistance. Thus, Ark. Code Ann. §11-9-526 and §11-9-505(b)(3) are not applicable to the present claim.
12. The respondent employer-carrier has controverted the claimant's entitlement to any permanent benefits in excess of a permanent physical impairment of 17% to the body as a whole.

13. The respondent Second Injury Fund has controverted the claimant's entitlement to any benefits from the Fund.
14. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent disability benefits herein awarded, which exceed the permanent physical impairment of 17% to the body as a whole.

ORDER

The respondent employer-carrier shall pay to the claimant permanent partial disability benefits equivalent to an 18% permanent partial disability to the body as a whole.

The respondent employer-carrier shall continue to be liable for all reasonably necessary medical services required by the claimant for his compensable lumbar injury.

The Second Injury Fund shall be liable to the claimant for the remainder of the compensation due to the claimant for permanent total disability that would be in excess of the respondent employer-carrier's liability for permanent partial disability benefits for a permanent physical impairment of 18% to the body as a whole.

The respondent employer-carrier shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted 1% permanent partial disability benefits herein found to be their liability.

The Second Injury Fund shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent total disability benefits herein found to be their liability.

Both the respondent employer-carrier and the Second Injury Fund are liable for one-half of their respective attorney's fees in addition to the other benefits herein awarded. The remaining one-half of this attorney's fee shall be withheld by the

respondent employer-carrier and the Second Injury Fund from the respective controverted benefits herein found to be their obligation.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge