

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F300489

WILLIE ROGERS

CLAIMANT

HILAND DAIRY

RESPONDENT

OLD REPUBLIC INSURANCE COMPANY,  
INSURANCE CARRIER

NO. 1 RESPONDENT

SECOND INJURY FUND

NO. 2 RESPONDENT

OPINION FILED FEBRUARY 16, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

Respondents No. 1 represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 30, 2004, in Fort Smith, Arkansas. A Pre-Hearing Order was entered in this case on September 22, 2004. This Pre-Hearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. By letter dated November 8, 2004, the Second Injury Fund's attorney conceded that Ark. Code Ann. §11-9-525 was applicable to the present claim and that the Second Injury Fund was accepting liability for combined functional disability (loss of wage earning capacity) of 30% to the body as a whole, which would be over and above the 15% permanent physical impairment previously accepted by the respondents, Hiland Dairy and Old Republic Insurance Company. At the hearing, this was added as an additional stipulation and the second issue was eliminated, as this stipulation made it moot. A copy of this Pre-Hearing Order with the appropriate amendment 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 January 3, 2003, the relationship of employee-employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. On January 3, 2003, the claimant sustained a compensable injury to his back.
4. There is no dispute, at present, over the payment of medical expenses.
5. There is no dispute, at present, over the payment of temporary disability benefits.
6. The respondents have accepted liability for a permanent physical impairment of 15% to the body as a whole.
7. The Second Injury Fund concedes that it is liable for combined permanent disability and admits liability for a combined permanent disability of 30% to the body as a whole, which is in addition to the permanent physical impairment of 15% to the body as a whole.

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

1. Extent of functional or wage loss disability.
3. Attorney's fee.

In regard to these issues, the claimant contends that he is entitled to wage loss disability greatly in excess of his impairment rating and that the liability for that wage loss disability is either that of the respondent- carrier or the Second Injury Fund.

In regard to these issues, the respondent employer-carrier contends that they are only liable for the 15% permanent physical impairment produced by the claimant's

compensable injury of January 3, 2003, and that any additional benefits are the liability of the Second Injury Fund.

In regard to these issues the respondent Second Injury Fund concedes that it has liability for any benefits attributable to "combined disability" in excess of the 15% permanent physical impairment accepted by the respondent employer-carrier. The Second Injury Fund contends that this "combined disability" is in the amount of 30% to the body as a whole, and the Second Injury Fund accepts liability for permanent partial disability benefits in this amount.

#### DISCUSSION

\_\_\_\_\_ All parties appear to concede that the claimant's compensable injury of January 3, 2003, has resulted in a permanent physical impairment of 15% to the body as a whole. The parties are also in agreement that Ark. Code Ann. §11-9-525, is applicable to the present claim and that the Second Injury Fund has liability, accordingly. The Second Injury Fund has voluntarily accepted liability for permanent partial disability benefits in the amount of 30% to the body as a whole, which is in addition to the 15% permanent physical impairment accepted by the respondent employer-carrier. Thus, the actual issue is whether the Second Injury Fund's obligation under Ark. Code Ann. §11-9-525 (b)(4) exceeds 30% to the body as a whole, and, if so, by what amount. The burden would rest upon the claimant to prove his entitlement, under this subdivision, to benefits in excess of the 30% permanent partial disability accepted by the Fund.

The medical evidence shows that the claimant had a laminectomy on July 16, 1996. Following this laminectomy, the claimant had "residual signs and symptoms," including rigidity or muscle spasms and abnormalities indicated on repeat radiographic studies were indicative of residual neural impingement.

Although the claimant's prior difficulties and resulting surgery would clearly have had some effect on the claimant's physical abilities, these restrictions were not sufficient to prevent him from performing his pre-injury position for the respondent, which he had held for many years. Following his initial recovery period, the claimant returned to his customary position with the respondent (a route salesman) and continued in this position through the date of the second compensable injury giving rise to this claim.

The percentage or degree of permanent physical impairment and permanent functional disability from pre-existing non compensable injuries must be calculated in the same manner and meet the same requirements as would be appropriate for compensable injuries. Clearly, the claimant's pre-existing back difficulties and resulting surgery in 1996, would be the major cause of an objectively supported permanent physical impairment. The evidence shows that this pre-existing injury or condition and resulting surgery would qualify the claimant for a 10% permanent physical impairment under the American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition, under Table 75, Category IIE, on page 113. However, the evidence presented shows that, prior to his subsequent compensable injury, the claimant would not have qualified for benefits for permanent functional disability for this pre-existing back difficulties, as he continued to work in the same employment position at wages equal to or greater than those he was receiving prior to the onset of these pre-existing difficulties.

The evidence shows that the claimant experienced an employment related injury to his lower back, on or about March 14, 2000. The nature of this injury was diagnosed as a lumbar strain, superimposed upon or exacerbating the claimant's post surgical herniated disc. However, after a brief period of treatment and a brief period of physical restrictions, the claimant returned to his regular employment

position until the compensable injury giving rise to this claim. The evidence presented fails to show that this 2000 employment related injury produced any ratable degree of permanent physical impairment or resulted in any permanent functional disability.

Dr. Luke Knox, a neurosurgeon and the claimant's primary treating physician for his compensable injury, has opined that the claimant has experienced a permanent physical impairment of 15% to the body as a whole, due solely to his last compensable injury of January 3, 2003 (Joint Exhibit 1, page 51). Dr. Knox is a competent neurosurgeon and has considerable expertise in the area of medicine associated with this compensable injury. His assessment of a permanent physical impairment of 15% to the body as a whole was made in accordance with the Commission's official rating guide (i.e. The American Medical Association's Guides to the Evaluation of Permanent Impairment, fourth edition). The method used by Dr. Knox gave no consideration to pain, loss of range of motion, straight leg raising, or any other subjective factors. It is further apparent that the claimant's compensable injury was the "major cause" of this degree of permanent impairment. Thus, under Ark. Code Ann. §11-9-525(b)(4), this actual anatomical impairment would be the maximum liability of the respondents, Hiland Dairy and Old Republic Insurance Company.

Next, it becomes necessary to determine the claimant's current combined impairments and disabilities. The claimant's combined permanent anatomical impairment is an easy matter. It would simply be the sum of his pre-existing impairment and the impairment produced by his compensable injury of January 3, 2003. This sum would be in the amount of 27% to the body as a whole (i.e. 12% plus 15%). As the claimant had no actual pre-existing permanent "functional" disability (loss of wage earning capacity), his current permanent "disability" status would actually represent his "combined disabilities."

The record shows that the claimant is 57 years old and is a high school

graduate. At the hearing, the claimant appeared to be personable and at least of average intelligence. His prior work experience consists primarily of that of a milk route salesman/deliveryman for the past 28 years. At the time of his compensable injury, the claimant was earning approximately \$726.00 per week in this position. He also worked for a period, long ago, as a grocery stocker/clerk.

The record further shows that the claimant is now restricted from performing any employment activities requiring bending or twisting at the waist, prolonged standing, prolonged sitting, or prolonged walking. His lifting and carrying ability is limited to approximately 35 pounds on an occasional basis, 10 to 20 on a frequent basis, and 10 or less on a constant basis.

The claimant's testimony reflects that he is able to do light housework, such as vacuuming, cooking, etc. He is also physically able to do some yard work, in the form of operating a weed eater and a riding lawn mower.

It must further be noted that the claimant has demonstrated a high degree of motivation in attempting to maintain his employment with this respondent. Although he has experienced difficulties with his back for a number of years, he has repeatedly returned to his employment position with this respondent, as soon as he was allowed to do so by his treating physician. He also attempted to return to employment with this respondent following the compensable injury giving rise to this claim. However, it is apparent that his regular position, as a milk route sales/deliveryman required physical activities that exceed his current limitations. The respondent, Hiland Dairy, has made no attempt to provide the claimant with a position that would be compatible with his current limitations.

When the claimant's current physical limitations and restrictions are considered in light of his age, education, prior work experience, and other matters reasonably expected to affect his employability, I find that the claimant is currently

experiencing a permanent "functional" disability or loss of wage earning capacity that is in the amount of 30% to the body as a whole.

The claimant's physical restrictions and limitations prevent him from performing the position he had at the time of his last or most recent compensable injury. These physical restrictions have also prevented him from any employment he had previously held and a significant number of employments for which he would otherwise be qualified. However, there would still remain available to the claimant a substantial number of clerical, sales, and possibly lower level management positions, that would be within his physical restrictions for which he would be otherwise qualified. These potential employments exist in sufficient number to provide him with a reasonable expectation of obtaining employment in the open job market. However, such remaining employment positions would, at least at the starting level, pay significantly less than the wages the claimant was earning at the time of his compensable injury.

In summary, I find that the claimant is currently experiencing a permanent partial disability of 57% to the body as a whole. This includes a combined permanent physical impairment of 27% to the body as a whole and a combined permanent functional disability of 30% to the body as whole.

Pursuant to Ark. Code Ann. §11-9-525(b)(4), the respondents, Hiland Dairy and Old Republic Insurance Company, are liable for permanent partial disability benefits attributable to the 15% permanent physical impairment produced by the claimant's compensable injury of January 3, 2003. No liability attaches for the claimant's pre-existing permanent physical impairment of 12% to the body as a whole and pre-existing permanent functional disability of 0% to the body as a whole. The Second Injury Fund is liable for the "balance" of 30% to the body as a whole.

The remaining issue involves controversion and appropriate attorney's fees. After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to prove that the respondents, Hiland Dairy and Old Republic Insurance Company, have controverted the claimant's entitlement from them of permanent partial disability benefits for the permanent physical impairment of 15% to the body a whole, which is herein found to be their obligation. I further find that the greater weight of the credible evidence fails to prove that the Second Injury has controverted the claimant's entitlement to the 30% permanent partial disability which is herein found to be the Fund's liability. Thus, there are no controverted benefits awarded in this Opinion. While the claimant's attorney might be entitled to a reasonable fee solely from the claimant on uncontroverted benefits herein awarded, this matter is not currently before this Commission.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 3, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On January 3, 2003, the claimant earned wages sufficient to entitle him to the maximum weekly compensation rates in effect at the time of his compensable injury of \$440.00 for total disability and \$330.00 for permanent partial disability.
4. On January 3, 2003, the claimant sustained a compensable injury to his lower back or lumbar spine.
5. There is no dispute, at the present time, over the claimant's entitlement to reasonably necessary medical services at the respondents' expense, and all such expenses have or are being paid.

6. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits, and all such benefits accruing to date have been paid.
7. Ark. Code Ann. §11-9-525 is applicable to the present claim. Pursuant to subdivision (b)(4) of this subsection, the greater weight of the evidence establishes that the claimant is currently experiencing combined impairments and disabilities totaling 57% to the body as a whole. This includes a pre-existing impairment of 12% to the body as whole and a pre-existing functional disability of 0% to the body as a whole. This amount further includes a permanent anatomical impairment of 15% to the body as a whole, due solely to the compensable injury of January 3, 2003. The respondents, Hiland Dairy and Old Republic Insurance Company, are liable to the claimant for permanent benefits for the 15% permanent anatomical impairment, caused by the compensable injury of January 3, 2003. No liability attaches for the 12% pre-existing permanent anatomical impairment and 0% pre-existing permanent functional disability. The Second Injury Fund is liable for the "balance" or combined disability of 30% to the body as a whole.
8. The respondents, Hiland Dairy and Old Republic Insurance Company, have controverted the claimant's entitlement to receive from them any permanent partial disability benefits in excess of 15% to the body as a whole. These respondents have not controverted the claimant's entitlement to receive from them permanent benefits for the permanent anatomical impairment of 15% to the body as a whole, herein awarded.
9. The Second Injury Fund has controverted the claimant's entitlement to receive from the Fund any permanent benefits in excess of 30% to the

body as a whole. The Fund has not controverted the claimant's entitlement to receive from the Fund permanent benefits for a combined permanent partial disability of 30% to the body as a whole, herein awarded.

10. As no "controverted" benefits have hereinafter been awarded, no controverted attorney's fees can be awarded.

#### ORDER

The respondents, Hiland Dairy and Old Republic Insurance Company, shall pay to the claimant permanent partial disability benefits for permanent anatomical impairment of 15% to the body as a whole and shall be entitled to credit for all such benefits previously paid.

The Second Injury Fund shall be liable to the claimant for permanent partial disability benefits for a permanent partial disability of 30% to the body as a whole.

The respondents, Hiland Dairy and Old Republic Insurance Company, remain liable for any reasonably necessary medical services required by the claimant for his compensable injury of January 3, 2003.

As no controverted benefits have herein been awarded, no controverted attorney's fee can be awarded to the claimant's attorney.

All benefits 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.

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MICHAEL L. ELLIG  
Administrative Law Judge

