

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E306971

JAMES W. RUSHING, EMPLOYEE **CLAIMANT**

**INTERNATIONAL PAPER CO.,
SELF-INSURED EMPLOYER** **RESPONDENT NO. 1**

SEDGWICK CLAIMS MGMT. SVCS., TPA **RESPONDENT NO. 1**

DEATH & PERM. TOTAL DIS. TRUST FUND **RESPONDENT NO. 2**

OPINION FILED DECEMBER 28, 2005

Hearing before Administrative Law Judge J. Mark White on October 27, 2005, in El Dorado, Union County, Arkansas.

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

Respondents represented by Mr. Michael Dennis, Attorney at Law, Pine Bluff, Arkansas.

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

STATEMENT OF THE CASE

On October 27, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on August 15, 2005, and a Prehearing Order was entered that same day. A copy of the August 15, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth

in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including February 3, 1993; that on February 3, 1993, the claimant sustained a compensable injury to his neck as well as a compensable mental injury; that respondents accepted the February 3, 1993, injuries as compensable and paid benefits; and that the claimant earned an average weekly wage of \$386, entitling him to a compensation rate of \$252 for total disability benefits and \$189 for permanent partial disability benefits. Prior to the hearing, the parties further stipulated that if the claimant is found to be permanently totally disabled, such disability did not begin until after his last day of work, January 8, 2004.

The parties agreed that the issues to be presented were whether the claimant is entitled to permanent partial disability benefits; whether an independent medical evaluation (IME) is reasonably necessary to determine the claimant's permanent anatomical impairment; whether the claimant is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his permanent anatomical impairment; whether the claimant is entitled to additional temporary total disability benefits; whether medical treatment has been reasonably

necessary in connection with the compensable injury; whether additional medical treatment, specifically the medications prescribed by the treating physicians, remains reasonably necessary in connection with the compensable injury; and controversion and attorney's fees.

The claimant contends that he is entitled to temporary total disability benefits from on or about January 8, 2004, until the end of his healing period, on or about March 4, 2004; that he should be awarded permanent partial disability benefits associated with his compensable injuries; that he is now totally and permanently disabled as a result of his compensable injuries, or in the alternative is entitled to wage-loss disability benefits in excess of the anatomical rating assigned; that the medical treatment he has received from on or about January 1, 2004, to date has been reasonable, necessary, and related to his compensable injuries; that the additional medications being prescribed by his treating physicians are reasonable, necessary, and related to his compensable injuries; that the incident of January 2004 was a recurrence of his original injury; and that respondents should be ordered to pay attorney's fees as permitted by law.

The respondents contend that they have accepted compensability for the prescription drug benefits incurred as a result of the compensable injury and that other prescription drugs currently being prescribed to the claimant are not the result

of the compensable injury; that an independent medical evaluation (IME) is not reasonably necessary; and that the incident of January 2004 is an independent intervening cause relieving the respondents of liability for additional benefits.

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 proven by a preponderance of the evidence that the medical treatment received after January 2004, including all treatment by and at the referral or prescription of Dr. Linda Boswell and Dr. Gary Booker, and including his hospitalizations at Brentwood Hospital, has been reasonably necessary in connection with his compensable injury; and that additional

medical treatment remains reasonably necessary in connection with his compensable injury.

4. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from January 12, 2004, through March 3, 2004.
5. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from January 12, 2004, through March 3, 2004.
6. The claimant has proven by a preponderance of the evidence that he has sustained permanent impairment in the amount of 75%, and he is thus entitled to permanent partial disability benefits in the amount of 75% to the body as a whole.
7. The claimant has proven by a preponderance of the evidence that he is permanently totally disabled.
8. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

The claimant sustained a compensable injury to his neck on February 3, 1993, when a large tree branch fell on him. As a result of this incident, the claimant soon developed a compensable mental injury in the form of panic disorder. The respondents accepted the physical and mental injuries as compensable and paid benefits.

The claimant did not seek treatment for his neck injury at first. But a few days later, the symptoms of panic disorder manifested themselves:

I was sitting in the living room, and I'm telling you, I got to where I couldn't breathe. My chest started— My heart started going 90 miles an hour. I was all plumb sweaty and I jumped up, ran outside. My wife said, "What's wrong with you?" I said, "I don't know. I don't know what's wrong. I can't breathe." Well, I fought that one off, come back in the house, and it hit again. And I said, "What in the world is wrong with me?" Nothing like that had ever happened to me before.

The claimant was admitted to Brentwood Hospital for in-patient psychiatric care under the direction of Dr. Linda Boswell on March 7, 1993, and released on March 19, 1993. Medical records reflect that at the time of his admission the claimant exhibited "severe shortness of breath, anxiety, sweating, increased heart rate, shaking, burning, trouble swallowing, and pain in his chest."

Dr. Boswell continued to treat the claimant in the following years with medication, and in that time the claimant sporadically reported panic attacks. He was able to return to work for the respondent-employer for several years in spite of the panic attacks, though he testified that his supervisors gave him "leeway" in his assignments, due to his mental condition.

In September 2001 the plant where the claimant worked shut down. After drawing unemployment benefits for a time, the claimant went to work for a trucking company as a truck driver. A treatment note from Dr. Boswell dated July 22, 2002, notes that the claimant was scared of the dark, and the claimant testified he did not want to drive in the dark. He testified that he had never been scared of the dark before his compensable injury.

The claimant was laid off ten months later, though he testified that he thought he was let go because of the medication he was taking for his panic disorder. He then went to work for Key Energy driving a tanker truck, where he worked for six months. He testified that he ordinarily drove in the daytime, but "every once in a while" he would have to drive at night. In January 2004, he was attempting to load oil into the tanker truck in the dark when he experienced a severe panic attack. He did not return to work after that attack, and on January 12, 2004, he was readmitted to Brentwood Hospital for psychiatric treatment. He was

released and then readmitted twice more, with his last discharge on February 5, 2004. In a letter dated March 4, 2004, Dr. Boswell wrote:

Several months ago the symptoms worsened, resulting in the patient being re-admitted to Brentwood Hospital on two different occasions. He had become suicidal, stating he could not continue living if they could not control the panic attacks. He is only able to stay alone for short periods of time without having a panic attack. He has problems leaving his home and has much difficulty with large crowds.

That summer Dr. Boswell closed her practice and transferred the claimant's care to Dr. J. Gary Booker. Dr. Booker has essentially continued Dr. Boswell's treatment plan and made only minor changes to the claimant's medications. Since then, Dr. Boswell has assigned the claimant a permanent impairment rating of 75% to the body as a whole for his panic disorder.

II. Adjudication

A. Independent Intervening Cause

The respondents contend that any medical treatment or disability incurred by the claimant after January 2004 are an aggravation of the compensable injury, while the claimant contends they are a recurrence. The respondents point to the night-time incident of January 2004 as an independent intervening cause relieving them of further liability.

The test for distinguishing an aggravation from a recurrence is whether the subsequent episode was a natural and probable result of the first injury, or was precipitated by an independent intervening cause. *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). If there is a causal connection between the primary injury and the subsequent disability, there can be no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances. *Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993).

It is plain from the record that the claimant's condition worsened after the incident of January 2004 – the claimant himself testified that his panic attacks have grown worse since that time. But it is likewise plain from the record that a causal connection exists between the claimant's treatment and disability after January 2004 and his original compensable injury. Dr. Boswell expressly testified to a causal connection, saying, "I think it's all part of the same illness.... I think it all relates back to the panic attack that started in '93." The problems experienced by the claimant before and after January 2004 are precisely the same; the only difference is in the severity of those problems.

The question, then, is whether the claimant's activities in the incident of January 2004 were unreasonable under the circumstances. I find that they were not

unreasonable. The claimant was performing his normal and expected job duties; he had driven at night before, even though he had been afraid of the dark for at least two years prior. Therefore, I find that the claimant's disability and treatment after January 2004 were a recurrence of his compensable injury.

The record contains no evidence to cast doubt on the reasonableness of the treatment provided to the claimant after January 2004. Given the above, I find that the claimant has proven by a preponderance of the evidence that the medical treatment received after January 2004, specifically all treatment by and at the referral or prescription of Dr. Linda Boswell and Dr. Gary Booker, and including his hospitalizations at Brentwood Hospital, has been reasonably necessary in connection with his compensable injury; and that additional medical treatment remains reasonably necessary in connection with his compensable injury.

The claimant contends he was entitled to temporary total disability benefits from January 8, 2004, through March 4, 2004. An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, which ever occurs first. ARK. CODE ANN. § 11-9-521 (a); *Wheeler Construction Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his

injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant was hospitalized on January 12, 2004. As of March 3, 2004, Dr. Boswell's notes reflect that the claimant's condition had stabilized. Dr. Boswell opined that the claimant was not able to work during this time. I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from January 12, 2004, through March 3, 2004. I therefore conclude that the claimant was entitled to temporary total disability benefits from January 12, 2004, through March 3, 2004.

In making this finding, I note that after the passage of Act 796 of 1993, disability benefits for mental injuries are limited to twenty-six (26) weeks. ARK. CODE ANN. § 11-9-113. Nonetheless, the injury herein occurred before the effective date of Act 796.

B. Permanent Partial Disability Benefits

Permanent impairment is "any permanent functional or anatomical loss remaining after the healing period has been reached." *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark.

882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.*

Dr. Boswell has assigned the claimant a permanent impairment rating of 75% to the body as a whole for a “moderately severe” impairment. Her opinion was given in response to a letter from claimant’s attorney which included with it the relevant chapter from the *AMA Guides*, 4th Edition. The 4th Edition does not identify a specific percentage for each category of impairment, but it does note the ranges provided in earlier editions of the *Guides*, and 75% is within the range established by earlier editions for moderately severe impairments. Given Dr. Boswell’s opinion, I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent impairment in the amount of 75%, and that he is thus entitled to permanent partial disability benefits in the amount of 75% to the body as a whole. Because I so find, the issue of an independent medical evaluation is moot.

C. Permanent Total Disability

The claimant contends he is now permanently totally disabled as a result of his compensable injury. In determining permanent disability beyond anatomical impairment, the Commission may consider, in addition to the medical evidence, the

claimant's age, education, work experience, and other factors that may affect his future earning capacity. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992); ARK. CODE ANN. § 11-9-522 (1987).

As of the hearing, the claimant was 59 years of age. He has an eighth grade education and a limited ability to read and write. He worked for the respondent-employer for 38 years in a variety of jobs, including laborer, equipment operator, light maintenance technician, and truck driver. He has no specialized training or job skills other than his truck-driving skills. He is presently taking medication, and his doctors have indicated he will most likely be on medication for the rest of his life. Dr. Boswell opined as of March 6, 2004, "Mr. Rushing is not able to continue working and I do not feel he is a candidate for rehabilitation. I do not think he will ever be able remain in [sic] gainful employment." As discussed above, he has been assigned a permanent impairment rating of 75% to the body as a whole. Finally, I note that the claimant is presently receiving more money from his retirement and Social Security Disability benefits than he earned from his salary at the time of his injury, suggesting that he has little economic incentive to return to work.

From the record before me, it appears more likely than not that the claimant's condition is permanent, and that he is unemployable because of the length and severity of his compensable mental injury. *Cf. Kivo v. Supersaver Wholesale Warehouse*,

A.W.C.C. D611220 (Jan. 23, 2002). I recognize that he was able to work for the respondent-employer several years until it closed, but the record indicates that his supervisors made numerous accommodations to him so that he could work in spite of his mental injury. I do not find it reasonable to expect that other employers would be similarly accommodating, an inference supported by the claimant's relatively brief tenure with his last two employers. Therefore, given the evidence before me, I find that the claimant has proven by a preponderance of the evidence that he is permanently totally disabled. Because I so find, I do not find it necessary to reach the question of whether the claimant falls under the "odd-lot" category.

AWARD

The claimant has proven by a preponderance of the evidence that the medical treatment received after January 2004, including treatment by and at the referral or prescription of Dr. Linda Boswell and Dr. Gary Booker, and including his hospitalizations at Brentwood Hospital, has been reasonably necessary in connection with his compensable injury; that additional medical treatment remains reasonably necessary in connection with his compensable injury; that he was entitled to temporary total disability benefits from January 12, 2004, through March 3, 2004; that he is entitled to permanent partial disability benefits in the amount of

75% to the body as a whole; and that he is permanently totally disabled. 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.

HON. J. MARK WHITE
Administrative Law Judge