

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F100769

ROGER UCETTA, EMPLOYEE	CLAIMANT
AIR TRANSPORT INTERNATIONAL, EMPLOYER	RESPONDENT #1
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST	RESPONDENT #3

OPINION FILED JUNE 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, On March 30, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVID, Attorney at Law, Little Rock, Arkansas.

Respondents #1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On February 1, 2005, a pre-hearing conference was conducted in this claim, from which a

Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Roger Uccetta, the claimant, and Deborah Uccetta, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Roger Uccetta, the claimant with a date of birth of May 19, 1957, commenced his employment with respondents #1 on May 6, 1996. Claimant was employed as a airline captain and flew both domestically [freight] and internationally [military contracts for the government-a combination of both freight and personnel]. Claimant worked continuously for respondents #1 until his compensable injury of May 2000.

The testimony of the claimant reflects that prior to his employment in the airline industry he worked at a variety of jobs to include work with his father in construction and building homes. Claimant also work as a flight instructor from 1980 through 1987. The flight instructor's job required the claimant to have a flight instructor's certificate, commercial license, instrument reading, and a first class flight physical. The testimony of the claimant reflects that in his present physical condition, attributed to residuals of his compensable injury, he could not pass the required physical. Further, the claimant testified that even if he could pass the physical, in order to obtain an instructor's certificate, he would have to go back through some training and take the test, which he is not able to do in light of the residuals of his injury:

Well, for one, I wouldn't be able to pass the physical. And

the medications prevent me from flying, along with my inability to, to really to move. In certain positions it would definitely make it an unsafe situation. (T. 30).

The testimony of the claimant reflects that for the past two to three years he has taken Oxycontin, which was prescribed as a last resort, after other medications failed to address his pain complaint, due to either adverse reactions or ineffectiveness. Claimant noted that federal regulations prohibit him from being an airline pilot while taking Oxycontin.

Claimant's testimony reflects that prior to his employment by respondents #1, he was a pilot for a commuter, United Express Commuter, which operated a 50 passenger turboprop. Claimant was employed by another airline performing similar job duties prior to United Express Commuter.

_____ Claimant commenced his employment with respondent #1 on May 6, 1996. Claimant worked as a co-pilot for the first year and one-half during his employment with respondent #1, and was required to take a physical every year. Once he became a captain, approximately two and one-half years prior to his May 2000 compensable injury, claimant was required to take a physical every six (6) months. Claimant asserts that prior to his May 2000, compensable injury he enjoyed good health and was physically capable of performing his job.

Claimant acknowledged that he suffered a right shoulder injury in a 1991, motor vehicle accident, prior to the May 2000 compensable injury in the employment of respondent #1, for which he underwent two (2) surgeries to repair the torn rotator cuff. Claimant noted that once he healed for the injury, he resumed his employment duties as a pilot. Aside from being directed to avoid lifting weights with his right arm being extended, claimant maintains that the only other residuals experienced from the right shoulder injury and surgeries was "a little bit of discomfort"

when the weather would change. Claimant acknowledged that he presently having significant shoulder problems, however he is uncertain whether the same would in and of itself prevent him from passing a physical to get his pilot's license.

_____The testimony of the claimant further reflects that in 1998, he was diagnosed with a torn meniscus in his right knee, however did not undergo surgery for same until 2001, while being treated for the May 2000, compensable injury. Claimant suffered an injury to his ankle in a motor vehicle accident, which required medical treatment, but no surgery.

The compensability of the claimant's May 30, 2000, injury in the employment of respondent #1 is not disputed. In describing the mechanics of the accident, claimant's testimony reflects:

Well, we were flying out of, I believe it was Chihuahua to El Paso and on to Toledo. When we landed in El Paso, we were prepping the aircraft. The DC-8 is an older aircraft and very heavy, and we locked the controls. And to lock the controls you, both the Captain and the First Officer have to push forward on the yoke and next to the First Officer is a long bar, similar to this (indicating), and it's to be pulled back to the lock position as such. And sometimes we need three people to do it. Well, on this particular day we were parking and a thunderstorm had been right near the airport, it was gusting and started to kick the controls around. And the First Officer was distracted and took his hands off the controls at the critical points and when we were locking this thing and a gust of wind came, it just kicked it like a mule, you know, the jerk, something popped. (T. 31).

Claimant suffered an injury to his low back in the accident. The injury was reported to appropriated supervisory personnel of respondent #1, and accepted as compensable. The medical evidence in the record reflects that claimant was treated with physical therapy and medication following the accident. Claimant also returned to work for approximately two months (October

and November 2000) following his injury. Claimant's testimony reflects that the afore made his back injury worse.

In January 2001, claimant underwent surgery in the form of L4-5 right discectomy under the care of Dr. Stewart Harley. Claimant continued to experience symptoms attributable to the compensable May 30, 2000, injury, subsequent to the surgery. After undergoing further diagnostic studies and treatment relative to the injury, claimant asserts that a fusion was recommended. Prior to proceeding with further surgery an second opinion evaluation was scheduled.

The medical in the record reflects that claimant was seen by Dr. Mark B. Hartman, a Charlotte, North Carolina, orthopedic surgeon, pursuant to the directions of respondent #1. The February 20, 2003, report of Dr. Hartman, relative to his evaluation of the claimant reflects, in pertinent part:

I was asked to see Roger Uccetta as an IME. He injured himself almost two and half years ago when he was taxiing a freight plane and received a jolt. Initially, he had back pain. Subsequently, he developed leg pain. He was seen by Dr. Harley and Dr. Pikus. He underwent a 4-5 right discectomy. Unfortunately, his back and leg pain never really improved significantly. Subsequently, he said he had another injury during therapy postoperatively and it has progressively gotten worse. He has done blocks. He has done therapy. He is currently not working. In conferences between Dr. Silver, Dr. Burke and Dr. Harley concerning this patient in regards whether a 4-5 decompression and fusion would be of benefit, his postoperative MRI's have shown a recurrent disc at 4-5 on the left, not really consistent with his symptoms.

* * *

- IMPRESSION:**
1. Chronic lumbar sprain/strain.
 2. Recurrent disc at 4-5.

PLAN: In light of the patient's pain, he still has back pain greater than leg pain, I told him that the success rate of a lumbar decompression, discectomy and fusion at 4-5 is probably somewhere around 50-60%. I do not think that doing just a discectomy when he has no left leg pain and the disc is on the left would be of benefit.

I actually think he is currently exhausted most of the conservative care and is at maximum medical improvement. I think he has 15% permanent/partial impairment. I think he is capable of a light duty job with 20 pound lift/carry, 40 pound push/pull, change positions every 45 minutes. I encouraged him to try to stay off of all narcotics and try to control his pain with anti-inflammatories. Will see him back on a p.r.n basis. (CX #1, p39).

The evidence in the record reflects that respondent #1 ceased paying temporary total disability benefits to the claimant upon receipt of the February 20, 2003, report of Dr. Hartman, and commenced the payment of indemnity benefits to correspond with the 15% anatomical rating. There is no evidence in the record to reflect that a change of physician was effectuated in the claim, pursuant to Ark. Code Ann. § 11-9-514. Accordingly, following the February 20, 2003, evaluation by Dr. Hartman, claimant's authorized treating physician relative to his compensable injury remained the same or referral therefrom as before the evaluation.

The medical in the record reflects that prior to the February 20, 2003, evaluation by Dr. Hartman, claimant had received medical treatment under the care of Dr. Miles Hyman, from July 11, 2002, through February 3, 2003. (CX. #1, p. 36-38). Following the February 20, 2003, evaluation by Dr. Hartman, claimant returned to the care of Dr. Hyman on March 5, 2003, and has continued under the care of same. (CX. #1, p. 40-48).

Claimant's testimony reflects that Dr. Hyman, as a pain management specialist, deals specifically with opiates, and is the physician who prescribes his Oxycontin. Claimant noted that while there was an effort to avoid prescribing the Oxycontin by his treating physician, once he

was placed on it, he has not been taken of it. Claimant's testimony reflects, with respect to the beneficial effects of the Oxycontin:

Well, if I, before taking the medicine the pain was so bad that I was pretty much bedridden most of the time, chair or bedridden to where the ability to even move was almost out of the question. I was just so consumed with pain that it was, you know, I was basically useless. I mean I couldn't do anything. And what the Oxycontin has done is given me the ability to at least somewhat function, get up in the morning. Once the medicine starts working I'm able to get around and try to help my wife and, you know, do what little things I can do. It's given me some freedom. (T. 64-65).

Claimant acknowledged that the medication does make him sleepy at times. In addition to taking two Oxycontin twice a day, claimant testified that he takes Prevacid for stomach irritability, blood pressure medicine and an anti-depressant. Claimant also takes a breakthrough pain medication, Roxicodone, between the two regular doses of Oxycontin.

Regarding his current symptoms attributable to the May 30, 2000, compensable injury, the testimony of the claimant reflects:

Just a, it's almost hard to describe the pain. It's just excruciating. It's in the lower back region but radiates down the legs, particularly, it favors the left leg.

A combination (sharp, dull, aching). Sometimes very sharp and then as it radiates on, it dulls up and then it may find another point that it hurts, you know, pretty bad. (T. 38).

Claimant noted that initially he experienced a drop-foot on the right, which the January 2001, surgery was supposed to address. Claimant acknowledged that while the symptoms in his right leg were not completely resolved with the surgery, it did help some. Claimant testified that he uses a cane to assist him in walking because of the pain in his right leg, although he does not use it every day.

Claimant further testified regarding his symptoms:

Well, as I said, the right leg is primarily the drop foot, you know, the biggest problem with that one, which occasionally it just makes it so that, for example, one of the tests they give you, you stand on your toes and then you stand on your heels. And I don't have the ability to stand on my heel on my right foot. That's how they determined I had a problem there.

But the pain down the left leg can be quite intense. It starts in like the left buttocks and just goes right down the leg and it creates just a real discomfort, I mean, you can't get comfortable. You try to bend your knee and move your legs, you know, everything you can to try to alleviate the pressure. (T. 38-39).

Claimant takes Zoloft for depression. In explaining his depression claimant testified:

The psychiatrist said it's from the chronic pain. It's some syndrome, chronic pain something syndrome. I can't remember exactly the terminology but it's due to the pain. He said that's common with someone with severe chronic pain. (T. 51).

Mrs. Deborah Uccetta, the claimant's wife provided testimony corroborative of that of the claimant regarding the impact of the claimant's May 30, 2000, compensable injury on the claimant physically, economically, and socially. Ms. Uccetta contrasted the claimant's physical activity level prior to the compensable and subsequent to the injury.

Mrs. Uccetta noted that while the claimant has previously had surgery relative to his right shoulder prior to his May 2000, compensable injury, he had recovered from it and was not having any residuals from it until the compensable injury. Regarding the afore, Mrs. Uccetta testified that while the claimant was undergoing physical therapy relative to the compensable May 30, 2000, low back injury, he re-injured the shoulder.

A vocational assessment was conducted by Cascade Disability Management relative the claimant's ability to return to gainful. (RX. #1, ex. #1) The initial vocational assessment report

was completed on February 1, 2005. A labor market survey report was completed regarding the claimant on March 2, 2005. (RX. #1, ex. #2).

After a thorough consideration of all to the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On May 30, 2000, the relationship of employee-employer-carrier existed among the claimant and Respondents #1.
3. On May 30, 2000, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$394.00/\$295.00 for total/permanent partial disability.
4. The claimant has been paid indemnity benefits by Respondents #1 relative to temporary total disability, as well as indemnity benefits to correspond with his 15% whole body anatomical impairment growing out of the May 30, 2000, compensable injury.
5. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of May 30, 2000.
6. The claimant's healing period ended on February 20, 2003, and resulted in a 15% whole body permanent physical impairment.
7. When the claimant's age, education, work experience, and other matters reasonably expected to affect the claimant's future earning capacity, the claimant has been permanently totally disabled within the purview of the Arkansas Workers' Compensation

statutes.

8. Respondent #2, the Second Injury Fund, has no liability in this claim.

9. Respondent #1 is entitled to a credit for the amount paid toward the claimant's anatomical impairment rating against the first \$75, 000.00 of permanent and total disability benefits it must pay to the claimant.

10. Respondent #1 has controverted the claimant's entitlement to permanent disability benefits in excess of the 15% anatomical impairment.

CONCLUSIONS

The compensability of the claimant's May 30, 2000, injury in the employment of respondent #1 is not disputed. Claimant asserts that as a result of the compensable injury he had been rendered permanently and totally disabled, or, loss of earning capacity in excess of the 15% anatomical impairment. The position of each respondent is as outlined in Pre-hearing Order, which incorporates the respective pre-hearing filing of the parties.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions. The parties have stipulated that as a result of the May 30, 2000, compensable low back injury, claimant has sustained a permanent physical impairment in the amount of 15% to the body as a whole, when he reached maximum medical improvement on February 20, 2003. Respondent #1 initiated the payment of permanent partial disability benefits to correspond with the claimant's rating.

Claimant was employed by respondent #1 as a pilot at the time of his May 30, 2000, compensable injury. Claimant had been employed by respondent #1 for four (4) years at the time

of the compensable injury, having commenced his employment on May 6, 1996. Claimant is a high school graduate who has attended several flight academies which equates to over two years of college. Claimant is 5' 11" tall and weights 320 pounds. Claimant attributes his current weight gain to inactivity due to residuals of his compensable May 30, 2000, injury.

Wage Loss Disability

The evidence in the record preponderates that prior to his May 30, 2000, compensable low back injury claimant was gainfully employed in a physically demanding job, and successfully discharged his employment duties with restrictions or limitations. Following the May 30, 2000, compensable injury and initial medical treatment, claimant returned to the employment of respondent #1 in October and November 2000, however was unable to continue.

Claimant has not worked since November 2000, due to residuals of the May 2000, compensable injury. In January 2001, claimant underwent surgery at the L4-5 level. As a consequence of the injury, claimant has incurred severe restriction of his physical activities. While able to drive, claimant is unable to continue such activity or to ride as a passenger in excess of one hour. Claimant is unable to bend, lift significant weights, or engage in standing or walking for any appreciable period of time.

Claimant is required to take prescription narcotic medication to address his pain complaints growing out of the compensable injury. In addition to eliminating the prospects of returning to flying an aircraft as a means of employment, the prescription pain medication has the side effect of rendering claimant sleepy.

Claimant has held a variety of jobs prior to becoming a full time pilot, to include that of a flight instructor. The credible evidence in the record reflects that in order to be a flight instructor

or pilot, claimant would be required to take and pass a physical. Claimant is physically unable to pass the required physical to be a pilot or maintain his instructor's certificate. While undergoing physical therapy relative to the May 30, 2000, compensable injury, claimant re-injured his right shoulder. Claimant had previously undergone two (2) surgeries on a torn rotator cuff in his right shoulder, relative to a 1991 injury. Claimant is right-hand dominate. The claimant's previous right shoulder injury did not adversely impact his employment once he recovered from the surgery. There is no evidence that the prior right shoulder injury effected or impacted his employment with respondent #1. Subsequent to the May 2000, compensable injury, and re-injury to the shoulder during physical therapy, the prior right shoulder injury also now serves as a basis for some of the claimant's physical limitation with respect to employment activities.

The labor market survey report, while identifying a number of employment positions, fails to take into account the claimant's need for prescription medication on a regular basis, the impact of the medication of the claimant's activity level, and claimant's severe physical limitations with respect to walking, standing, bending, lifting. At the time of his injury, claimant earned between \$76,000.00 and \$78,000.00, annually.

The credible evidence reflects that claimant was motivated to return to work following his May 30, 2000, compensable injury, as well as following the January 2001, surgery. Since the surgery, claimant had been unable to achieved appreciable relief from his residual symptoms of low back, is in constant pain relative to his low back and lower extremities, and takes prescription medication on regular basis which adversely effects his activity level. Further, claimant's physical limitations growing out of the compensable May 30, 2000, injury adversely impacts the claimant's activity level, contributing to his weight increase.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Cross v. Crawford County Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The evidence in the record preponderates that when the claimant's age, education, work experience, permanent restrictions and limitations, coupled with other matters that reasonably expected to affect the claimant future earning capacity are considered, the claimant has been rendered permanently and totally disabled from engaging in gainful employment, pursuant to Ark. Code Ann. §11-9-519 (c), and in accordance with *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961). Respondents have controverted the claimant's entitlement to permanent disability benefits in excess of the 15% permanent physical impairment.

Second Injury Fund Liability.

While it is undisputed that the claimant suffered an injury to his right shoulder in 1991, for which he underwent surgery on two (2) occasion, there is no evidence in the record to reflect the same adversely impacted his earning capacity prior to his May 6, 1996, employment with respondent #1. Indeed, the evidence in the record reflects that claimant resumed his employment as a pilot following the recovery from the 1991 right shoulder surgery.

Claimant was employed as a co-pilot by respondent #1 for approximately two years commencing in 1996, during which time he was required to undergo and successfully past a annual physical. After becoming a Captain, a position which he held during his last two years with respondent #1, claimant was required to undergo and successfully pass a physical every six (6) months.

Because of the claimant's prior shoulder injury and surgeries, respondent #1 joined respondent #2, the Second Injury Fund, as a party to this claim. The test that is used to determine

whether the Second Injury Fund, respondent #2, must share liability for compensating an injured worker was stated in *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988):

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to the 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.

Id. at 5, 746 S.W.2d at 541. The evidence in the record preponderates that the claimant's current disability status is the product of May 30, 2000, compensable injury alone. Respondent #2 does not have any liability in this claim.

Credit For Payment of Permanent Total Disability Benefits

The parties have stipulated that the claimant reached the end of his healing period on February 20, 2003, relative to the May 30, 2000, compensable low back injury suffered in the employment of respondent #1. Respondent #1 accepted and paid permanent partial disability benefits to the claimant to correspond to the 15% permanent physical impairment assessed by Dr. Mark Hartman.

Respondent #3, the Death and Permanent Total Disability Trust Fund, contends that respondent #1 must first pay permanent partial disability in the form of the anatomical rating for the claimant's compensable injury before payment of permanent total disability benefits. Further, respondent #3 maintains that respondent #1 is not entitled to credit against its \$75,000.00 maximum for payment of the claimant's permanent partial anatomical rating for the injury.

The arguments of respondent #3 have been previously addressed by the Full Commission in an Opinion delivered on Ma 4, 2005, *Joseph Thomas v. Legacy Insurance Services*, WCC # F100487. Respondent #1 paid permanent partial disability benefits to the claimant at the weekly compensation benefit rate of \$296.00, commencing with the end of the claimant's healing period on February 20, 2003, pursuant to Ark. Code Ann. §11-9-522 (a). Once a determination of permanent and total disability has been made, the benefits due the claimant are no longer governed by Ark. Code Ann. §11-9-522, but rather Ark. Code Ann. § 11-9-519 (e). In *Thomas*, the Commission concluded:

Thus, when a determination of permanent total disability has been made, the benefits paid by a respondent after the end of the healing period are classified as permanent and total disability benefits under Ark. Code Ann. §11-9-502 (b). The statute then provides, "all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund."

Id.

According, respondent #1 is entitled to a credit for the amount of permanent anatomical impairment rating benefits ultimately paid to the claimant against the first \$75,000.00 of permanent and total disability benefits respondent #1 must pay.

AWARD

Respondents #1 are hereby ordered and directed to pay to the claimant permanent total disability benefits at the weekly compensation disability benefits of \$394.00, commencing with the end of his healing period on February 20, 2003, and continuing until such time as they have satisfied their obligation to the claimant pursuant to Ark. Code Ann. § 11-9-502 (b), as a result of his compensable injury of May 30, 2000. Said sums accrued shall be paid in lump without

discount. Respondent #1 may claim credit for sums heretofore toward the aforementioned obligation.

Respondents #1 are further ordered and directed to pay all reasonably necessary and related medical, hospital, nursing and other apparatus expenses growing out of the claimant's compensable injury of May 30, 2000, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted portion of this award pursuant to Ark. Code Ann. § 11-9-715, and, in accordance with *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

This award shall bear interest pursuant to Ark Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, Administrative Law Judge