

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310205

DOUG BOYETTE, EMPLOYEE	CLAIMANT
CONAGRA POULTRY COMPANY, EMPLOYER	RESPONDENT NO. 1
GALLAGHER BASSETT SERVICES, INC., TPA	RESPONDENT NO. 1
DEATH & PERM. TOTAL DIS. TRUST FUND	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED JUNE 9, 2006

Hearing before Administrative Law Judge J. Mark White on March 16, 2006, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

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

Death & Permanent Total Disability Trust Fund waived its appearance.

Second Injury Fund represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 16, 2006, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on December 5, 2005, and a Prehearing Order was entered that same day. A copy of the December 5, 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/self-insured employer relationship existed at all relevant times, including September 9, 2003; that on September 9, 2003, the claimant sustained compensable injuries to his low back and right shoulder; that respondent no. 1 has accepted the September 9, 2003, injuries as compensable and paid benefits, including payments towards permanent anatomical impairment ratings of 14% to the body as a whole; and that the claimant earned wages sufficient to entitle him to the maximum compensation rates.

The parties agreed that the issues to be presented were whether the claimant is entitled to additional temporary total disability benefits; whether the claimant is permanently totally disabled; in the alternative, whether the claimant has sustained wage loss in excess of his anatomical impairment rating; the liability, if any, of the Second Injury Fund and the Death & Permanent Total Disability Trust Fund; whether the respondents are entitled to credit toward their \$75,000 maximum liability for permanent partial disability benefits paid; and controversion and attorney's fees. Prior to the hearing, respondent no. 1 also raised the issue of its

entitlement to credit for benefits paid per Ark. Code Ann. § 11-9-411, and there was no objection to addition of this issue.

The claimant contends that he is due additional temporary total disability benefits from January 28, 2004 through December 10, 2004; that he continued having problems with his shoulder even after his rating and release from Dr. David Collins; that Dr. Collins did additional shoulder surgery in October 2004, and the claimant re-entered his healing period, however, respondents did not pay TTD benefits during that time; that he reached the end of his healing period no earlier than December 10, 2004; that he is 56 years old and has an eighth grade education with a GED he completed while in the military; that he learned truck driving in the military and transferred this skill into a job as a truck driver with respondents, a job he held for over 30 years; that he has a total of at least fourteen percent (14%) impairment to the whole body as a result of both his shoulder and low back injuries, both of which have required surgery; that he cannot perform any kind of gainful employment and is drawing Social Security Disability benefits; that there is no program of rehabilitation that is feasible in light of the impairment and disability sustained; that he is entitled to permanent and total disability benefits; in the alternative, if he is not found to be permanently totally disabled, he has sustained substantial wage loss in excess of his impairment rating; that respondents have

controverted this claim with respect to the benefits claimed at present; that he is entitled to maximum attorney's fees on all benefits awarded; and that the credit provided for in Ark. Code Ann. § 11-9-411 is not applicable to the VA benefits currently being received by the claimant.

Respondents contend that Dr. Schlesinger performed a right L5-S1 decompression on October 30, 2003 and released the claimant at maximum medical improvement with an eight percent (8%) impairment rating on January 28, 2004; that the claimant was treated by Dr. Collins for a right AC joint, and a partial claviclectomy on the right was performed on October 7, 2004; that the claimant was released by Dr. Collins on December 10, 2004, with a six percent (6%) impairment to the body as a whole with restrictions of no lifting above shoulder level and no lifting over 15 pounds; that it should be noted that Dr. Collins' rating of six percent (6%) to the body as a whole was originally rendered on February 18, 2004, and Dr. Collins stated that surgical intervention would not change the claimant's impairment rating; that the claimant has a nonwork-related lung problem, which may be COPD or Agent Orange, and he received a rating from the military; that due to this preexisting condition, the claimant was unable to pass his DOT physical; that in light of this condition, the respondents have brought in the Second Injury Fund pursuant to Rule 24; that the claimant is collecting approximately \$2,300 per month

in disability benefits from the Veterans Administration; and that the respondents are entitled to credit under Ark. Code Ann. § 11-9-411 for all VA disability benefits paid the claimant.

The Death & Permanent Total Disability Trust Fund contends that pursuant to Ark. Code Ann. § 11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death & Permanent Total Disability Trust Fund liability; that if the Second Injury Fund is found to not have liability and the claimant is found to be permanently totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with Ark. Code Ann. § 11-9-502; that the Trust Fund has therefore not controverted the claimant's entitlement to benefits; that Respondent No. 1 must first pay permanent anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits; and that Respondent No. 1 is not entitled to credit for payment of the claimant's permanent anatomical impairment rating for the compensable injury against its \$75,000 maximum liability for permanent total disability benefits pursuant to Ark. Code Ann. § 11-9-502(b)(1). The issues raised by the Trust Fund as to the respondents' payment of the anatomical impairment ratings have been resolved by the Arkansas Court of Appeals in the matter of *Death & Permanent Total Disability Trust Fund v. Legacy Insurance Services, et al*, __ Ark. App. __, __ S.W.3d __

(May 10, 2006). Therefore, those issues will not be considered further herein.

The Second Injury Fund contends that if the claimant's preexisting disabilities have combined with his compensable injuries to produce his current liability status, the Second Injury Fund is entitled to credit for benefits paid by the VA.

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 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 he was totally incapacitated from earning wages from January 28, 2004, through December 10, 2004.
4. The claimant's healing period ended as of February 28, 2004, and he entered a new healing period for his shoulder from August 31, 2004, through

December 10, 2004.

5. The claimant has therefore proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from January 28, 2004, through February 28, 2004, and from August 31, 2004, through December 10, 2004, subject to a credit for temporary benefits already paid by the respondents for these periods of time.
6. The claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled.
7. The claimant has proven by a preponderance of the evidence that he has sustained wage loss of 56% in excess of his anatomical impairment, for a total impairment of 70%.
8. The claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his disability or impairment.
9. The claimant is entitled to wage-loss disability benefits of 56% in excess of his anatomical impairment, for a total impairment of 70%.
10. The respondents have proven by a preponderance of the evidence that prior to his compensable injury the claimant had a permanent partial impairment of his low back; and that this prior permanent partial impairment has combined with the claimant's recent compensable injury to produce his

current disability status.

11. The Second Injury Fund is therefore liable for all wage-loss disability benefits awarded herein.
12. The respondents and the Second Injury Fund are not entitled to an offset against the claimant's VA benefits.
13. The Death & Permanent Total Disability Trust Fund has no liability herein.
14. The respondents have controverted all benefits sought herein, and the Second Injury Fund has controverted the claimant's entitlement to wage-loss disability benefits.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a truck driver. On September 9, 2003, he sustained compensable injuries to his low back and right shoulder when he slipped and fell down some stairs. After being treated at the emergency room, he was treated by the company physician, Dr. Greg Smart. X-rays performed by Dr. Smart revealed degenerative changes at L5-S1. On a referral from Dr. Smart, Dr. Scott Schlesinger saw the claimant on October 1, and on October 30, Dr. Schlesinger performed surgery, "a right L5 and S1 decompression for lateral

recess stenosis and removal of a right L5-S1 sub angular disc herniation." Two weeks later, Dr. Smart recorded that the claimant's back condition had "certainly improved." On December 15, Dr. Schlesinger released the claimant from care with an anatomical impairment rating of 7% to the body as a whole, though on January 28, 2004, he revised the rating to 8%. He indicated the claimant could return "to regular duty effective January 6, 2004 as tolerated."

On December 8, the claimant saw an orthopedic specialist, Dr. David Collins, for treatment of his right shoulder. After performing a triphasic bone scan, Dr. Collins gave his diagnosis as, "Post-traumatic chondrolysis/osteolysis, AC joint, including distal clavicle." Dr. Collins recommended surgery, but surgery was postponed because of the claimant's continued back problems.

The claimant returned to Dr. Schlesinger on January 28, 2004. He had attempted to return to work but was unable to continue working because of his back. After reviewing the results of an MRI, Dr. Schlesinger opined the claimant probably had an inflamed nerve root. He prescribed medication and took the claimant back off of work through the end of February.

On February 18, 2004, Dr. Collins reiterated his recommendation of shoulder surgery, but he noted the claimant declined:

He is still unsure what he wants to do with his shoulder.
It is a source of pain, but he is not enthusiastic about

undergoing surgery. He is not enthusiastic about the possibility of having an outcome which may not relieve his symptoms.

I reviewed with him in detail the fact that we have undertaken a thorough workup of his pain syndrome and appears that his symptoms are confined to the AC joint. He has a positive bone scan, focal tenderness and plain radiographic findings.

At some point he is likely to require partial claviclectomy.

Since the claimant declined surgery, Dr. Collins released him from care with an anatomical impairment rating of 6% to the body as a whole. He indicated the claimant could "pursue activities without restriction."

The claimant returned to Dr. Smart on February 27 after a second unsuccessful attempt to return to work. He continued to see Dr. Smart over the following months for his back, and Dr. Smart opined the claimant could not return to truck driving. Rather than return to work, the claimant retired from the respondent-employer. He testified that he retired because his back pain was too severe for him to perform his job duties.

The claimant finally returned to Dr. Collins for his shoulder on August 31, complaining of renewed shoulder pain. When an arthrogram ruled out a rotator cuff tear, the claimant agreed to undergo the surgery Dr. Collins had originally recommended to repair his AC joint. Dr. Collins performed the surgery on October

7. One week later the claimant was “doing extremely well,” and on December 10 Dr. Collins released him from care with “permanent restrictions arm below shoulder level, no forces greater than 15#.”

The claimant does have a number of pre-existing conditions that may impair his ability to work. He was injured in battle in Vietnam; he sustained a low back injury, but he continued fighting and stayed in Vietnam through the end of his term. That back injury caused recurring problems in the following decades, up until the time of his compensable injury. The back problem was diagnosed in 1971 by a Dr. Edward Domingues as a “herniated nucleus pulposus, right, L-5, S-1 disc, with nerve involvement.” There are no imaging studies from that time to confirm the diagnosis, though there is likewise no evidence to contradict it. The claimant also suffers from asthma or some other type of lung problem, though his testimony indicates this condition is now better than it was before the compensable injury. The claimant has long struggled with post-traumatic stress disorder as a result of his Vietnam experience, and these problems have grown worse since he has not been working. He has some degree of hearing loss, though there is no evidence in the record this hearing loss has affected his ability to work. He has also been diagnosed with diabetes and possibly COPD, though again there is no evidence these conditions have affected his ability to work.

II. Adjudication

A. Additional Temporary Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant contends he was entitled to temporary total disability benefits from January 28, 2004, through December 10, 2004, though the respondents' counsel indicated his clients paid temporary benefits through February 14, 2004. As of January 28, Dr. Schlesinger took the claimant off of work for another three weeks. On February 27, Dr. Smart restricted the claimant to "limited activity" and noted that the claimant "obviously cannot tolerate the current duties of driving." Dr. Smart reiterated these restrictions when he released the claimant on March 10. After the claimant underwent his shoulder surgery, he was released by Dr. Collins as of December 10, 2004. Given this evidence, I find that the claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages

from January 28, 2004, through December 10, 2004.

The claimant was declared by Dr. Schlesinger to be at MMI for his back as of the end of February 2004, and Dr. Collins declared him to be at MMI as of February 18 for his shoulder when the claimant declined surgery. Thereafter, what little treatment the claimant received for either condition was geared towards managing his condition and keeping the status quo, rather than improving his condition. The claimant received no treatment for his shoulder until August 31, when he returned to Dr. Collins for his shoulder surgery. Dr. Collins released him and declared him to be at MMI as of December 10, 2004.

Given this evidence, I find that the claimant's healing period ended as of February 28, 2004, and that he entered a new healing period for his shoulder from August 31, 2004, through December 10, 2004. I therefore conclude that the claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from January 28, 2004, through February 28, 2004, and from August 31, 2004, through December 10, 2004. The respondents are entitled to credit for any temporary benefits already paid for these periods of time.

B. Permanent Disability

The claimant contends that he is permanently and totally disabled.

"Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." Ark. Code Ann. § 11-9-519 (e). The claimant bears the burden of proving that he is unable to earn meaningful wages in any employment. *Id.* In considering permanent disability benefits in excess of a claimant's anatomical impairment rating, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." Ark. Code Ann. § 11-9-522 (b)(1). These "other matters" may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a).

The claimant was 57 years old as of the hearing. He has a GED and specialized training in truck driving. He served in the military in Vietnam and was honorably discharged. After leaving the military, he worked for a brief time as a car mechanic and as a door-to-door insurance salesman. He then worked for the

respondent-employer as a truck driver for thirty-two years. Even while he was working he received disability benefits from the Veterans' Administration, though the amount of those prior benefits is unknown. The claimant testified that prior to his surgery, he could earn from \$700 to \$1,250 per week from the respondent-employer, including overtime. The parties did not stipulate to a specific average weekly wage but instead stipulated only that the claimant was entitled to the maximum compensation rates.

The claimant has had both back and shoulder surgeries. He is not taking medication for either condition; however, he did testify that the reason he takes no medication for his back or shoulder is due to possible drug interactions with his diabetes medication. When Dr. Schlesinger released the claimant from care for his back, he assigned no permanent restrictions, though he stated he was releasing the claimant to regular duty "as tolerated." Dr. Smart, on the other hand, specifically opined in the context of the back injury that the claimant was "unable to return to his regular duties of truck driving." As for the claimant's shoulder injury, he was released from care after his surgery by Dr. Collins with "permanent restrictions arm below shoulder level, no forces greater than 15#." Though he has a number of other medical conditions, including some for which he has been awarded disability by the VA, the claimant testified he could work were it not for the severe back, shoulder,

and leg pain of which he complains.

After reviewing the record as a whole, I am not persuaded that the claimant is incapable of earning wages in *any* employment. I find that the claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. However, I am also persuaded that his wage-earning capacity has been impaired beyond the 14% anatomical impairment accepted by the respondent-carrier. I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 56% in excess of his anatomical impairment, for a total impairment of 70%. Though he has other medical conditions, I am persuaded that his compensable back and shoulder injuries are more than 50% of the cause of his present disability and impairment. I find that the claimant has proven by a preponderance of the evidence that his compensable injury is the major cause of his disability or impairment.

C. Second Injury Fund Liability

The Second Injury Fund exists to protect employers of handicapped workers so that the employers will not be held liable “for a greater disability or impairment than actually occurred while the worker was in his or her employment.” Ark. Code Ann. § 11-9-525(a)(1). Three elements must be proven to establish the liability of the

Second Injury Fund. First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). "Disability" is statutorily defined as a loss of wage-earning capacity. Ark. Code Ann. § 11-9-102(8). "Impairment" is any condition "sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause for the impairment." *Mid-State Construction Co. v Second Injury Fund, supra*. An impairment need not be a work-related condition, nor must it necessarily be shown to have caused a loss of wage-earning capacity. *Id.*

The claimant was wounded in action in Vietnam, sustaining an injury to his low back. While he required no extraordinary treatment at that time, he was treated off and on in the following years. In 1971 he was specifically diagnosed with a herniation at L5-S1 on the right, the same location as his compensable back injury. The claimant testified he was able to work and perform his prior job duties despite the old back injury; it was only after the compensable injury that he was unable to work. He frequently required treatment for his low back in the years preceding his

compensable injury, though he was able to work in this time. The 1971 herniation was a condition capable of being rated under the *AMA Guides*, and was sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause for the impairment.

The parties have stipulated that the claimant suffered a compensable injury at his present place of employment. Given the record before me, I find that the respondents have proven by a preponderance of the evidence that prior to his compensable injury the claimant had a permanent partial impairment of his low back; and that this prior permanent partial impairment has combined with the claimant's recent compensable injury to produce his current disability status. I therefore conclude that the Second Injury Fund is liable for all wage-loss disability benefits awarded herein.

D. Respondents' Entitlement to Credit

The Workers' Compensation Act provides as follows:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or

accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

Ark. Code Ann. § 11-9-411 (a).

The respondents and the Second Injury Fund contend they are entitled to an offset for the disability benefits paid to the claimant by the Veterans Administration. The respondents contend the claimant should not receive a double recovery for the same period of disability.

Undoubtedly, the claimant will receive a double recovery if an offset is not applied. Nonetheless, the Commission is charged by the Legislature to strictly construe the provisions of the Workers' Compensation Act. Ark. Code Ann. § 11-9-704(c)(3). Strict construction is narrow construction, requiring that nothing be taken as intended that is not clearly expressed and that the plain meaning of the language be employed. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003).

Determination of this question turns on how § 11-9-411 (a) is interpreted – specifically, whether the itemized list of benefit policies is intended by the Legislature to be exclusive. In other words, may an offset be taken for benefits paid for the same “period of disability” when the source of the benefits is not listed in the statute? The plain answer from both the Court of Appeals and the Commission is in the negative.

In the case of *Dollarway School District v. Lovelace*, __ Ark. App. __, __ S.W.3d __ (Feb. 23, 2005), the Court held that no offset may be taken against life insurance proceeds, for § 11-9-411 makes “no mention of life insurance, death or dependency benefits.” Similarly, the Full Commission held that no offset may be taken on payments “not made by an insurer.” *Norman v. North Hills Service, Inc.*, A.W.C.C. F408828 (Nov. 21, 2005). Therefore, since the payments made to the claimant were not made by an insurer, nor through a group plan of insurance, I must conclude that the respondents and the Second Injury Fund are entitled to no offset against the claimant’s VA benefits.

AWARD

The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from January 28, 2004, through February 28, 2004, and from August 31, 2004, through December 10, 2004, subject to a credit for temporary benefits already paid by the respondents for these periods of time; and that he is entitled to wage-loss benefits of 56% in excess of his anatomical impairment, for a total impairment of 70%. The respondents have proven by a preponderance of the evidence that the Second Injury Fund is liable for all wage-loss disability benefits awarded herein. The respondents and the Second

Injury Fund 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. Thomas Mickel, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

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