

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402600

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| JO ANN HIGDON | | CLAIMANT |
| BREEDEN DODGE, INC. | | RESPONDENT |
| WESTPORT INSURANCE COMPANY, INSURANCE CARRIER | NO. 1 | RESPONDENT |
| SECOND INJURY FUND | NO. 2 | RESPONDENT |

OPINION FILED JANUARY 5, 2006

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 Employer-Carrier represented by WILLIAM FRYE, 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 October 11, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on July 13, 2005. Prior to the commencement of the hearing and by agreement of the parties, an amendment was made in regard to the appropriate weekly compensation rates. Prior to the commencement of the hearing the Second Injury Fund had announced that it was accepting liability for benefits under Ark. Code Ann. §11-9-525. The Fund stated that it was accepting liability for permanent partial disability benefits equivalent to a disability equal of 30% to the body as a whole. Thus, the issue of Second Injury Fund liability and liability of the Death & Permanent Disability Trust Fund became moot. A copy of the pre-hearing order

with these amendments noted thereon was Commission's Exhibit No. 1 to the hearing.

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

1. On February 2, 2004, the relationship of employee-employer-carrier existed between the parties.
2. On February 2, 2004, the appropriate weekly compensation rates are \$270.00 for total disability and \$203.00 for permanent partial disability.
3. On February 2, 2004 the claimant sustained a compensable injury to her lumbar spine.
4. There is no dispute over the payment of medical expenses or temporary total disability benefits.
5. The healing period ended on March 7, 2005.
6. The respondents have accepted liability for permanent partial disability benefits for a permanent partial impairment of 10%.
7. The Second Injury Fund acknowledges liability under Ark. Code Ann. §11-9-525 and accepts responsibility for a combined disability of 30% to the body as a whole.

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

1. Extent of permanent disability, including both that are due to permanent physical impairment and permanent functional disability (i.e. loss of wage earning capacity).

In regard to these issues, the claimant contends that she is entitled to permanent disability benefits greatly in excess of the 19% impairment rating. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondent employer-carrier contends that they are only liable for permanent partial disability benefits attributable to the permanent physical impairment resulting from the compensable injury of February 2, 2004, which they contend does not exceed 10% to the body as a whole.

The respondent Second Injury Fund contends that its liability under Ark. Code Ann. §11-9-525 does not exceed 30% to the body as a whole.

DISCUSSION

_____The first matter to be addressed is the extent of permanent physical impairment resulting from the compensable injury of February 2, 2004. The burden rests upon the claimant to prove the existence and extent of such permanent physical impairment. She must further show that the existence and extent of permanent physical impairment is supported by objective and measurable physical findings, Ark. Code Ann. §11-9-704(c)(1)(B). The degree of permanent physical impairment must be calculated in a manner that conforms to the official rating guide adopted by this Commission, Ark. Code Ann. §11-9-522(g). In determining the extent of permanent physical impairment for spinal injuries, such as that experienced by the claimant, no consideration can be given to pain, loss of range of motion, or straight leg raising tests, Ark. Code Ann. §11-9-102(16)(A)(ii). Finally, the claimant must show that the

compensable injury was the “major cause” of the permanent physical impairment, Ark. Code Ann. §11-9-102(4)(E)(ii).

The Appellate Courts have held that it is the duty of this Commission (rather than any medical expert) to ascertain the existence and extent of any permanent physical impairment in a manner that conforms to the requirements of the Act. However, this does not mean that expert medical opinion on this issue is to be disregarded. Clearly, such medical opinion can be helpful and (if it satisfies the criteria set out in the Act), such expert medical opinion can form the basis for an assessment of permanent physical impairment by this Commission. In that event, the expert medical opinion must conform to all the statutory requirements of the Act and be stated “within a reasonable degree of medical certainty”.

The only expert medical opinion on the degree or percentage of permanent physical impairment is expressed by Dr. Gary Moffitt of the Lowell Occupational Medical Center. In his report of March 7, 2005, Dr. Moffitt states:

“In regard to permanent impairment, I feel that she (the claimant) has sustained a DRE Category III which equates to a 15% all body impairment rating.”

In regard to the scar on her back from the burn, I do feel that there is some impairment present. This lies in the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Table 2 on page 13-280. She was thought to have a Class I impairment. With this Class, the evaluation is allowed to give a rating from 0 to 9%. I think a 5% rating would be appropriate.” The 15% has been combined with a 5% utilizing the combined values chart for a whole body impairment of 19%.”

In his report, Dr. Moffitt reviews the various factors he

considered in arriving at his opinion. All of these facts appear to be substantiated by the record. Thus, it would appear that Dr. Moffitt's opinion was in no way based on any mistake of material fact or lack of information sufficient for the formation of his opinion. His assessment of permanent physical impairment is reasonable and stated with conviction and clarity. Thus, it is "stated within a reasonable degree of medical certainty" and deserves consideration in the resolution of this issue.

Although Dr. Moffitt is essentially a general practitioner, he has for a long time concentrated on the evaluation and treatment of employment related injuries and conditions. Further, he has particular expertise in rating permanent physical impairment and has become certified or licensed in this area. His services, in this regard, are almost always provided at the request of respondents. He clearly is not known to be in any way "liberal" in his ratings.

In formulating his rating, Dr. Moffitt employed the DRE method found in the official rating guide. Clearly, the evidence presented shows that the claimant would correctly fit into the DRE thoracolumbar category III: radiculopathy. Not only has the claimant undergone surgical correction of a right sided herniated disc at the L5-S1 level with nerve root impingement and resulting neurological deficits (which was necessitated by her compensable injury of February 2, 2004), but this surgical was not successful. The medical evidence objectively shows continuing impingement of the S1 nerve root at the L5-S1 level and continuing neurological

difficulties (radiculoathy).

Although the method for assessing impairment employed by Dr. Moffitt does conform to the Commission's official rating guide, it is not the method generally used. The most commonly used method is to employ Table 75 on page 110 of the Guides, which provides a percentage or degree of impairment for specific spine disorders. Dr. Moffitt is well aware of Table 75 and has frequently employed it in assessing the percentage of permanent impairment on previous occasions. It would appear from his use of the DRE method that it was his opinion that, under the circumstances of this particular case, the use of the DRE method was more appropriate.

It must be noted that although Table 75 provides a rating for a "surgically treated disc lesion with residual, medically documented pain and rigidity", it does not provide a rating for the specific spinal disorder of an unsuccessful surgically treated disc lesion with a continuing nerve root impingement and continuing neurological deficit. However, the DRE method does provide a rating for this specific situation or spinal disorder. This specific situation is covered by DRE Category III on page 102.

After consideration of all the evidence presented, I find that Dr. Moffitt's assessment of a 15% permanent physical impairment for the claimant's compensable lumbar injury and subsequent unsuccessful corrective surgery is persuasive and controlling. His basis for this rating is amply explained and is supported by the evidence of record. His assessment was made in a manner that conforms to this Commission's official rating guide i.e. The

American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition). This method of assessment gives no consideration to pain, straight leg raising testing, or range of motion testing. The factors considered in this method of rating clearly represent "objective and measurable physical findings." Finally, it is apparent from the evidence presented that the compensable injury of February 2, 2004, was the "major cause" (if not the sole cause), of the claimant's unsuccessful surgery and residual nerve root impingement. Therefore, this injury would also be the "major cause" of the degree of permanent physical impairment caused by these factors.

In his report of March 7, 2005, Dr. Moffitt also assessed an additional 5% permanent physical impairment for "scarring" to the skin of the claimant's back. This "scarring" occurred as the result of a mishap during the lumbar surgery. However, the claimant has withdrawn any claim for benefits due to permanent physical impairment from this scarring (T.4). Therefore, it is not necessary to address or even consider this portion of Dr. Moffitt's assessment.

In summary, it is my opinion that the 15% permanent physical impairment assessed by Dr. Moffitt is a correct and accurate assessment of the permanent physical impairment produced by the claimant's compensable lumbar injury of February 2, 2004. Therefore, I find that the claimant is entitled to receive permanent partial disability benefits for a permanent physical impairment of 15% to the body as a whole. Under Ark. Code Ann.

§11-9-522(a) and §11-9-525(b), the respondent employer-carrier is liable to the claimant for permanent partial disability benefits equivalent to this degree of permanent physical impairment.

The next matter concerns the liability of the Second Injury Fund for the “balance” of combined disability, under Ark. Code Ann. §11-9-525(b)(4). The Second Injury Fund contends that this amount is equivalent to a 30% permanent partial disability to the body as a whole. The Fund has accepted liability for this degree or percentage of permanent partial disability. The burden rests on the claimant to prove the “balance” of her combined functional or wage loss disability that exceeds 30% to the body as a whole.

_____The medical evidence shows that the claimant had a pre-existing permanent physical impairment of 5% to the body as a whole, at the time of the compensable injury of February 2, 2004. This assessment of permanent physical impairment was made by Dr. James Blankenship in a report dated May 8, 2001. This degree of impairment was assessed for a non surgical herniated disc at L5-S1. The only permanent limitations or restrictions that were placed upon the claimant’s potential activities as a result of this prior injury or condition was a restriction against lifting weights in excess of 40 pounds. Following the claimant’s release from medical treatment for this prior condition, the claimant returned to her previous employment position with the respondent. There is no evidence that the claimant sustained any actual permanent functional disability or loss of wage-earning capacity, as a result of this prior permanent lumbar injury.

As previously found in this Opinion, the claimant has experienced a 15% permanent physical impairment to the body as a whole, as a result of her compensable injury of February 2, 2004. The claimant testified that following her compensable injury of February 2, 2004, she has continued to experience pain in her low back that radiates into her left buttock and down her left leg. She stated that, at the time of the hearing, she was physically unable to lift more than 5 to 10 pounds, walk any substantial distance, sit or stand for more than 30 minutes at a time, or bend or stoop. She further stated that she must also lay down for 45 minutes to an hour every 3 to 4 hours during the day. Finally, she stated that she was unable to sleep through the night.

On her function capacity evaluation (FCE), the claimant was noted as exhibiting significant physical restrictions and limitation. However, this testing also showed varying levels of physical effort by the claimant. On testing for maximal effort, some of these tests were interpreted as showing maximum effort while others showed that the claimant was not giving maximum effort. This testing was further interpreted as indicating that the claimant demonstrated "poor psychodynamics" and "inappropriate illness behavior". However, the testing of subjective pain complaints was interpreted as showing that the claimant's subjective pain complaints were reasonable and reliable.

Clearly, a surgically treated lumbar disc will result in some substantial physical restrictions and limitations. Any one undergoing such a procedure for this type of discal injury will

have limitations on their lifting abilities. They will also experience increased difficulties upon prolonged walking, standing, or sitting. They will also generally require the ability to change positions, as needed. Finally, there will be limitations on twisting, bending, and stooping. In the event of unsuccessful surgery with residual neurological deficits or radiculitis, these limitations will be even greater.

In the present case, the claimant's constant pain will also act to limit any potential employment activities. Regardless of the magnitude of this pain, the mere presence of constant pain would clearly interfere with the ability to perform any employment requiring any significant concentration or focus. Pain sufficient to require the use of narcotic medication would limit the ability to drive, work at heights, or work around dangerous machinery.

The evidence presented clearly establishes that the claimant is suffering from chronic pain, as a result of her compensable injury and unsuccessful surgery. While the magnitude of the claimant's chronic pain may be difficult to determine and would be based solely in the claimant's testimony, the actual existence of some degree of chronic pain is amply demonstrated by the medical evidence presented. The FCE reflected that specific testing was performed to determine the validity of the claimant's subjective pain complaints and revealed the claimant's subjective pain complaints to be reasonable. All of the various medical experts, who have seen and evaluated the claimant, have concurred that the claimant is experiencing substantial chronic pain, which is

sufficient to merit some type of additional medical intervention (either in the form of a chronic pain management program or the use of a surgically implanted device for pain relief). Finally, the claimant's chronic subjective pain complaints are substantiated by objective diagnostic studies performed on the claimant after the surgery. These tests show continuing nerve root impingement which would reasonably explain and support the existence of the claimant's continued subjective pain complaints.

These various restrictions and limitations on the claimant's potential employment activities must be considered in light of her age, education, prior work experience, and all other facts which would be reasonably expected to impact her potential employability. The record reveals that the claimant is relatively young, being only 43 years of age. She has an 11th grade formal education with a GED which places her at or above the average education level. She has received a vo-tech associate degree with office and clerical work. Her previous employment experience consists of factory work, working in a photo lab, and working in automotive parts departments (including delivery work). She has performed this last position for approximately 6 years prior to her compensable injury on February 2, 2004. This consisted of a one year period of employment with O'Reilly's Auto Parts and a 5 year employment with this respondent.

The claimant testified that she could not return to any of her pre-injury positions and did not know of any employment positions she could perform. She stated that she has not tried to look for work because she "knows" that she cannot do anything.

On the other hand, the respondents have not offered the claimant any employment within her restrictions. The record further fails to show any attempt by either the respondent employer-carrier or the Second Injury Fund to provide the claimant with re-employment assistance.

After consideration of the claimant's physical limitations and restrictions from her compensable injury of February 2, 2004, in light of her relatively young age, her average or above educational level, her limited prior employment experience, her lack of motivation, and the lack of any re-employment assistance on the part of the respondents, I find that the claimant has proven that she is currently experiencing permanent functional disability or loss of wage earning capacity in the amount of 35% to the body as whole.

This 35% permanent partial disability is in addition to the permanent partial disability of 15% to the body as a whole for the permanent physical impairment that was caused by the compensable injury of February 2, 2004.

Thus, as a result of her last compensable injury, the claimant is entitled to permanent partial disability benefits equivalent to a 50% permanent partial disability to the body as a whole. This includes permanent partial disability for a 15% permanent physical impairment, which is the liability of the respondent employer-carrier. It also includes a permanent functional disability of 35% to the body as a whole, which represents the "balance" of compensation, under Ark. Code Ann. §11-

9-525(b)(4). Liability for these latter benefits rests upon the Second Injury Fund of the State of Arkansas, pursuant to the provisions of this subsection.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On February 2, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On February 2, 2004, the claimant earned wages sufficient to entitle her to weekly compensation rates of \$270.00 for total disability and \$230.00 for permanent partial disability.
4. On February 2, 2004, the claimant sustained a compensable injury to her lumbar spine.
5. There is no dispute over the payment of medical expenses or temporary total disability benefits, at the present time.
6. The claimant's healing period from the effects of the compensable injury of February 2, 2004 ended on March 7, 2005.
7. Ark. Code Ann. §11-9-525 is applicable to the present claim.
8. At the time of the claimant's compensable injury, on February 2, 2004, she was experiencing a permanent physical impairment of 5% to the body as a whole, but was not experiencing any percentage of actual functional

disability or loss of wage-earning capacity.

9. Claimant has experienced a permanent physical impairment of 15% to the body as a whole, solely as a result of the compensable injury of February 2, 2004 and the subsequent unsuccessful surgical intervention that this injury required.
10. The claimant currently has combined disability or impairment of 55% to the body as a whole. This includes a pre-existing impairment of 5% to the body as a whole, a subsequent permanent impairment of 15% to the body as a whole (due to the compensable injury of February 2, 2004), and a functional disability or loss of wage earning capacity in the amount of 35% to the body as a whole.
11. Pursuant to Ark. Code Ann. §11-9-525(b)(4), the respondent employer-carrier is liable for the 15% permanent physical impairment from the compensable injury of February 2, 2004. The Second Injury Fund of the State of Arkansas is liable for the "compensation for that balance", in the amount of 35% to the body as a whole.
12. The respondent employer-carrier has denied liability for any permanent partial disability benefits in excess of 10% to the body as a whole. The Second Injury Fund of the State of Arkansas has denied liability for any permanent partial disability benefits in excess of 30% to the body as a whole.

13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded for permanent physical impairment awarded exceed 10% to the body as a whole, and the partial disability benefits herein awarded for combined functional disability or loss of wage-earning capacity, which exceed 30% to the body as a whole.

ORDER

The respondent employer-carrier shall pay to the claimant permanent partial disability benefits for permanent physical impairment of 15% to the body as a whole. The respondent employer-carrier shall be entitled to credit for any permanent partial disability benefits they have previously paid.

The respondent Second Injury Fund shall pay to the claimant permanent partial disability benefits for a combined permanent functional disability of 35% to the body as a whole. The Second Injury Fund shall be entitled to credit for any permanent partial disability benefits it has previously paid.

The respondent employer-carrier shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional 5% controverted permanent partial disability herein found to be their liability. One-half of this fee shall be the obligation of these respondents in addition to such benefits. The remaining one-half of this fee shall be withheld by these respondents from these benefits.

The Second Injury Fund of the State of Arkansas shall pay to

the claimant's attorney the maximum statutory attorney's fee on the additional 5% controverted permanent partial disability benefits herein found to be the Fund's obligation. One-half of this attorney's fee is the obligation of the Fund in addition to such benefits. The remaining one-half of this fee is to be withheld by the Fund from such benefits.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge