

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F304519

PRESTON HORTON, EMPLOYEE

CLAIMANT

**WOOD MANUFACTURING COMPANY, EMPLOYER
MANAGEMENT CLAIM SOLUTIONS, INC./TPA**

RESPONDENT #1

SECOND INJURY FUND

RESPONDENT #2

OPINION FILED OCTOBER 13, 2006

A hearing in this case was conducted on May 4, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondent #1 was represented by Joseph H. Purvis, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Terry Pence, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on January 31, 2006. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

Six stipulations are contained in the Prehearing Order. After amending the fifth stipulation, the parties confirmed all six stipulations at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on April 23, 2003, and at all other relevant times.
2. Claimant sustained a compensable low back injury on April 23, 2003.

3. Due to his April 23, 2003 low back injury, Claimant was assigned, and Respondents paid, a 10% impairment rating to the body as a whole.

4. Claimant sustained a prior compensable low back injury on November 7, 1998, while working for the Respondent employer. Due to this prior low back injury, Claimant was assigned and paid a 7% impairment rating to the body as a whole.

5. Claimant's temporary total disability benefits rate is \$329.00; his permanent partial disability benefits rate is \$247.00.

6. Respondents controvert the award of additional benefits.

At the May 4, 2006 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to wage-loss disability benefits.

2. Whether Claimant is not entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment under Ark. Code Ann. § 11-9-522(b)(2), because the Respondent employer offered him a job within his physical limitations.

3. Whether the Second Injury Fund is liable for benefits to Claimant.

4. Whether Claimant is entitled to an attorney's fee.

DISCUSSION

Although four issues are raised in this proceeding, resolution of the second issue is dispositive of the remaining three. Therefore, this discussion will concentrate on those matters in the record relevant to the second issue raised.

At the time of the hearing Claimant was 51 years of age. He began working for the

Respondent employer in 1978. He described an incident that occurred in late 1998.

One of my jobs was to take acetone, the container of acetone out to dump it. And I was carrying it, and I raised it up on the deal to dump it into it. I turned just right, as I lifted it, and I blew out -- I ruptured my disc.

The parties stipulated that Claimant sustained a compensable low back injury on November 7, 1998.

Claimant received medical treatment for this injury. He underwent an MRI of his lumbar spine on January 6, 1999. The resulting impression reported a “[l]arge, left-sided, L5-S1 disk herniation with some extrusion of the disk material superior.” Although Claimant complained of some numbness in his left leg, he did not complain of pain and he did not undergo surgery. Following conservative treatment, on May 7, 1999, his treating physician declared him at maximum medical improvement as to this injury, assigned a 7% whole person permanent impairment rating, and released Claimant from his care.

Claimant subsequently continued to work despite ongoing physical problems. He attempted to work every day, but he continued to experience back pain as well as numbness in his left foot.

Claimant experienced another incident on April 23, 2003.

I was trimming a boat, and I leaned over and I was trimming. The boat got a little hard on me, and I was trying to trim it, anyway. And, when I pulled against the knife, I felt a real sharp pain, like somebody stuck with a knife. Just from my back, all the way down to my ankle. I wasn't able to continue that day.

Compared to prior to this incident, Claimant's pain afterwards was worse. The parties stipulated that Claimant sustained a compensable low back injury on April 23, 2003.

Claimant first presented to Dr. Richard Burnett on April 23, 2003. He underwent an MRI of his lumbar spine on May 1, 2003. Interpreting this study, Dr. Kyle McAlister

observed “[a] large herniated nucleus pulposus at the L5-S1 level, eccentric to the left, that obliterates the left neuroforamina. The patient apparently had a herniated nucleus pulposus on a previous study done in 1999 in the same area, and I do not see a great deal of change.” After presenting to Dr. Burnett two more times, Claimant was referred to Dr. Scott Schlesinger.

Dr. Schlesinger examined Claimant on May 14, 2003. Claimant rated his pain as ten on a scale of one to ten, and reported “severe” pain in his left leg. Dr. Schlesinger reviewed Claimant’s latest MRI study and noted “a very large left L5-S1 disc herniation compressing the left S1 root to a significant degree.” He recommended that Claimant undergo a microsurgical discectomy at the L5-S1 level. Claimant underwent this procedure, as well as a hemilaminectomy, on May 21, 2003.

Although Claimant initially reported some relief from his first procedure, that report was not sustained. An MRI of Claimant’s lumbar spine undertaken on July 17, 2003 resulted in an impression that “[p]ostoperative changes are present related to previous left L5 and S1 hemilaminectomy. There is evidence for residual or recurrent disk herniation paracentral to the left.” Claimant again presented to Dr. Schlesinger on July 18, 2003; the doctor read this latest MRI as “evidence of a recurrent disc herniation at the L5-S1 level with a free fragment.” Dr. Schlesinger opined that surgery was the only option for addressing this matter. Thus, Claimant again underwent an L5-S1 hemilaminectomy and microsurgical discectomy on July 23, 2003.

_____When Claimant presented to Dr. Schlesinger for a follow-up visit on September 3, 2003, he reported an absence of sciatic pain. He still had “back soreness and some back pain.” Claimant did not believe he was ready to return to his regular job. The doctor

therefore returned him to light duty at four hours a day for the next month, with the expectation that Claimant would undergo physical therapy during that time.

Claimant again presented to Dr. Schlesinger on October 6, 2003. Claimant reported that he was “still having too much back pain and a feeling of weakness in his left leg in order to go back to work.” Claimant also reported that his employer did not have light duty available. Dr. Schlesinger continued physical therapy for another month, and added: “It may be that he is not ever able to go back to the kind of work he was doing. In fact, I think that is the likelihood.”

On November 3, 2003, Dr. Reginald Rutherford performed nerve conduction and EMG tests on Claimant. The nerve conduction study was reported as normal. As to the EMG, Dr. Rutherford reported “there is evidence of minimal active denervation left L5 distribution. The pattern seen suggests reinnervation is evolving with significant recovery in nerve function having been achieved by this point. Present study does not provide an adequate explanation for present complaints and clinical findings.” Claimant then presented to Dr. Schlesinger that same day. The doctor reviewed the EMG and nerve conduction tests and ordered another MRI to address Claimant’s continuing back pain and occasional pain in his left leg. He restricted Claimant to sedentary duty for a few weeks in anticipation of a functional capacity evaluation and to permit an anticipated postoperative epidural steroid injection to take effect.

Claimant underwent another MRI of his lumbar spine on November 3, 2003. This study produced the following impression:

Degenerative disk disease at the L4-5 and L5-S1 levels. At the L4-5 level there is minimal diffuse bulge at the disk. As compared to the prior study there is interval left-sided laminectomy at the L5-S1 level. There is evidence

for scar or granulation tissue which does involve the left S1 root. I do not see evidence for recurrent nor residual disk herniation. There is minimal diffuse bulge and spur and mild narrowing of the left L5 neural foramen.

Dr. Schlesinger reviewed the MRI films with Claimant on November 6, 2003. He opined that the study demonstrated “no evidence of recurrent disc herniation and no explanation for his continued symptoms.” Dr. Schlesinger again recommended a postoperative epidural steroid injection as well as a functional capacity evaluation.

After a failed attempt to complete a functional capacity evaluation on November 19, 2003, Claimant completed the evaluation on December 17, 2003. The summary of its findings reported in part:

Mr. Horton provided full physical effort during the Functional Capacity Evaluation (FCE) today from clinical observations and testing. Mr. Horton’s subjective reports were reliable with only few clinical inconsistencies. The job description of a boat trimmer is listed by the Dictionary of Occupational Titles (DOT) as a medium physical demand. Mr. Horton did not meet that demand level; he met the sedentary to light duty physical demand levels.

Although the summary indicates that Claimant could only perform at a certain physical demand level, it did not explicitly restrict Claimant to working less than a full eight hour day. It did note that Claimant tolerated a total of one hour and fifty-six minutes sitting and a total of one hour and fifty-two minutes standing.

In a letter dated December 22, 2003, Dr. Schlesinger noted that he read the functional capacity evaluation. Based upon this report, he released Claimant with the permanent restriction of sedentary to light duty physical demands at work. He opined that Claimant had reached maximum medical improvement and assigned a 10% permanent impairment rating. The parties stipulated that this rating has been paid.

Dr. David Paff of Springfield, Missouri examined Claimant on January 21, 2004. He

recorded Claimant's history, provided a physical examination, and reviewed Claimant's records and studies. He opined that Claimant's work "was a substantial factor" in his resulting injury at L5-S1. He added:

This patient would be able to do light work, and is doing that at the present time. It would not surprise me, however, due to the nature of his previous work and his educational level, that he would reach a point in the near future where he could not continue to work on a regular basis. It would be difficult for him to be employable in the work force as a result of that. He probably should be retrained for a more sedentary type of job where he could stand at will and not have to lift very much or bend that much.

In the meantime, the Respondent employer sought approval for Claimant's employment in another role. On January 9, 2004, the Respondent employer wrote Dr. Schlesinger a letter that included the following job description: "Wiring Harness Assembler: Requires employee to sit or stand for the assembly of wires into a harness to supply to manufacturing for final finish." Dr. Schlesinger was asked to sign if he agreed; he responded "OK [with] me." The Respondent employer then wrote Claimant on January 15, 2004. After noting Dr. Schlesinger's opinion that Claimant was capable of sedentary to light duty physical demands, the Respondent employer committed to "provide you a job within those restrictions, at your regular rate of pay." Claimant was directed to present to the wiring department on January 19, 2004.

Three additional items of correspondence document subsequent events. On January 20, 2004, the third party administrator confirmed that Claimant actually did return to work on January 19, 2004. The letter also stated:

It is my further understanding Ranger Boats will allow you to work up to a full eight (8) hour shift. We will pay you Temporary Partial Disability benefits during this process.... Additionally, it is our position you should be able to work up to a full shift within four (4) weeks. Therefore, TPD benefits will only be paid for four (4) weeks.

On February 26, 2004, the Respondent employer's human resources manager wrote Claimant that "the four (4) weeks Ranger has allowed you to work partial days has expired." Claimant was directed to report to the wiring shop on March 1, 2006, "where [he would] be expected to return to a full-time work schedule." The letter noted that if Claimant did not meet the requirements of a full time employee, his employment status would be subject to review. Finally, on April 13, 2004, the Respondent employer's human resource manager wrote Claimant, noting that "[a]s of March 25, 2004 we have not heard from you regarding your absence from work." Therefore, the Respondent employer treated Claimant's absence as a voluntary resignation and processed his termination of employment.

At the hearing, Claimant was extensively questioned concerning his job in the wiring department, its effect upon his physical condition, and his reason for leaving that position. He agreed that he could sit or stand as needed on this job; he used his hands to perform the job and it did not aggravate his back. He recalled that this job "was one of the easiest jobs I ever had." He confirmed that the Respondent employer paid him for this job at the same rate of pay he enjoyed prior to the April 23, 2003 compensable injury.

Nonetheless, Claimant did not believe he could perform the wiring job. He worked "two, three, four hours a day, whenever I could stand to," or on average "about three or four hours" per day, for the two months he was on this job. His back continued to hurt and he could not take pain medication on the job. He testified that he was told by letter that he was going to have to begin working more hours; he testified that he tried to do so but could not work eight hours because of pain in his back. Therefore, on March 25, 2004, Claimant simply did not return to work.

As to his back condition during this time, Claimant conceded that no doctor excused or released him from the wiring job. Claimant did present to his family physician, Dr. Robert Ahrens. Dr. Ahrens wrote the Respondent employer on March 8, 2004 to report that Claimant "remains quite limited. At present, he is unable to tolerate more than ½ day at work. I am not particularly optimistic for future improvement but we shall see." There are no studies in the record supporting Dr. Ahrens' opinion.

As to the expectation that Claimant would return to full days, he testified that he received the letter dated February 26, 2004, then reported to Dr. Ahrens; Dr. Ahrens' note quoted immediately above resulted. Claimant denied ever being advised by the Respondent employer that he could continue to work half-days indefinitely. However, Claimant conceded that the Respondent employer would work with him if he could not work eight hours a day, and the record reflects that he continued to work less than a full day from the date of the February 26, 2004 letter until the day he last worked, March 24, 2004.

Q. Nobody at Ranger ever told you they were going to cut you off or do anything punitive to you if, in fact, you could not work an eight-hour day, did they?

A. No.

Q. The goal, as this lady says, is to get you up to working an eight-hour day. And, as a matter of fact, at the time you walked off the job and you quit, you were only -- you'd never worked more than three and half hours, did you?

A. Around that.

Q. All right. Now, is three and a half hours a half day or less?

A. It's less.

Claimant conceded that Dr. Ahrens was not an authorized treating physician and that nothing in his letter took Claimant off work.

A. Defense under Ark. Code Ann. § 11-9-522(b)(2)

Respondents argue that Claimant is not entitled to permanent partial disability benefits in excess of his percentage of permanent physical impairment, under Ark. Code Ann. § 11-9-522(b)(2). That section provides:

However, so long as an employee, subsequent to his or her injury, ... has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

Id. Respondents have the burden of proving Claimant's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of his accident. Ark. Code Ann. § 11-9-522(c)(1). Respondents must sustain this burden of proof by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Respondents sustained their burden of proving by a preponderance of the evidence that Claimant received and had available a bona fide and reasonably obtainable offer to be employed, at wages equal to his average weekly wage at the time of his accident. Therefore, Claimant is not entitled to permanent partial disability benefits in excess of his percentage of permanent physical impairment.

Taking the elements of the statutory defense in turn, it is evident that Claimant received the offer: he did, in fact, return to work in the wiring department. The offer was bona fide for the same reason: Claimant actually worked at the wiring job; he was not

forced to leave, but left of his own accord. The offer was reasonably obtainable. The objective studies failed to document a reason for Claimant's complaints after his second procedure; Dr. Schlesinger agreed with the functional capacity evaluation that Claimant could perform sedentary to light duty work; Dr. Schlesinger approved the wiring job; the job allowed Claimant to sit or stand at will, only required use of his hands, and did not aggravate his back. Claimant agreed that it was the "easiest" job he'd ever had. Dr. Schlesinger did not limit Claimant to less than a full day of work, and the Respondent employer permitted Claimant to work less than a full day up to the time he failed to return. Although Claimant believed he could not work a full day, there is no medical evidence in support of his subjective belief, other than Dr. Ahrens' note - and that is not supported by any study. Compare Estes v. Cedar Chems., 54 Ark. App. 311, 315, 925 S.W.2d 444, ___ (1996) (under an earlier version of the statute, noting the absence of medical evidence to support a subjective belief that an employee could not perform a job). Compared to the opinion of Dr. Schlesinger, Claimant's treating specialist who had all of the studies and the functional capacity evaluation at hand, Dr. Ahrens' opinion is entitled to little weight. Finally, the Respondent employer offered in writing to pay Claimant at his pre-accident rate of pay, and he confirmed that this occurred.

B. Remaining Issues

Claimant seeks wage-loss disability benefits, and there is a question whether the Second Injury Fund is liable for those benefits. In light of the disposition of this case under Ark. Code Ann. § 11-9-522(b)(2), those issues need not be addressed. Likewise, since no benefits are awarded herein, Claimant is not entitled to an attorney's fee. See Ark. Code Ann. § 11-9-715.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on April 23, 2003, and at all other relevant times.
3. Claimant sustained a compensable low back injury on April 23, 2003.
4. Due to his April 23, 2003 low back injury, Claimant was assigned, and Respondents paid, a 10% impairment rating to the body as a whole.
5. Claimant sustained a prior compensable low back injury on November 7, 1998, while working for the Respondent employer. Due to this prior low back injury, Claimant was assigned and paid a 7% impairment rating to the body as a whole.
6. Claimant's temporary total disability benefits rate is \$329.00; his permanent partial disability benefits rate is \$247.00.
7. Respondents controvert the award of additional benefits.
8. Respondents sustained their burden of proving by a preponderance of the evidence that they extended to Claimant a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident. The job in the wiring department was bona fide and Claimant received this offer: he actually worked in this position for approximately two months. The wiring department job was reasonably attainable: Dr. Schlesinger approved the position; the job was consistent with the findings of his functional capacity evaluation; Claimant was only required to use his hands and the job did not aggravate his back; he could sit or stand at will; and the Respondent employer was willing to work with Claimant to get him to a full eight hour day. Claimant confirmed that he was paid for this job in the wiring department

at the same rate of pay he enjoyed prior to the April 23, 2003 accident.

9. Because Respondents proved their defense under Ark. Code Ann. § 11-9-522(b)(2), Claimant is not entitled to wage loss disability benefits in excess of his percentage of permanent physical impairment, and it is not necessary to discuss the liability of the Second Injury Fund, Respondent #2.

10. Because benefits are not awarded herein, Claimant is not entitled to an attorney's fee.

ORDER

For the reasons given in the Findings of Fact and Conclusions of Law, Claimant's request for wage loss disability benefits is denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml