

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E407881

RICK MCDANIEL		CLAIMANT
GEORGIA-PACIFIC CORPORATION		RESPONDENT
SEDGWICK JAMES CLAIMS MANAGEMENT, INSURANCE CARRIER/TPA	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT
DEATH & PERMANENT DISABILITY TRUST FUND	NO. 3	RESPONDENT

OPINION FILED JANUARY 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondent No. 1 represented by ANDREW IVEY, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

Respondent No. 3 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 18, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on March 16, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On February 22, 1994, the relationship of employee-self insured employer-third party administrator existed

between the parties.

2. The appropriate weekly compensation rates are \$267.00 for total disability and \$200.00 for permanent partial disability.
3. On February 22, 1994, the claimant sustained a compensable injury to his left shoulder.
4. There is no dispute at present over the payment of medical expenses or temporary total disability benefits.
5. The last healing period ended August 23, 2004.
6. The respondents have accepted and paid permanent partial disability benefits for a permanent physical impairment of 18% to the body as a whole.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. The extent of permanent functional disability or wage loss, including permanent total disability.
2. Second Injury Fund liability.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends that as a result of his compensable injury to his left shoulder and/or this compensable injury together with his pre-existing permanent impairments and disabilities he has been rendered permanently totally disabled.

In regard to these issues, the respondent employer contends that the claimant has sustained no permanent disability in excess

of the permanent physical impairment of 18% to the body as a whole. In the alternative, the respondent employer contends that Ark. Code Ann. §11-9-525 is applicable to the present claim and the Second Injury Fund is liable for all permanent disability in excess of the permanent physical impairment of 18% to the body as a whole.

In regard to these issues, the Second Injury Fund contends that Ark. Code Ann. §11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability for any permanent disability benefits.

In regard to these issues, the Death & Permanent Disability Trust Fund contends that the claimant is not permanently totally disabled. In the alternative, it contends that if the claimant is permanently totally disabled such disability is the result of combined disability and is the Second Injury Fund's obligation.

DISCUSSION

I. SECOND INJURY FUND LIABILITY

The first issue to be addressed is the question of whether Ark. Code Ann. §11-9-525 is applicable to the present claim. The threshold requirements for the application of this subsection are:

- (1) The claimant must have been experiencing permanent physical impairment or disability, at the time of the compensable injury giving rise to the present claim, and continues to independently produce permanent impairment or disability thereafter.
- (2) The compensable injury giving rise to the present claim must result in additional permanent physical impairment or disability.
- (3) The combined permanent physical impairments and disabilities must exceed that resulting from the last compensable injury, considered alone and of itself.

The evidence clearly shows that the claimant sustained a compensable injury to his left knee in 1976. This compensable injury was in the form of a tear of the lateral meniscus of the left knee and required surgical intervention, in the form of a total lateral meniscectomy. As a result of this procedure, the claimant was assigned a 10% permanent physical impairment to his left leg or left lower extremity by Dr. Peter Irwin, his treating physician.

Under the Commission's official rating guide (at the present time) only a 7% permanent physical impairment to the leg would be appropriate for this injury, Table 64, page 85 of the Guides. However, at the time this impairment was assessed there was no statutory requirement that any official guide be used and the current official Guide did not even exist. Regardless of whether 10% or 17% is appropriate, some percentage of permanent impairment was unquestionably produced by the 1976 knee injury.

Clearly, this permanent knee injury further resulted in some limitations and restrictions on the use of the claimant's left knee. However, the claimant returned to employment with this respondent, apparently at wages equal to or greater than those he was receiving at the time of his compensable knee injury. Thus, not only would the claimant have been barred from receiving permanent disability benefits for any loss of wage earning capacity (at that time) by the provisions of Ark. Code Ann. §11-9-521, but he had not yet experienced any actual wage loss at that time.

Nonetheless, the claimant's compensable knee injury was producing permanent physical impairment at the time of the claimant's compensable left shoulder injury. It also continued to independently produce such impairment and permanent restrictions on the claimant's potential employment activities, through the present time. This satisfies the first threshold requirement for the application of Ark. Code Ann. §11-9-525.

The record shows the occurrence of various other physical injuries and conditions prior to the compensable shoulder injury giving rise to this claim. These include a hyperextension of the index finger of the claimant's right hand in 1980, high blood pressure or hypertension beginning in 1982, a scrotal abscess in 1984, a twisted right ankle in 1984, superficial thrombophlebitis with varicosities in his right leg beginning in 1984, a kidney stone in 1990, and a dorsal ganglion cyst of the right wrist in 1993.

However, the greater weight of the evidence fails to show that any of these pre-existing injuries or conditions were producing physical impairment or permanent disability at the time of the claimant's compensable shoulder injury, on February 22, 1994. In fact, with the exception of the claimant's hypertension, the greater weight of the evidence indicates that all of the other pre-existing conditions ultimately responded to appropriate medical treatment and appeared to have resolved by the time of the claimant's compensable injury on February 22, 1994. Therefore, I find that these various other pre-existing injuries or

conditions are not sufficient to cause Ark. Code Ann. §11-9-525 to be applicable to this claim and are irrelevant in making a determination of the extent of permanent disability benefits to which the claimant is entitled under this subsection.

In reaching the foregoing decision I am aware that the Commission's official rating guide does provide for an assessment of permanent physical impairment for peripheral vascular disease of the lower extremities (Table 69, page 89 and Table 14, page 198 of the Guides). Although the medical evidence indicates that the claimant did, for a period of time, exhibit some of the criteria indicated for the assessment of a permanent physical impairment for a peripheral vascular disease, the surgical procedures that were performed on the claimant's right leg in March of 1991 appear to have resolved these symptoms. There is no evidence of any continued claudication, edema, cellulitis, stasis dermatitis, ulcerations, etc. involving the claimant's right leg after his surgery and brief follow up.

The greater weight of the evidence shows that the claimant's compensable left shoulder injury, on February 22, 1994, has clearly resulted in additional permanent impairment and ultimately permanent "disability" or loss of earning capacity. There is no question that the claimant is entitled to benefits under the Act for the permanent physical impairment and permanent disability produced by his compensable left shoulder injury. The respondent employer has accepted liability for and have paid permanent partial disability benefits for a permanent physical impairment of 18% to

the body as a whole. This satisfies the second threshold requirement for the application of Ark. Code Ann. §11-9-525 to the present claim.

As previously noted, the claimant's compensable left knee injury and resulting surgery caused permanent damage to the anatomical components of the claimant's left knee. This resulted in both permanent impairment and permanent limitations on the use of this portion of the claimant's body. This permanent physical impairment and resulting permanent restrictions or limitations were unaffected by the claimant's subsequent compensable left shoulder injury of February 22, 1994. The claimant's compensable left shoulder injury resulted in additional permanent physical impairment to an entirely different portion of the claimant's anatomy and produced entirely separate and distinct physical limitations and restrictions.

Although the additional permanent impairment and the additional physical limitations and restrictions are significant, they are clearly insufficient, in and of themselves, to result in permanent total disability. The permanent restrictions and limitations imposed by the compensable left shoulder injury essentially affect only the use of the claimant's left and non-dominant arm. These restrictions and limitations would not, in and of themselves, totally preclude the claimant from all forms of regular gainful employment for which he was otherwise qualified.

Therefore, I find that the claimant's "combined" disabilities and impairments do exceed the disabilities and impairments

resulting from the compensable injury of February 22, 1994, considered alone and of itself. This satisfies the final threshold requirement for the application of Ark. Code Ann. §11-9-525 to the present claim.

II. EXTENT OF DISABILITY AND RESPECTIVE LIABILITY BETWEEN THE RESPONDENT EMPLOYER AND THE SECOND INJURY FUND

The claimant contends that he is now permanently totally disabled from performing any and all forms of regular gainful employment for which he is qualified. The burden rests upon the claimant to prove his entitlement to permanent disability benefits. Further, the claimant must prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled as a result of either the effects of the compensable injury to his left shoulder on February 22, 1994, or the combined effects of this compensable injury with pre-existing disability or impairments he was experiencing at the time of this compensable injury. After consideration of the evidence presented, I do not find that the greater weight of the credible evidence establishes that the claimant has been rendered permanently totally disabled as the result of the impairment and physical limitations or restrictions resulting from his compensable left shoulder injury of February 22, 1994, or the combined effects of the impairment and disability produced by this compensable injury together with the disabilities or impairments attributable to all injuries or conditions existing at the time this compensable injury was sustained.

At the time of the claimant's compensable left shoulder injury, the claimant was only experiencing a permanent physical impairment of at most 10% to his left leg. The compensable injury to the claimant's left shoulder resulted in an additional permanent physical impairment of 18% to the claimant's body as a whole. The claimant's pre-existing compensable left knee injury would have prevented him from engaging in regular gainful employment that required strenuous use of his left lower extremity, prolonged standing in one position, and prolonged walking (particularly, on uneven or potentially slick surfaces) both at the time of his compensable left shoulder injury and continuing through the present. As a result of the limitations and restrictions imposed by his compensable left shoulder injury, the claimant has been prevented from performing employments that require the strenuous use of his left arm or shoulder (i.e. no lifting or carrying more than 5 pounds), repetitive activity with his left arm, or use of his left arm at or above shoulder level.

The evidence shows that the claimant is relatively young, being 49 years of age. He also appears reasonably intelligent and has an average or above education (a high school degree and one semester of college courses). He does have a somewhat limited job history, having worked the last 19 years with this respondent.

When the foregoing impairments and restrictions are considered in light of the claimant's age, education, and previous work experience, it is apparent that these impairments and restrictions have resulted in the claimant experiencing a significant permanent

functional disability or loss of wage earning capacity. He has been prevented from continuing in the employment positions he has previously held with the respondent. He has also been prevented from performing many types of employment for which he would otherwise be qualified.

However, there would still remain a substantial number of employments that would be within the restrictions imposed as a result of the claimant's permanent knee injury and permanent left shoulder injury and for which the claimant would otherwise be qualified by his age, education, mental abilities, and previous work experience. These potential employments exist in sufficient number in the area of the claimant's residence to provide him with a reasonable expectation of employment. Such positions would include various types of light factory or assembly line work, light clerical work, and sales positions. Thus, the claimant would not qualify for permanent total disability benefits under Ark. Code Ann. §11-9-525(b)(5).

Employing the procedure mandated by Ark. Code Ann. §11-9-525(b)(4), I find that the actual anatomical impairment produced by the compensable injury of February 22, 1994, is to the body as a whole. This is the compensation liability of the respondent employer.

I further find that the degree or percentage of the claimant's disability or impairment that is attributable to all injuries or conditions existing at the time the compensable left shoulder injury was sustained is in the amount of at least 7% to the leg

below the hip. Under this subsection, no liability would attach for compensation attributable to this degree of permanent physical impairment (in fact, the claimant was most likely compensated for this loss in 1976).

I find that the claimant's current "combined" permanent impairment and disability, which was produced by the effects of the claimant's compensable left shoulder injury of February 22, 1994 and all permanent injuries and conditions existing at the time this injury was sustained, is in the amount of at least 7% to the entire leg and 50% to the body as a whole. Thus, when the pre-existing impairment and disability is subtracted (i.e. 7% to leg) and the permanent physical impairment produced by the compensable injury of February 22, 1994 is subtracted (i.e. 18% to the body as a whole), the compensation for the remaining balance of 32% to the body as a whole is the liability of the Second Injury Fund.

At this point, I would note that Dr. Greg Jones has opined in his various reports that he feels that the claimant is "medically disabled" (report of February 24, 2005), Claimant's Exhibit No. 1, page 10. However, the reports and records of Dr. Jones also indicate that, considering only the claimant's compensable shoulder injury and pre-existing knee injury, the claimant would be physically capable of performing "sedentary employments". Finally, I would note that although Dr. Jones is a board certified orthopaedic surgeon and is highly qualified in this area, he has not been shown to have any particular knowledge or expertise in vocational placement or have any particular knowledge of the

employment expert or have any knowledge of the employment market in this area. The Act leaves these matters to the greater expertise of this Commission.

It would also appear from the medical evidence that Dr. Steve Edmondson and Dr. A. N. Adjei have also opined that the claimant is permanently disabled from performing regular employment. However, it is obvious from the reports and records of both of these physicians that their opinions are not based solely on the impairment and limitations caused by either the claimant's compensable left shoulder injury or those caused by both this injury acting together with the various injuries and conditions existing at the time the compensable left shoulder injury occurred. Rather, the opinions of these physicians are based upon the claimant's current impairment and limitations resulting from all of the injuries and conditions from which the claimant is now suffering. Considering all of the conditions from which the claimant is now suffering, these physicians are probably correct in their opinions.

The evidence shows that since the claimant's compensable left shoulder injury of February 22, 1994, the claimant has experienced a vast array of maladies and difficulties. These subsequent conditions have independently resulted in extensive restrictions and limitations on the claimant's physical abilities and potential employability.

The medical evidence shows that, in August of 1996, the claimant began experiencing vertigo and impaired hearing. Only a

month later, in September of 1996, the claimant experienced an anteriolateral myocardial infarction. This was the result of significant blockage due to arteriosclerotic heart disease. Stenting was performed to correct this condition at that time. In June of 1999, the claimant was diagnosed as suffering from Bell's Palsy. In November of 2003, the claimant experienced another myocardial infarction and additional stenting was required. In December of 2004, the claimant began experiencing additional cardiac difficulties that have resulted in significant angina with only minimal exertion. Finally, in July of 2005, the claimant underwent a partial medial meniscectomy of the right knee. This was apparently due to progressive degenerative changes and the claimant's continuing substantial weight.

Clearly, all of the foregoing conditions have significantly restricted the claimant's physical abilities. These additional restrictions in and of themselves would likely be sufficient to preclude the claimant from obtaining any type of regular gainful employment. However, all of these conditions only produced disability or impairment after the occurrence of the compensable injury to the claimant's left knee on February 22, 1994. As a result, the Act does not provide for any compensation for the permanent disability or impairment that these conditions may now be producing, either from the respondent employer, or the Second Injury Fund, or any other party.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has

jurisdiction of this claim.

2. On February 22, 1994, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On February 22, 1994, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability.
4. On February 22, 1994, the claimant sustained a compensable injury to his left shoulder.
5. There is no dispute, at the present time, over the payment of medical expenses or temporary total disability benefits.
6. The claimant's healing period from the effects of his compensable left shoulder injury ultimately ended on August 23, 2004.
7. The provisions of Ark. Code Ann. §11-9-525 are applicable to the present claim. Specifically, the claimant had pre-existing impairment or disability, at the time of his compensable shoulder injury. The compensable shoulder injury resulted in additional impairment and disability for which the claimant is entitled to be compensated under the Act. Finally, the "combined" disabilities and impairments exceed the disability and impairment from the compensable injury of February 22, 1994, considered alone and of itself.

8. The claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled, either as the result of the effects of the compensable injury of February 22, 1994, or as a result of the effects of the combined disabilities or impairments resulting from the compensable injury of February 22, 1994, together with all disabilities or impairments in existence at this compensable injury.
9. The compensation liability of the respondent employer for the compensable injury of February 22, 1994, considered alone, is the actual anatomical impairment resulting from the compensable shoulder injury of February 22, 1994, or 18% to the body as a whole.
10. The degree or percentage of impairment or disability attributable to all injuries or conditions, which existed at the time of the compensable injury of February 22, 1994, is in the amount of 7% to the leg. The degree or percentage of disability or impairment which existed prior to the compensable injury of February 22, 1994, plus the disability or impairment resulting from the combined disability is in the amount of 7% to the leg and 50% to the body as a whole. Thus, the Second Injury Fund is liable for compensation for the "balance" of 32% to the body as a whole.

11. The respondent employer has controverted the claimant's entitlement to any permanent partial disability benefits from said respondent in excess of 18% to the body as a whole.
12. The Second Injury Fund has controverted the claimant's entitlement to any permanent disability benefits from said Fund.
13. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee from the controverted permanent partial disability benefits herein awarded against the Second Injury Fund. Liability for this attorney's fee is solely the obligation of the Second Injury Fund.

ORDER

The respondent self insured employer shall pay to the claimant permanent partial disability benefits equivalent to an 18% permanent partial impairment to the body as a whole. The respondent self insured employer shall be entitled to credit for all such benefits previously paid.

The Second Injury Fund shall pay to the claimant permanent partial disability benefits for a permanent partial disability of 32% to the body as a whole.

The Second Injury Fund shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted permanent benefits herein found to be the obligation of the Fund, i.e. 32% to the body as a whole. Such attorney's fees shall be in addition to

these benefits.

For the reasons heretofore stated in this Opinion, the claimant's request for permanent total disability benefits should be and hereby is denied.

As the claimant has failed to prove permanent total disability and as Ark. Code Ann. §11-9-525 has been found applicable to this claim, all claims against the Death & Permanent Total Disability Trust Fund are denied and dismissed.

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