BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F409778

RONALD STANDLEY, Employee	CLAIMANT
HUGG & HALL EQUIPMENT, Employer	RESPONDENT #1
SAFECO INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
PRUDENTIAL FINANCIAL	DISABILITY CARRIER

OPINION FILED MAY 26, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 19, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 1, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The relationship of employee-employer-carrier existed between the claimant and respondent #1 at all relevant times.

3. The claimant sustained a compensable injury to his neck and back on September 2, 2004.

4. The claimant was earning sufficient wages to entitle him to compensation at the

weekly rates of $453.00 for temporary total disability benefits and $340.00 for permanent partial disability benefits.

5. Claimant's healing period ended on November 10, 2005.

6. Respondent #1 has accepted an impairment rating of 10% to the body as a whole.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to permanent benefits in excess of the 10% rating.
2. Second Injury Fund liability.
3. Attorney fee.

Prior to the hearing the Second Injury Fund raised as an issue its entitlement to a credit against the full weekly benefits owed to claimant under a disability policy provided by Prudential Financial. Respondent #1 joins in this request for full credit.

The claimant contends he is unable to return to work making the same or similar wages; therefore, he is entitled to permanent partial disability benefits in excess of the rating.

Respondent #1 contends that the claimant is not entitled to any benefits in excess of the impairment rating. Alternatively, if the claimant is determined to have sustained a wage loss disability, it should be the responsibility of the Second Injury Fund.

The Second Injury Fund contends that it is not liable for payment of compensation benefits because the requirements of Second Injury Fund liability have not been satisfied. Furthermore, in the event the Second Injury Fund is liable for compensation benefits, the Second Injury Fund requests a credit against the full weekly benefits owed to claimant under a disability policy provided by Prudential Financial.

From a review of 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 witness and to observe his demeanor, the following findings of fact and

conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 1, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

3. The Second Injury Fund is liable for payment of benefits attributable to claimant's loss in wage earning capacity.

4. The Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole and is liable for payment of an attorney fee pursuant to A.C.A. §11-9-715(a)(2)(A).

FACTUAL BACKGROUND

The claimant is a 49-year-old man who currently lives in Huntsville. Claimant's primary jobs in the past have included general laborer in construction and some truck driving. Claimant also testified that he suffered prior injuries to his knee and to his right shoulder before working for respondent #1.

Respondent #1 sells, services, and rents various equipment; including, back hoes, track hoes, aerial lifts, scissor lifts, trenchers, et cetera. Claimant's job duties for respondent #1 required him to drive an 18-wheeler to deliver equipment to various construction sites, businesses, and home owners.

Claimant testified that he initially suffered an injury to his back while working for respondent #1 when he slipped off a curb and fell to the ground. Claimant was sent for

medical treatment and was given crutches. Claimant testified that while using the crutches he twisted and his back popped and he felt immediate relief. After being off work for approximately two weeks the claimant was released to full duty and received no additional treatment for that injury.

The injury which is the subject of this claim occurred in September 2004 when claimant injured his neck and cervical spine while he was in the process of chaining down a forklift for delivery and felt a burning sensation in his back.

Following that injury the claimant was initially treated by Dr. Wilson who eventually referred claimant to Dr. Blankenship, neurosurgeon. The medical records indicate that Dr. Blankenship's initial medical treatment was concerned primarily with claimant's lumbar spine. However, claimant's cervical spine eventually became the focus of Dr. Blankenship's treatment and he performed surgery on the claimant's cervical spine on June 13, 2005. In a letter dated November 23, 2005, Dr. Blankenship opined that claimant had reached maximum medical improvement as of November 10, 2005. Dr. Blankenship assigned claimant no permanent impairment rating for his lumbar injury, but did assign the claimant a 10% rating to the body as a whole for his cervical injury. Dr. Blankenship also ordered a functional capacities evaluation which was conducted on November 4, 2005 and indicated that claimant could perform work at a sedentary level.

Respondent #1 accepted as compensable claimant's injuries to his lumbar and cervical spine. In addition, respondent #1 paid claimant permanent partial disability benefits based upon the 10% rating assigned by Dr. Blankenship. Claimant has now filed this claim contending that he is entitled to permanent disability benefits in excess of the 10% rating. Respondent #1 contends that any benefits in excess of the 10% rating owed to claimant is the responsibility of the Second Injury Fund.

ADJUDICATION

WAGE LOSS.

When considering claims for permanent partial disability benefits in excess of the percentage of permanent physical impairment, the Commission may take into account various factors including the percentage of physical impairment, the employee's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

After my consideration of the relevant wage loss factors, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

As previously noted, the claimant is 49 years old. He testified that the last grade he completed was the ninth grade and that he failed the tenth grade. Claimant testified that he has not received his GED and that he was in special education classes while in school.

After his first jobs of working on a farm for his father, bussing tables, and working at a saw mill and service station, the claimant has primarily worked as a general laborer in the construction field and as a truck driver. In fact, claimant's first full time job was performing general labor and driving trucks for Main Construction. Claimant testified that he has never been a supervisor and that he has had trouble reading and writing, but admitted that he could read and write well enough to keep paperwork and logs as a truck driver.

Prior to working for the respondent the claimant had suffered two other significant injuries. The first of these injuries involved claimant's knee. Claimant testified that in the early to mid 1980s he fell in the river and his knee popped out. In addition, while working for Main Construction he again injured his knee and eventually underwent a surgical procedure by Dr. Duke Harris. Claimant testified that he did not remember whether Dr.

Harris gave him any specific restrictions for his knee. However, claimant testified that he did have restrictions due to the knee injury. Claimant testified that after his knee injury he returned to work at a different job. According to claimant, his employment with Main Construction involved him performing construction work in red clay, dirt, and mud. Claimant testified that these conditions caused problems with his knee so he went to work for Sweetser's Construction which did not require him to wade around in mud and dirt and cause problems with his knee. At this point claimant primarily became a truck driver. Claimant testified that his knee continues to bother him to the extent that he has difficulty squatting because he cannot fully bend the knee and he is limited in the amount of walking he can perform and the types of surface upon which he can walk.

Claimant also testified that he had a prior injury to his right shoulder. Claimant testified that he initially injured his right shoulder in a motorcycle accident and has dislocated the shoulder some five to six times, with the last dislocation in 1995. Claimant testified that he has undergone no surgery on the shoulder but continues to suffer from weakness in his arm and is limited in his ability to lift with his right arm. According to claimant's testimony he does not lift above the shoulder level for fear that his shoulder will dislocate again.

Claimant has not worked for any employer since his injury with respondent #1 and admitted that he has not made any effort to look for work and has not applied for any jobs since his September 2004 injury. Claimant has applied for social security benefits but is not currently receiving them. Claimant is receiving long-term disability benefits from an insurance policy he purchased through his employer from Prudential Financial. According to a letter written by Nancy Hoffman at Prudential Financial dated March 17, 2004, claimant's gross benefits from the disability policy are $2,125.75 per month. However, pursuant to the policy, $1,963.00 is deducted from claimant's benefit because he is receiving workers' compensation benefits. This results in a benefit amount of $162.75 per

month to claimant.

As previously noted, claimant's most recent injury with respondent #1 involved his lumbar spine and cervical spine. Dr. Blankenship opined that claimant had suffered no permanent impairment as a result of his lumbar spine injury but did assign the claimant a 10% rating to the body as a whole for his cervical spine injury which resulted in surgery. In a report dated August 25, 2005, Dr. Blankenship noted that the claimant would have a permanent weight lifting restriction of 25 pounds. He also noted that claimant should engage in no prolonged stooping or bending. At Dr. Blankenship's request the claimant subsequently underwent a functional capacities evaluation which although showing some minor inconsistencies, concluded that claimant had given full physical effort. The functional capacities report of November 4, 2005 indicates that claimant could perform sedentary-type work with lifting up to 10 pounds on an occasional basis (0-33% of the day). The evaluation also noted that claimant would be restricted from lifting above the shoulder level, but he would be able to perform some work above the shoulder on an occasional basis. Claimant would also be able to sit on a frequent basis (34-66% of the day) with the ability to stand as needed once or twice per hour. Finally, the evaluation concluded that claimant might benefit from vocational rehabilitation in order to find a new occupation that did not require lifting more than 10 pounds and that did not require claimant to stay in a seated position for extended periods of time.

After my review of the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. According to the functional capacities evaluation, claimant's physical ability is limited to sedentary-type work which does not require him to stay in a seated position for extended periods of time. Claimant's prior job experience primarily involves heavy physical labor in the construction and truck driving fields. On the other hand, claimant's education has been limited. In addition to the claimant's compensable neck injury, the claimant is also

limited as a result of his prior knee and right shoulder injuries. Claimant has applied for social security disability benefits and is currently drawing long-term disability benefits from Prudential. Claimant has not looked for employment nor applied for a job since his injury in September 2004. A claimant's lack of interest in looking for employment is an impediment to the Commission's full assessment of a claimant's loss and is a factor which may be considered in determining the amount of wage loss. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W. 2d 946 (1984); *Oller v. Champions Parts Rebuilders*, 5 Ark. App. 307, 635 S.W. 2d 276 (1982).

Accordingly, after considering all of the relevant wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

SECOND INJURY FUND LIABILITY.

Respondent #1 contends that the Second Injury Fund is liable for payment of any benefits owed to claimant for a loss in wage earning capacity. According to the decision in *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988), three elements must be proven in order for the Second Injury Fund to have liability. First, the employee must have suffered a compensable injury at their 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.

After reviewing the evidence in this case, I find that all three elements of Second Injury Fund liability have been satisfied.

First, I find that the claimant suffered a compensable injury at his present place of employment. The parties stipulated that claimant suffered a compensable injury to his lumbar and cervical spine while working for respondent #1 in September 2004.

I also find that prior to the claimant's most recent injury the claimant had a

permanent partial disability or impairment. A pre-existing impairment or disability can be either work or non-work related. *Second Injury Trust Fund v. POM, Inc.*, 316 Ark. 796, 875 S.W. 2d 832 (1994). Furthermore, impairment does not necessarily mean that a claimant has suffered a wage loss. *Second Injury Trust Fund v. White Consolidated*, 317 Ark. 226, 875 S.W. 2d 834 (1994).

In this particular case, the claimant had two injuries prior to his employment with the respondent. This included an injury to the claimant's right shoulder which resulted in five to six dislocations and more importantly, an injury to his knee which resulted in surgery. While claimant testified that he was unsure as to whether or not he was actually assigned an impairment rating by Dr. Harris following his right knee surgery, the claimant testified that that injury resulted in his changing jobs due to his inability to perform his prior job duties with his knee injury. According to claimant's testimony his employment with Main Construction at the time of his knee surgery required him to work in areas which had red clay, dirt, and mud. This red dirt would build up on his feet during the course of the day and cause his knee to swell. As a result, claimant changed jobs and began working as a truck driver in order to avoid those work conditions. Claimant testified that even after his knee surgery he continually had to watch where he put his knee in order to avoid further injury. In fact, claimant testified that he had to elevate the knee and to "take it easy" on weekends in order to rest up so that he could perform his work the next week.

I find that this evidence establishes that prior to claimant's most recent injury he had a permanent partial disability or impairment. Thus, the second element of Second Injury Fund liability has been satisfied.

Finally, I find that the claimant's pre-existing disability or impairment combined with his most recent compensable injury to produce his current disability status. While claimant testified that even if only the last injury were considered he did not believe he could perform any of his prior jobs because of his neck and back injury, the issue in this case is

not limited to claimant's ability to perform only prior jobs but the claimant's ability to perform jobs in the future; i.e., the claimant's future earning capacity and how it has been affected. The claimant was assigned a 10% rating for his cervical spine by Dr. Blankenship and was assigned no permanent physical impairment for his lumbar spine injury. While this injury alone and of itself would have produced significant limitations and severely affected the claimant's future earning capacity, that effect has been magnified by the claimant's prior disability or impairment involving his knee and his right shoulder. According to claimant's testimony he is limited in his ability to lift with his right arm for fear that his right shoulder will dislocate again. Furthermore, claimant testified that his prior knee condition continues to bother him which limits him in his ability to bend, squat, and walk.

Based upon this evidence, I find that the claimant's prior disability or impairment has combined with his most recent injury to produce his current disability status. While claimant would have suffered a significant loss in wage earning capacity as a result of his most recent injury considered alone and of itself, I find that claimant's future earning capacity is greater when claimant's recent injury is combined with his prior knee and right shoulder injuries.

Accordingly, for the foregoing reasons, I find that all elements of Second Injury Fund liability have been satisfied. Therefore, the Second Injury Fund is liable for payment of permanent partial disability benefits in an amount equal to 60% to the body as a whole.

I also find that the Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole and is liable for payment of an attorney fee pursuant to A.C.A. §11-9-715(a)(2)(A).

CREDIT FOR DISABILITY BENEFITS.

While an employee of respondent #1, the claimant obtained a short-term and long-term disability policy from Prudential Financial. The terms of the policy itself were

admitted into evidence as an exhibit by the Second Injury Fund. As previously noted, a letter from Prudential indicates that claimant would be eligible for a gross monthly benefit of $2,125.75. However, pursuant to the terms of the policy Prudential is deducting $1,963.00 for benefits claimant is receiving as a result of the workers' compensation injury. Therefore, claimant is receiving a monthly benefit of $162.75.

The Second Injury Fund contends that it is entitled to take a credit against the full weekly benefits owed to claimant under the disability policy. The Second Injury Fund contends that Prudential cannot take credit for workers' compensation benefits paid to claimant because that policy provision is in violation of public policy as well as A.C.A. §11-9-411. The Second Injury Fund also contends that the Commission and courts have never allowed less than credit for the full face value of disability benefits. In other words, the Second Injury Fund contends that it is entitled to a monthly credit of $2,125.75, the benefit claimant would be entitled to from the disability policy if workers' compensation benefits were not deducted.

I find no merit to the Second Injury Fund's contention. Under the Second Injury Fund's theory, a third party, in this case, Prudential, would be legally responsible for paying benefits resulting from a workers' compensation injury. While the Second Injury Fund contends that provisions such as that contained in the Prudential policy are a violation of public policy as well as A.C.A. §11-9-411, I believe that the opposite is true. While a workers' compensation carrier or in this case the Second Injury Fund may be entitled to an offset for disability benefits paid to claimant under the terms of a group disability policy, that statute does not indicate that these benefits are to be paid by the group carrier. To the contrary, even though a workers' compensation carrier or the Second Injury Fund is entitled to an offset, that carrier or in this case the Second Injury Fund is required to reimburse the group carrier in the event the group disability carrier asserts a claim for those benefits. In *Norman v. North Hills Service, Inc.,* Full Commission Opinion filed November 21, 2005

(F408828), the Full Commission stated:

> The respondent is correct in asserting that they should be entitled to a credit to offset their liability for benefits based upon any proceeds the claimant has received from group health or medical insurance policies. However, the respondent ignored later sections of that statute which provide that the group disability carriers should be entitled to assert a claim for any such benefits that they have paid to a claimant as a result of a job related injury. Specifically, Ark. Code. Ann. §11-9-411(c) provides that prior to any final disposition of a claim, the Commission shall determine the amount of any benefits paid by the group insurance carriers and shall direct the respondent to hold such amount in reserve until such time as the group carrier shall assert their subrogation claims. If no subrogation has been made for a period of five (5) years, then the respondent shall pay the sum to the Death and Permanent Disability Trust Fund. (Emphasis added.)

A.C.A. §11-9-411 was not designed to force other insurers to pay benefits, but was designed to prevent a double recovery by a claimant. The statute puts the burden on the responsible workers' compensation party to pay, not the group health or disability carrier. Although the workers' compensation carrier is entitled to an offset, it is still required under the provisions of A.C.A. §11-9-411 to pay those offset sums back to the group health or disability carrier or to the Death and Permanent Total Disability Trust Fund depending upon whether the group health or disability carrier requests subrogation.

Finally, I note that pursuant to A.C.A. §11-9-704(c)(3) administrative law judges and the Commission are to construe the provisions of the workers' compensation law strictly. A.C.A. §11-9-411(a) states that benefits payable to an injured worker are to 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, ..." (Emphasis added.) In this particular case, claimant has not received benefits from Prudential in the amount of $2,125.75. To the contrary, he has only received benefits in the amount of $162.75 per month.

In summary, I find no merit to the Second Injury Fund's contention that it is entitled to a credit against the full weekly benefits owed to claimant under a disability policy provided by Prudential Financial. The Second Injury Fund is entitled to an offset in the amount of $162.75 for benefits paid to claimant under the provisions of his disability policy pursuant to A.C.A. §11-9-411.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. The Second Injury Fund is liable for payment of permanent partial disability benefits in an amount equal to 60% to the body as a whole. The Second Injury Fund has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole and is liable for payment of an attorney fee pursuant to A.C.A. §11-9-715(a)(2)(A). Finally, the Second Injury Fund is not entitled to a credit for $2,125.75, but is entitled to a credit in the amount of $162.75 paid to claimant monthly as the result of a long-term disability policy. A.C.A. §11-9-411.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE