

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F401855

NORA THOMPSON, Employee	CLAIMANT
RICHARDSON CENTER, Employer	RESPONDENT #1
AIG CLAIM SERVICES, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED SEPTEMBER 26, 2006

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

Claimant represented by KEN OSBORNE, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by JARROD PARRISH, Attorney, Little Rock, Arkansas.

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

Respondent #3 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not participating in hearing.

STATEMENT OF THE CASE

On August 23, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 31, 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 on February 10, 2004.

4. Claimant was earning an average weekly wage of \$190.00 which would entitle her to compensation at the rate of \$127.00 per week for temporary total disability benefits.

5. The claimant's healing period ended on July 8, 2005.

6. Respondent #1 has accepted and is paying benefits based upon a 29% rating to the body as a whole.

Subsequent to the pre-hearing conference and prior to the hearing respondent #1 by letter from its attorney dated August 16, 2006 stipulated that claimant was permanently totally disabled and that it was paying benefits accordingly. However, respondent #1 contends that the Second Injury Fund is liable for benefits in excess of the claimant's permanent anatomical rating.

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

1. Claimant's correct anatomical impairment rating.
2. Extent of claimant's permanent disability.
3. Application of A.C.A. §11-9-113(b)(1).
4. Second Injury Fund liability.
5. Attorney fee.

The claimant contends she is permanently totally disabled.

Respondent #1 contends it has not controverted the payment of any benefits. Respondent #1 contends that the Second Injury Fund is liable for benefits. It is believed that claimant had cognitive difficulties prior to the fall in February 2004. Additionally, prior to the incident at bar, a meningioma was found on the front of claimant's brain and visual disturbances, dizzy spells, pain, numbness, and headaches were noted at that time (February 2003). Claimant has also been diagnosed with severe depression, anxiety disorder, and PTSD. Claimant underwent surgery on her foot and has undergone four eye-related surgeries. Claimant also underwent a cardiac catheterization in June 2005 and she suffers from allergy problems. Respondent #1 contends these conditions along

with the problems arising from her work-related fall combine to create her current level of disability.

Respondent #2, Second Injury Fund, contends that respondent #1 owed a 47% whole body impairment. The February 10, 2004 work injury produced two types of permanent injury: (1) "cognitive" disorder, and (2) "seizure" disorder. Both of these diagnosed conditions meet the criteria established in the *Diagnostic and Statistical Manual of Mental Disorders*. Per A.C.A. §11-9-113(b)(1), the claimant is limited to 26 weeks of disability benefits. Respondent #1 has the burden of proving Second Injury Fund liability and they cannot do so. This employer did not employ a "handicapped" worker. If the claimant is permanent and totally disabled, such disability is due to the work injury of February 10, 2004 and there is no combination of disabilities or impairments such as to invoke Second Injury Fund liability. If it is found that the Fund does not have liability in this case, respondent #1 by making a claim against the Fund has controverted all wage loss disability benefits in excess of the rating. Further, if it is found that 47% is the correct amount of anatomical impairment, respondent #1 has controverted 18% in weekly benefits (the difference between 47% and 29% accepted). Claimant cannot prove she is permanently and totally disabled.

Respondent #3 contends that pursuant to A.C.A. §11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death and Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits.

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 her 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 May 31, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact. Respondent #1's contention that claimant is permanently totally disabled is also hereby accepted as fact.

2. The Second Injury Fund is not liable for payment of any compensation benefits. Specifically, claimant's current disability is the result of her last injury considered alone and of itself.

3. Although respondent #1 has not controverted the claim, I nevertheless find that claimant's attorney is entitled to an attorney fee in the amount of \$1,200.00 pursuant to A.C.A. §11-9-715(a)(1)(C)(i). This fee is to be paid by claimant out of the permanent total disability benefits due her from respondent #1.

FACTUAL BACKGROUND

The claimant is a 51-year-old woman who drove a van for respondent #1. Respondent #1 operates a workshop for disabled individuals. The claimant was responsible for driving these disabled individuals to respondent #1's workshop and also was required to run some errands if necessary.

On February 10, 2004 the claimant slipped and fell on some ice striking her head on the ground. Claimant was taken to the emergency room at Washington Regional Medical Center with complaints of severe headache, nausea, and neck pain. At that time claimant was diagnosed as suffering from a concussion and a cervical strain. Claimant continued to be evaluated by several physicians after that date with various complaints including dizziness, tinnitus, and headaches. On October 12, 2004 claimant came under

the care of Dr. Ryan Kaplan, a neurologist. At that time the claimant was making complaints of dizziness, headaches, nausea, and decreased hearing in her left ear. Claimant also related problems of poor memory, trouble holding her head up, and trouble driving. Dr. Kaplan ordered an MRI and EEG of the claimant's brain. The MRI scan revealed a small lesion consistent with a meningioma which was a condition which had previously been diagnosed. In his report of November 9, 2004, Dr. Kaplan noted that the claimant's EEG was abnormal and that it revealed seizure discharges. Based upon this abnormality he indicated that claimant should not drive for at least one year and that she should take seizure precautions. It was Dr. Kaplan's opinion that claimant's seizures were secondary to head trauma from a fall at work.

Claimant continued to be evaluated by Dr. Kaplan and in a report dated May 18, 2005 Dr. Kaplan stated that claimant's current diagnosis would be epilepsy due to head trauma. He also noted that claimant suffered from post-concussive syndrome/disorder. Dr. Kaplan indicated that the claimant would suffer from epilepsy for the rest of her life and that she would need treatment for this condition. It was Dr. Kaplan's opinion that this epilepsy was related to claimant's work injury. He again indicated that claimant should not be driving due to her diagnosis of epilepsy.

On July 8, 2005 Dr. Kaplan saw claimant for follow-up treatment. In his report of that date he indicated that due to her cognitive dysfunction from the brain injury as well as her seizures he did not think claimant would be able to return to work and stated that claimant had reached maximum medical improvement.

Following that report by Dr. Kaplan claimant was sent by respondent #1 to Dr. Moffitt for an independent medical evaluation. Dr. Moffitt assigned the claimant an impairment rating based in part upon his opinion that claimant suffered from an impairment that required direction and supervision of daily activities. Dr. Moffitt also completed a form dated August 16, 2005 indicating that in his opinion the claimant was permanently and

totally disabled.

Respondent #1 accepted claimant's injury as compensable and paid compensation benefits and most recently has admitted that claimant is permanently totally disabled and is paying benefits accordingly. Nevertheless, respondent #1 contends that due to various pre-existing conditions the Second Injury Fund should be liable for all benefits in excess of claimant's permanent physical impairment rating.

ADJUDICATION

This case presents somewhat of an unusual situation in that respondent #1 has stipulated that the claimant is permanently totally disabled. However, respondent #1 contends that all benefits in excess of the claimant's permanent physical impairment rating should be paid by the Second Injury Fund. On the other hand, the Second Injury Fund contends that it is not liable for compensation benefits for a number of reasons including its contention that claimant does not have a valid permanent anatomical impairment and that claimant is not permanently totally disabled. While respondent #1's stipulation regarding permanent total disability benefits is binding as to respondent #1, it is not binding as to the Second Injury Fund.

The Arkansas Supreme Court in *Mid-South Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988) stated that a three-part test must be considered for Second Injury Fund liability.

- (1) The employee must have suffered a compensable injury at their present place of employment.
- (2) Prior to that injury the employee must have had a permanent partial disability or impairment.
- (3) The disability or impairment must have combined with the recent compensable injury to produce the current disability status.

Even if I were to assume that the first two elements of Second Injury Fund liability had been met in this case, I would nevertheless find that claimant's currently disability status is not the result of a combination between pre-existing disability or impairment and her most recent compensable injury, but instead is the result of the last injury considered alone and of itself.

In this particular case, there is no question that claimant suffered from a number of pre-existing physical conditions. Claimant testified that as a teenager she fell off a horse and hit her head; the claimant has also undergone four surgical procedures for crossed eyes; claimant suffered a shoulder injury after falling off a horse and pulling tendons in her shoulder; claimant has undergone several surgical procedures on her knees and legs; claimant underwent surgery on her stomach in 2002; claimant suffered from pain and swelling in her legs in August 2003 which resulted in a trip to the emergency room; claimant has longstanding problems with arthritis; claimant has a history of depression and panic attacks; claimant has suffered from pre-existing visual problems; claimant has suffered from fibromyalgia, tendinitis, and bursitis. Finally, claimant's CT scan in 2003 revealed a meningioma in the front of her brain which claimant must have tested each year. Despite all of these pre-existing conditions, there is no indication that any of these pre-existing conditions have had any impact on the claimant's ability to return to work. There is no indication that claimant has been assigned any physical limitations or has had any restrictions placed upon her ability to return to work as a result of any of these pre-existing conditions. With respect to the meningioma, the medical evidence indicates that while claimant must undergo yearly testing, there is no indication that it affects the claimant's ability to work and no limitations have been placed upon claimant as a result of that condition. Likewise, claimant's prior complaints of depression and panic attacks have not resulted in any restrictions or an inability to work.

On the other hand, the medical evidence does indicate that claimant's inability to

return to work after her work-related injury is the direct result of the injury itself. As previously noted, claimant eventually came under the care of Dr. Kaplan, a neurologist, who ordered an MRI scan and an EEG of the claimant's brain. According to Dr. Kaplan's report of November 9, 2004, the claimant's EEG was abnormal and revealed seizure discharges. Dr. Kaplan stated in his report of that date that claimant's seizures were secondary to head trauma from her fall at work.

Likewise, in a report dated May 18, 2005 Dr. Kaplan stated that claimant's current diagnosis would be epilepsy due to head trauma and post-concussive syndrome/disorder. Dr. Kaplan indicated that the claimant would suffer from epilepsy for the rest of her life and that she would need continued treatment. It was also his opinion that this condition was related to claimant's work injury and that claimant would not be able to return to her regular job duties because she was incapable of driving due to her diagnosis of epilepsy.

Significantly, Dr. Kaplan in a report dated July 8, 2005 stated that due to the claimant's work-related injury he did not believe the claimant would be capable of returning to work.

Because of her cognitive dysfunction from the brain injury, as well as her seizures, I do not think she will be able to return to work and that she is probably at maximum medical improvement.

In summary, in order for the Second Injury Fund to be liable a prior disability or impairment must have combined with a recent compensable injury to produce the claimant's current disability status. In this particular case, I find that claimant's current disability status (permanent total disability as stipulated by respondent #1) has resulted from claimant's most recent compensable injury, not a combination of the recent injury and claimant's pre-existing conditions. While claimant may have suffered from numerous pre-existing conditions, the medical evidence in the form of Dr. Kaplan's opinion is that she is permanently totally disabled as a result of cognitive dysfunction and seizures which

resulted from her work-related injury. Dr. Kaplan does not indicate in any way that claimant's pre-existing conditions contributed to her inability to work. Instead, his opinion is based upon the claimant's work-related injury.

Based upon Dr. Kaplan's opinion which I find to be credible and entitled to great weight, I find that the Second Injury Fund is not liable for payment of any compensation benefits. Instead, I find that claimant's current disability status is the direct result of her work-related injury; therefore, respondent #1 is liable for payment of permanent total disability benefits.

Claimant's attorney has requested an attorney fee in this case even though respondent #1 has not controverted claimant's entitlement to permanent total disability benefits. Pursuant to A.C.A. §11-9-715(a)(1)(C)(i) when the Commission finds that a claim has not been controverted but further finds that bona fide legal services have been rendered in respect to the claim the Commission may direct payment of fees by the injured employee out of the compensation awarded. Subsection (ii) states that in awarding an attorney fee the Commission may take into consideration the nature, length, and complexity of the services performed and the benefits resulting to the compensation beneficiary. In this particular case, I do find that even though respondent #1 did not controvert claimant's entitlement to compensation benefits that compensation has nevertheless been awarded. Respondent #1 did stipulate that claimant was permanently totally disabled; however, the Second Injury Fund contended that it was not liable for compensation benefits in part because claimant had suffered no permanent impairment. Thus, to some extent claimant's entitlement to any continued compensation benefits was at issue had the Second Injury Fund been found liable. In short, while claimant's entitlement to compensation from respondent #1 was not at risk, claimant's entitlement to compensation from the Second Injury Fund was at risk had the Second Injury Fund not prevailed.

Attorney Osborne submitted into evidence subsequent to the hearing a time sheet reflecting the work he performed in this claim. After taking into consideration the amount of time spent by Attorney Osborne as well as the nature, length, and complexity of the services performed by him in this claim, I find that he is entitled to an attorney's fee in the amount of \$1,200.00. This attorney fee is to be paid entirely out of the permanent total disability benefits payable to the claimant and is not an award to be paid by respondent #1 in addition to the permanent total disability benefits. Respondent #1 is to withhold \$50.00 per week from claimant's permanent total disability benefits and remit that amount to Attorney Osborne until the \$1,200.00 fee is satisfied.

AWARD

Second Injury Fund is not liable for payment of any compensation benefits. Instead, respondent #1 is liability for payment of permanent total disability benefits to the claimant. Attorney Osborne is entitled to an attorney fee in the amount of \$1,200.00 pursuant to A.C.A. §11-9-715(a)(1)(C)(i) to be paid from benefits due claimant at the rate of \$50.00 per week until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE