

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303745

ROBERT AYDELOTT, JR.	CLAIMANT
LOGAN COUNTY	RESPONDENT
ASSOCIATION OF ARKANSAS COUNTIES INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	NO. 3 RESPONDENT

OPINION FILED JANUARY 12, 2007

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent No. 1 represented by GAIL MATTHEWS, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

Death & Permanent Total Disability Trust Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 17, 2006, in Fort Smith, Arkansas. The deposition of the claimant was taken on May 8, 2006, and has been admitted as Respondents' Exhibit No. 2. A pre-hearing order was entered in this case, on August 2, 2006. This pre-hearing order purported to set out the stipulations and to outline the issues to be litigated and resolved at the present time. A copy of this 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. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. The prior Opinion of the Full Commission dated July 13, 2005, was affirmed by the Court of Appeals on March 23, 2006, and has become final. This Opinion is now res judicata of all issues raised and addressed therein.

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, including permanent total disability.

2. Applicability of Ark. Code Ann. §11-9-525 and Second Injury Fund liability.

In regard to these issues, the claimant contends that he has sustained wage loss disability.

In regard to these issues, the respondent #1 contends that the claimant has not sustained a wage loss disability.

In regard to these issues, the Second Injury Fund denies any liability in this claim.

In regard to these issues, the Death & Permanent Total Disability Trust Fund has stated no specific contentions on these issues. Apparently, it takes the position that if Ark. Code Ann. §11-9-525 is applicable to this claim, then it has no liability. If Ark. Code Ann. §11-9-525 is inapplicable to the present claim, then it would allow the respondent employer-carrier to litigate the

issue of permanent total disability and will abide with the outcome.

DISCUSSION

I. APPLICABILITY OF ARK. CODE ANN. §11-9-525 AND SECOND INJURY FUND LIABILITY

The first issue to be addressed is the issue of whether Ark. Code Ann. §11-9-525 is applicable to the present claim. The burden rests upon the parties benefitting from the application of this subsection to prove by the greater weight of the credible evidence all of the facts and elements necessary for the application of this subsection.

The Courts have recognized that there are two threshold requirements for the application of this subsection. The first of these requirements is that the compensable injury must be a permanent injury and must have resulted in some degree of permanent physical impairment. This issue was addressed in the prior opinion, wherein the claimant was found to have experienced a permanent physical impairment of 7% to the body as a whole, as a result of his compensable injury. This opinion has long since become final and is res judicata of this issue. Thus, the first threshold requirement for application of Ark. Code Ann. §11-9-525 has been proven.

The second threshold requirement is that the claimant must be experiencing some degree of permanent physical impairment, at the time of the occurrence of his compensable injury. Although the Act, itself, uses the terms impairment and disability, applicable

case law provides that there can be no “disability,” unless there is an ascertainable degree or percentage of permanent physical impairment, Walmart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W. 3rd 727 (2000). Case law also provides that in establishing pre-existing permanent impairment or disability, the same criteria are to be applied as would be required to establish the existence and extent of permanent impairment or disability from a compensable injury.

The voluminous medical record introduced shows that the claimant has been diagnosed as experiencing a various array of mental/emotional and physical conditions and maladies prior to the compensable injury giving rise to this claim. In February of 2003, the claimant was diagnosed as experiencing mental/emotional difficulties that would make him an unsuitable candidate for any law enforcement position. There is also medical evidence of a prior right knee injury in 1996, and a number of subsequent injuries and episodes of right knee difficulties thereafter. There is evidence of lower back difficulties in mid 1999 and neck or cervical complaints in late 1999. Low back complaints again appeared in early 2001, as well as recurrent right knee complaints. In early 2002, complaints and difficulties were noted involving the claimant’s right elbow. In mid 2002, complaints of difficulties were recorded involving the claimant’s right thumb. In addition to these, the medical evidence shows periodic upper bouts of respiratory complaints, gastric complaints, and hypertensive complaints.

However, despite extensive testing, the medical evidence presented fails to disclose the presence of any “objective findings”, prior to the claimant’s current compensable injury, that would support an assessment of permanent physical impairment. All of the medical tests and studies performed on the claimant, prior to March 31, 2003, show no evidence of any permanent injury to the claimant’s back, cervical spine, right knee, right thumb, elbow or any other portion of his anatomy. The medical evidence also fails to show that the claimant was ever assessed any percentage or degree of permanent physical impairment for any physical or emotional injuries or conditions, prior to the compensable injury giving rise to this claim.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent physical impairment at the time of the compensable injury giving rise to this claim. Consequently, there would be no pre-existing “disability”. Therefore, Ark. Code Ann. §11-9-525 is inapplicable to the present claim and the Second Injury Fund would have no liability in this case.

II. EXTENT OF PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE EARNING CAPACITY

The next issue to be addressed is the issue of the existence and extent of permanent functional disability or loss of wage earning capacity. This issue is controlled by the provisions of Ark. Code Ann. §11-9-522. The burden rests upon the claimant to

prove all of the facts necessary to establish permanent functional disability or loss of wage earning capacity.

In determining the existence and extent of permanent functional disability or loss of wage earning capacity, Ark. Code Ann. §11-9-522(b) mandates that this Commission consider the actual degree or percentage of permanent physical impairment and the corresponding loss of use of the claimant's body, in light of the claimant's age, education, and prior work experience. This Commission is also to consider any other factors reasonably likely to effect the claimant's wage earning ability. This would include such things as the claimant's motivation to return to employment and the potential employment opportunities available in the area of the claimant's residence. Unlike permanent physical impairment, pain can be considered by this Commission in determining the extent of functional disability.

In the present case, the claimant has previously been found to have experienced a permanent physical impairment of 7% to the body as a whole. This degree of permanent impairment is the result of compensable cervical injuries that were sustained in the employment related accident of March 31, 2003.

However, no permanent physical impairment has been determined in regard to any other injuries sustained by the claimant in the accident of March 31, 2003. These include injuries to his gluteal area or pelvis and to his head.

The claimant was apparently treated by Dr. Stephen Heim, an orthopaedic surgeon, for complaints attributable to the injury to

his pelvic or gluteal area that is alleged to have arisen from the employment related motor vehicle accident of March 31, 2003. Dr. Heim has not assessed any degree of percentage of permanent physical impairment for these particular difficulties. There is also no evidence that he set any restrictions or limitations on the claimant's physical activities, as a result of the pelvic or gluteal injury. The records of Dr. Heim show that he discharged the claimant from further treatment for this injury in 2004.

In regard to the claimant's head injury, the medical evidence is contradictory concerning the occurrence of any actual physical damage to the claimant's brain, as the result of the March 31, 2003 motor vehicle accident. Some of the medical experts, who have seen and evaluated the claimant, have opined that the employment related incident of March 31, 2003, did produce some degree of actual physical brain damage. Some of these experts imply that this damage might be permanent, while others have indicated that it may only be transitory or temporary. On the other hand, a number of medical experts have expressed the opinion that the claimant has sustained no physical brain damage, permanent or otherwise, as the result of the motor vehicle accident, and that any cognitive difficulties are either of a purely psychological origin.

After consideration of all the evidence presented, it is my finding that the expert opinions that the claimant sustained no actual physical damage to his brain, as a result of the employment related incident of March 31, 2003, are entitled to the greater weight and credit. It appears that the various medical opinions

finding actual physical brain damage are based on psychoneurological testing which can be either subjective or objective and extensively a history received from the claimant of an absence of mental or emotional problems prior to the employment related accident.

This later factor is clearly subjective and do not appear to be accurate. These histories do not note that the claimant had significant learning difficulties throughout his school years and was already experiencing some degree of emotional or mental instability prior to the employment related accident, as reflected by the psychological evaluation performed on the claimant in February of 2003.

with only one possible exception, all of the physical testing performed on the claimant has failed to show any evidence or indications damage to the claimant's brain, particularly permanent brain damage. A multitude of tests, in the form of plain x-rays, CT scans, MRI studies, and nuclear scans have all failed to show the presence of any defects. The only exception is a MRI of the claimant's brain that was performed on January 6, 2006. This study was interpreted as showing "a round focus of low density measuring approximately 5 cm." in the right insular region of the claimant's brain, which could represent either merely a prominent perivascular space or a possible "old infarct". In any event this possible defect was not attributed to trauma from the March 31, 2003 motor vehicle accident.

It must also be noted that none of the various medical experts, whose opinions have supported the existence of brain damage from the employment related accident of March 31, 2003, have assessed any specific degree of percentage of permanent physical impairment for this damage. Further, from the evidence presented, it would be impossible for this Commission to independently assess any specific percentage or degree of permanent physical impairment for permanent physical brain damage, in a manner that would comply with all of the requirements of the Act. It would also be impossible for this Commission to independently assess any degree or percentage of permanent impairment for any purely psychological conditions, either related or unrelated to the motor vehicle accident.

After consideration of all the evidence presented, it is my opinion that the only permanent physical impairment that can be considered in determining the existence and extent of any permanent functional disability or loss of wage earning capacity is that attributable to the compensable injury to the claimant's neck or cervical spine. The prior Opinion of this Commission determined this permanent physical impairment to be in the amount of 7% to the body as a whole. As this Opinion has long since become final, it renders the issue of the existence and degree of permanent physical impairment is *res judicata*.

The claimant testified that his neck or cervical difficulties have continued to cause him constant pain with further periodic episodes of sharp knife like pain that resolve upon taking over the

counter medication. He also testified to experiencing periodic difficulties with his back (however, the evidence presented fails to establish that the claimant sustained any permanent injury to his back in the employment related accident of March 31, 2003). The claimant testified that he also continued to experience substantial memory loss and becomes anxious or uneasy when driving. The claimant testified that he was physically capable of helping his mother cook, wash dishes, and mow the yard. He performs daily exercises and walks daily. He testified that he was also able to continue to fish. It would appear from the claimant's testimony, that it is his opinion that his total inability to work is due to his mental or emotional problems, rather than any physical limitations.

The claimant testified that he had not attempted to seek employment from Logan County, since his accident on March 31, 2003, because he was advised that he had been fired. According to his testimony the only attempt he has made to return to employment involved a position driving a bus. However, he stated that this made him nervous and he quit. The claimant is now on social security disability and receives approximately \$1,100.00 a month for himself and his children. The record reveals that the claimant's gross wages, at the time of his employment related accident, were approximately \$1,600.00 per month.

The claimant's compensable cervical injury not only produced a 7% permanent physical impairment but would clearly prevent the claimant from engaging in employment activities that required heavy

lifting. It would also prevent him from employment activities requiring the use of his arms and hands at or above shoulder level. He would also be precluded from employments that would subject him to significant vibration or jarring, that required flexibility or repetitive movement of his neck. Finally, he would not be able to perform employments that required him to maintain his head in a fixed position or posture for extended periods.

The record reveals that the claimant is 39 years old. He went to the 12th grade in school, most of which was in special education classes. The claimant's previous employment positions have consisted of approximately 3 years as a dump truck driver for Logan County, 10 years as a mechanic and driver for Carco International, and an indeterminate period of time doing line work in poultry plants. The claimant appears to have only on the job training with no formalized vocational school. However, it would appear that, at least at one time, the claimant possessed a CDL or commercial driver's license.

After consideration of the extent of the claimant's permanent physical impairment and the resulting limitations on his potential employment activities, in light of his age, education, previous work experience, motivation, and all another factors relevant to his employability, I find that the claimant has failed to prove by the greater weight of the credible evidence that he has been rendered permanently totally disabled. Most of the claimant's perceived limitations are emotional or psychological in nature. I

do not find sufficient credible evidence to establish the actual existence of such limitations.

It is my opinion that there exists in the area of the claimant's residence, a sufficient number of employment positions, which would be within his limitations and restrictions and for which he would otherwise be qualified, to provide him with a reasonable opportunity of obtaining regular gainful employment. However, as he has qualified for and is receiving social security disability benefits, it is extremely doubtful that he will actually attempt to obtain any of these potential positions. These positions would consist primarily of light factory or assembly line work, light delivery work, and light maintenance or janitorial work.

However, the claimant has proven that the permanent effects of his compensable cervical injury would prevent him from returning to the employment position he held with the respondent at the time of his compensable injury. It would also preclude him from the vast majority of employment positions for which he would be otherwise capable and qualified, in light of his limited education, limited prior work experience, and level of intellectual functioning. The positions that remain available to the claimant would be limited in number and would likely be at wages substantially less than those he was earning at the time of his compensable injury.

After consideration of all the evidence presented, it is my finding that the claimant has proven by the greater weight of the credible evidence that he has sustained a permanent functional disability or loss of wage earning capacity that is equivalent to

a permanent partial disability of 13% to the body as a whole. Therefore, the claimant would be entitled to permanent partial disability benefits equivalent to a 20% permanent partial disability to the body as a whole. This would include benefits attributable to a 7% permanent physical impairment and benefits attributable to a 13% permanent functional disability.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On March 31, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On March 31, 2003, the claimant earned wages sufficient to entitle him to weekly compensable benefits of \$243.00 for total disability and \$182.00 for permanent partial disability.

4. On March 31, 2003, the claimant sustained various compensable injuries in an employment related motor vehicle accident, one of these injuries involved his neck or cervical spine.

5. The claimant has failed to prove that he has been rendered permanently totally disabled as a result of the effects of his compensable injuries of March 31, 2003.

6. The claimant has proven by the greater weight of the credible evidence that his compensable injuries of March 31, 2003, have resulted in a permanent partial disability of 20% to the body as a whole. This represents permanent partial disability for a

permanent physical impairment of 7% to the body as a whole and permanent partial disability for permanent functional disability for loss of wage earning capacity in the amount of 13% to the body as a whole.

7. The greater weight of the credible evidence fails to prove that the claimant was experiencing any permanent physical impairment or permanent disability at the time of his compensable injuries on March 31, 2003. Thus, Ark. Code Ann. §11-9-525 is inapplicable to the present claim and the Second Injury Fund has no liability.

8. The respondents have controverted the claimant's entitlement to any permanent total or permanent partial disability benefits.

9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent partial disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits equivalent to a permanent partial disability of 20% to the body as a whole. The respondents are entitled to credit for all such benefits previously paid.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional permanent partial disability benefits awarded herein for permanent functional disability or loss of wage earning capacity. One-half of this fee shall be the obligation of the respondents in addition to such

benefits. The remaining one-half of this fee shall be withheld by the respondents from such benefits.

The Commission's file reflects that a Child Support Lien has been filed in the present claim. Thus, the distribution of the benefits herein awarded to the claimant are subject to this lien in the manner and amount provided by the Act.

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