

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610765

LISA FERRARI		CLAIMANT
STEPPING STONE SCHOOL EXCHANGE		RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER	No. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED NOVEMBER 14, 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.

Respondents No. 1 represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 25, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on June 26, 2007. The 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 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. On September 20, 2006, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation rates are \$278.00 for total disability and \$208.00 for permanent partial disability.
3. On September 20, 2006, the claimant sustained a compensable injury to her back.
4. There is no dispute over the payment of medical expenses or temporary disability benefits.
5. The claimant's healing period ended on or about February 26, 2007.
6. The respondents have accepted liability for and are paying permanent partial disability benefits for a 7 percent permanent physical impairment 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 claimant's entitlement to permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity, in excess of that for permanent physical impairment.
2. Second Injury Fund liability.
3. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

"The claimant contends that she is entitled to disability in excess of 7 percent to the body as a whole because of the reduction of her earning capacity that has occurred as a result of her job related injury. The claimant contends that her attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents #1 contend:

“Respondents contend that all appropriate benefits have been paid with regard to this matter. It is respondents’ position that claimant is not entitled to wage loss disability benefits. In the event claimant is found entitled to wage loss disability benefits, it is respondents’ contention that the Second Injury Fund should be liable for payment of any such benefits.”

In regard to these issues, the Second Injury Fund contends:

“The claimant is not entitled to permanent partial disability benefits in excess of her anatomical impairment rating pursuant to Ark. Code Ann. §11-9-522. The claimant cannot prove that the September 20, 2006, compensable injury resulted in additional permanent disability or impairment to prove Second Injury Fund liability pursuant to Midstate and Ark. Code Ann. §11-9-525. Alternatively, there is not proof of a combination of a prior impairment or disability with an impairment or disability from the compensable injury greater than the impairment/disability from the last injury, in and of itself.”

DISCUSSION

I. SECOND INJURY FUND LIABILITY

The first issue to be addressed is whether Ark. Code Ann. §11-9-525 is applicable to the present claim. In order for this section to be applicable, three facts must be established by the greater weight of the credible evidence. First, it must be proven that the claimant was experiencing pre-existing permanent partial disability or impairment at the time the present compensable injury was sustained. Secondly, the current compensable injury must result in additional permanent partial disability or impairment. Third, there must be “combined” disability or impairment, such that this degree or percentage of disability or impairment is greater than

that which would have resulted from the last injury, considered alone and of itself.

The evidence presented shows that the claimant had a compensable injury to her lumbar spine, while employed by Bost Human Development in March of 1999. An MRI study that was performed shortly after the March 1999 compensable injury revealed a small central disc herniation of the L4-5 disc with no neuroforaminal compromise. The claimant apparently received a rating of 5 percent to the body as a whole for this compensable injury. Such a rating would conform to Table 75IIB in the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. This was the official rating guide both at that time and the present. This claim was ultimately settled by joint petition for \$5,169.50, payable to the claimant (this Commission may take judicial recognition of its prior Orders and Opinions, including the Joint Petition Order entered in the previous claim, E904400). This amount would have been approximately \$1,500.00 more than the claimant would have been entitled for the 5 percent permanent physical impairment rating.

The claimant testified that she was only off work, as a result of her March 1999 compensable injury, until some time in September of 2001. At that time, she returned to regular employment with no difficulties or limitations on her activities until the current injury on September 20, 2006. The claimant's testimony also reflects that in July of 2006, she experienced a "pulled muscle", but that this was in the area of her thoracic spine. She further

stated that this injury quickly and completely resolved. There is no evidence that this injury produced any permanent impairment or disability.

The claimant's testimony and the other evidence presented shows that except for her difficulties with her thoracic spine in mid 2006, the claimant was continuously employed and performed rather strenuous employment activities without any physical limitations or apparent difficulties from September of 2001 until September 20, 2006. During this time there is no evidence she required or sought any treatment or difficulties with her lumbar spine or missed any work as a result of such difficulties.

I find that the greater weight of the credible evidence establishes that the claimant was experiencing permanent physical impairment, at the time of her compensable injury on September 20, 2006. However, the evidence fails to prove that she was experiencing any permanent "disability" or reduction in wage earning capacity, at the time of this "second" injury. The existence of only pre-existing permanent impairment, without any accompanying permanent disability, is still sufficient to satisfy the first requirement for the application of Ark. Code Ann. §11-9-525. It must be noted that the specific wording of this section uses "permanent partial disability" and "permanent impairment" in the disjunctive or alternative.

An MRI study which was performed on the claimant shortly after the compensable injury of September 20, 2006, was interpreted as showing a small central disc herniation at L4-5 on top of a diffuse

bulging annulus with mild canal stenosis at this level, bilateral degenerative facet joint disease at L4-5, and L5-S1, mild bulging annulus at L1-2, mild canal stenosis at L3-4 and L5-S1. The claimant was ultimately treated for her compensable injury of September 20, 2006, by Dr. James B. Blankenship, a neurosurgeon. Dr. Blankenship attributed this episode of the claimant's lower back difficulties to the objectively demonstrated defect at L4-5. He ultimately assessed a permanent physical impairment of 7 percent to the body as a whole. This rating would conform to Table 75 II.C of the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment. Dr. Blankenship also permanently restricted the claimant from lifting in excess of 25 pounds or engaging in prolonged stooping or repetitive bending at the waist. These permanent restrictions have prevented the claimant from performing the employment position she held with the respondent, at the time of her compensable injury and from performing the employment position she had concurrently held with Bost Human Development.

I find that the greater weight of the credible evidence presented proves that the claimant's compensable injury on September 20, 2006, has resulted in both permanent physical impairment and actual permanent "disability" or loss of wage earning capacity. Therefore, the second requirement for the application of Ark. Code Ann. §11-9-525, has been met.

In reaching my decision concerning the existence of actual permanent "disability" or loss of wage-earning capacity, I am aware

that the claimant, through her motivation and family ties, has been able to obtain regular employment at wages that are relatively close to those she was earning for the respondent. However, Ark. Code Ann. §11-9-522(b)(2) only excludes the claimant from being entitled to benefits for permanent functional disability or loss of wage-earning capacity if she has obtained employment or has a bonafide or reasonably obtainable offer of employment at wages equal to or greater than her average weekly wage from the respondent at the time of her accident. Under the legislative mandate of strict interpretation, this Commission cannot modify or change this clear wording of the Act. The claimant's current wages may not be substantially less than her average weekly wage from the respondent, at the time of her accident. However, they are clearly not the same or greater than her average weekly wage from the respondent, at the time of her accident. Thus, Ark. Code Ann. §11-9-522(b)(2) would not be applicable to the present claim.

The medical evidence shows that the claimant's prior 1999 compensable injury, which gave rise to the pre-existing permanent impairment that she was experiencing at the time of her September 20, 2006 compensable injury, was to the exact same area and anatomical structures involved in the September 20, 2006 compensable injury (i.e. the L4-5 intervertebral disc). It would appear that the compensable injury of September 20, 2006 resulted only in increased permanent damage to this L4-5 intervertebral disc. However, this increased permanent damage was sufficient to now produce compromise or pressure on the claimant's spinal canal

(spinal stenosis). This increased physical damage also appears to be the cause of the claimant's current permanent physical restrictions and limitations and, in turn, her current actual permanent disability or loss of wage-earning capacity.

The greater weight of the evidence shows that the prior permanent damage to the claimant's L4-5 intervertebral disc, from the 1999 injury, effectively combined or merged with the additional permanent damage caused by the compensable injury of September 20, 2006. Thus, the permanent physical impairment assigned for this pre-existing damage would have also combined or merged with the permanent physical impairment assigned for the compensable injury of September 20, 2006. After the current compensable injury the pre-existing permanent damage from the 1999 injury would no longer form an independent basis for the assessment of any degree or percentage of permanent impairment.

As previously stated, the evidence also proves that the permanent damage and pre-existing permanent impairment from the 1999 injury was not causing any actual disability, at the time of the current compensable injury on September 20, 2006. Clearly, there is no evidence that this pre-existing permanent damage and impairment from the 1999 injury was independently producing any degree of actual disability, at any time since the compensable injury of September 20, 2006. Rather, the greater weight of the credible evidence shows that all of the claimant's permanent restrictions and limitations and resulting actual permanent disability that the claimant is now experiencing are solely the

result of the increased permanent damage caused by the compensable injury of September 20, 2006.

In summary, I find that the greater weight of the credible evidence simply fails to show that the claimant is experiencing any “combined” disabilities or impairments. Thus, the degree or percentage of disability or impairment caused by the combined disabilities or impairments would not be greater than that which would have resulted from the last injury considered alone and of itself. Ark. Code Ann. §11-9-525 is applicable under the facts of the present claim.

II. PERMANENT PARTIAL DISABILITY BENEFITS FOR PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE-EARNING CAPACITY

The final issue concerns the claimant’s entitlement to permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity. The claimant’s entitlement to these benefits is controlled by the provisions of Ark. Code Ann. §11-9-525(b). The burden rests upon the claimant to prove any loss of wage-earning capacity. In determining this issue, consideration is to be given to the claimant’s age, education, work experience and any other matters reasonably expected to affect her future earning capacity.

The record reveals that the claimant is 43 years old. She has an eleventh grade formal education with a GED. The claimant has worked as a pit clerk in a casino, a receptionist at a health care center, as a bookkeeper and as an attendant for mentally and physically impaired persons.

The claimant has a current permanent physical impairment of 7 percent to the body as a whole. She is restricted from engaging in employment activities requiring lifting in excess of 25 pounds, prolonged stooping, or repetitive bending.

The foregoing permanent restrictions would clearly prevent the claimant from performing her preinjury employment position with the respondent or her previous and concurrent employment position with Bost Developmental Services. These permanent restrictions would also preclude her from a considerable number of potential employment positions, for which she would otherwise be qualified. These employment positions would primarily be in manufacturing or assembly line work or in the medical care field (such as a CNA).

However, the claimant appears highly motivated. She was quickly returned to employment in the clerical field, through the apparent assistance of her relatives. She could also probably perform the activities required of a pit clerk, receptionist, or bookkeeper. However, these less strenuous positions exist in lesser numbers and are more sought after. For this reason, many of these positions pay less wages than the wages the claimant was earning at the time of her compensable injury. Although the claimant has apparently done some bookkeeping work (one of the higher paying of the positions that would be within the claimant's physical limitations), there is no evidence that she has any formal training in this field other than on the job training. This lack of formal training would significantly reduce her chances of obtaining such employment in the general job market.

After consideration of all the evidence presented, I find that the claimant has sustained a permanent functional disability or loss of wage-earning capacity, solely as the result of the effects of her compensable injury of September 20, 2006, in the amount of 10 percent to the body as a whole. This 10 percent permanent partial disability would be in addition to any permanent partial disability benefits to which the claimant is entitled for permanent physical impairment. Liability for these benefits rest solely on the respondents, Stepping Stone School Exchange and Commerce & Industry Insurance Company.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On September 20, 2006, the relationship of employee-employer-carrier existed between the parties.
3. On September 20, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$278.00 for total disability and \$208.00 for permanent partial disability.
4. On September 20, 2006, the claimant sustained a compensable injury to her lumbar spine.
5. There is no dispute over the payment of medical expenses or temporary total disability benefits and all such benefits have or are being paid.
6. The claimant's healing period from the effects of her compensable injury ended on or about February 26, 2007.

7. The respondents have accepted liability for and are paying permanent partial disability of 7 percent to the body as a whole.

8. The claimant has sustained a permanent partial disability for permanent functional disability or loss of wage-earning capacity in excess of the permanent partial disability for permanent physical impairment, in the amount of 10 percent to the body as a whole. The respondents, Stepping Stone School Exchange and Commerce & Industry Insurance Company, are solely liable for the permanent partial disability attributable to permanent functional disability or loss of wage-earning capacity.

9. Ark. Code Ann. §11-9-525 is not applicable, under the facts of the present claim and the Second Injury Fund has no liability in this claim. Specifically, the greater weight of the credible evidence fails to prove that the claimant has experienced any "combined" disability or impairment and that the degree or percentage of disability or impairment that has been caused by combined disability or impairment is greater than that which would have resulted from the last injury considered alone and of itself.

10. The respondents have controverted the claimant's entitlement to any benefits for permanent functional disability or loss of wage-earning capacity.

11. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted permanent partial disability for functional disability or loss of wage-earning capacity.

ORDER

The respondents, Stepping Stone School Exchange and Commerce & Industry Insurance Company, are liable to the claimant for additional permanent partial disability benefits for permanent functional disability or loss of wage-earning capacity in the amount of 10 percent to the body as a whole, which is in addition to any permanent partial disability for permanent impairment.

The respondents, Stepping Stone School Exchange and Commerce & Industry Insurance Company, remain liable for the expense of reasonably necessary medical services for the claimant's compensable injury.

The respondents, Stepping Stone School Exchange and Commerce & Industry insurance Company, are liable to the claimant's attorney for the maximum statutory attorney's fee on the controverted permanent partial disability benefits herein awarded for permanent functional disability or loss of wage-earning capacity. One-half of this fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this fee is to be withheld by the respondents from these benefits.

For the reasons heretofore set out in this opinion, all claims against the Second Injury Fund of the State of Arkansas 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