

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E417422**

**BETTY GERRALD (BARNETT),  
EMPLOYEE**

**CLAIMANT**

**DOUGLAS TOBACCO PRODUCTS COMPANY, INC.,  
EMPLOYER**

**RESPONDENT NO. 1**

**NATIONAL FIRE INSURANCE CO. OF HARTFORD,  
CARRIER**

**RESPONDENT NO. 1**

**SECOND INJURY FUND**

**RESPONDENT NO. 2**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 3**

**OPINION FILED JUNE 28, 2007**

Hearing before Administrative Law Judge Dale Douthit in El Dorado, Union County, Arkansas.

The claimant was represented by Honorable Floyd M. Thomas, Jr., Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 were represented by Honorable Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Honorable Terry Pence, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 did not participate.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on April 3, 2007 to determine whether the claimant was entitled to additional workers' compensation benefits.

This claim has been the subject of two prior hearings before Administrative Law Judges, the first being April 24, 1998 and the second on August 23, 2000. As

a result of those hearings, this claim has resulted in two opinions from the Arkansas Court of Appeals (December 22, 1999 and February 27, 2002).

A prehearing conference was conducted in this claim on December 20, 2006, and a Prehearing Order was filed on December 21, 2006. The parties agreed the Prehearing Order dated December 21, 2006 would be admitted into the record as Commission's Exhibit 1, subject to any modifications made at the full hearing.

The parties stipulated to the following at the April 3, 2007 full hearing:

(1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

(2) The employee/employer/carrier relationship existed at all relevant times, including October 4, 1994.

(3) The claimant's applicable compensation rates are \$267.00 per week for temporary total disability and \$200.00 per week for permanent partial disability.

(4) The December 22, 1999 opinion issued by the Arkansas Court of Appeals and its February 27, 2002 opinion are *res judicata* to this claim and are incorporated by reference herein.

(5) The hearing transcripts and all exhibits attached from the April 24, 1998 and August 23, 2000 hearings before the Administrative Law Judges are incorporated by reference.

(6) The Death & Permanent Total Disability Trust Fund is dismissed from this claimant without prejudice.

(7) Dr. Alkire and Dr. Nelson are authorized treating physicians for the claimant. (Transcript page 5 lines 3-4 and page 14, lines 7-17)

(8) The Court of Appeals in its December 22, 1999 decision found the claimant to have a fifty percent (50%) wage loss and Second Injury Fund liability.

By agreement of the parties, the following issues were presented for determination:

(1) Whether the claimant is entitled to an additional fifteen percent (15%) anatomical impairment rating as a result of claimant's June 6, 2005 surgery performed by Dr. Saer.

(2) Whether the claimant is now permanently and totally disabled or, in the alternative, entitled to additional wage-loss disability benefits.

(3) Attorney's fees.

Claimant contended, in summary, that due to her June 6, 2005 surgery, she is entitled to an additional fifteen percent (15%) anatomical impairment rating. The claimant contended that she is now totally and permanently disabled or, in the alternative, entitled to additional wage-loss disability benefits plus attorney's fees.

Respondents No. 1 contended, in summary, that claimant is receiving all indemnity benefits to which she is entitled. Respondents No. 1 contend that claimant was previously assigned a thirteen percent (13%) impairment as a result of two previous surgeries; that claimant has had a third surgery, and the doctor evaluating her condition has now determined claimant is entitled to fifteen percent (15%) impairment. Respondents No. 1 contended the differential is two percent

(2%). With regard to wage-loss disability, Respondents No. 1 contended claimant has been assigned fifty percent (50%) wage-loss disability, and that neither medical evidence nor lay testimony will support an award of any additional wage-loss disability.

Respondent No. 2 contended, in summary, that the fifty percent (50%) award assessed against the Second Injury Fund was paid out possibly in March of 2003, and that The Fund has paid no additional benefits since that time. Respondent No. 2 contended that claimant cannot meet her burden of proving the hat she has suffered a change of physical condition that would entitle her to any additional wage-loss disability benefits.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that she sustained an additional two percent (2%) whole body impairment as the result the of her October 4, 1994 compensable injury. This two percent (2%) whole body impairment award is in addition to her previously adjudicated thirteen percent (13%) whole body impairment.
4. The claimant has proven by a preponderance of the evidence that the major cause of her additional two percent (2%) anatomical impairment was her October 14, 1994 compensable injury.

5. The additional two percent (2%) anatomical impairment awarded herein was controverted by Respondents No. 1, and therefore a full statutory attorney's fee should apply.

6. Claimant has failed to prove by a preponderance of the evidence that her physical condition has changed in such a way to justify a modification of the wage loss previously awarded in this claim.

7. Since claimant has failed to prove a change in her physical condition, claimant has also failed to prove by a preponderance of the evidence that she is now permanently and totally disabled.

### **DISCUSSION**

As stated above, this claim has been the subject of two prior decisions of the Arkansas Court of Appeals. Those decisions recite the details of the claimant's work history, compensable injury, and surgeries up through August 23, 2002, and since those decisions are incorporated herein by reference, they will not be repeated. In summary, the claimant sustained a compensable back injury on October 4, 1994 and required surgeries in 1995 and 1996. In the 1999 Court of Appeals decision, the Court concluded the claimant sustained a thirteen percent (13%) whole body anatomical rating plus a fifty percent (50%) wage-loss disability. The Court also found Second Injury Fund liability.

The claimant subsequently requested additional wage-loss benefits; however, that request was denied by the Court of Appeals in their February 27, 2002 decision. Presently, the claimant is requesting additional benefits again

primarily due to a new surgery the claimant underwent on June 6, 2005 and based on the claimant's current symptoms. On June 6, 2005, the claimant underwent a laminectomy fusion for spondylolisthesis at L4 and S1 and for spondylolisthesis at L5-S1 by Dr. Saer. Dr. Saer then assessed the claimant with a fifteen percent (15%) whole body impairment rating using the AMA Guides, 4<sup>th</sup> Edition (LLX1 p.3)

Ark. Code Ann. § 11-9-102(4)(F)(ii) provides:

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

As stated earlier, compensability of the claimant's back injury has long been adjudicated and will not be revisited here. The records indicate the claimant had spondylolisthesis at the time of the compensability determination. Aggravation of a preexisting condition is capable of meeting the major cause requirement as long as the work-related aggravation was the major cause of some anatomic impairment. Pollard v. Meridian Aggregates, 88 Ark. App. 1, 193 S.W.3d 738 (2004). It must be noted that Respondents No. 1 accepted the June 2005 surgery as a compensable benefit and paid temporary total disability benefits for one year after the 2005 surgery. In fact, Respondents No. 1's counsel seemed to state at the April 3, 2007 full hearing that Respondents No. 1 do not contest an additional two percent (2%) whole body anatomical impairment rating.

THE COURT: Okay. Are you not controverting a 2% increase in the anatomical impairment?

MR. MULDROW: Other than the statute of limitations point that you have already addressed, no.

Claimant argued that she was entitled to an additional fifteen percent (15%) whole body impairment rating on top of her previously thirteen percent (13%) whole body impairment rating for a total of 28 percent (28%). I do not interpret Dr. Saer's report as support to claimant's argument. Claimant's counsel also argued that the AMA Guides, 4<sup>th</sup> Ed., supported claimant's position. However, my interpretation of Table 75 Section IV which deals with spondylolisthesis third or subsequent operations supports only an additional two percent (2%) whole body impairment over and above the claimant's previous thirteen percent (13%) whole body impairment rating. Table 75 Section IV shows an additional one percent (1%) for the third surgery and an additional one percent (1%) because the third surgery dealt with two levels.

Compensability of the claimant's spondylolisthesis is *res judicata* as well as the compensability of claimant's surgeries in 1995 and 1996. For one to argue claimant's third surgery in 2005 is not causally related or a compensable consequence of the 1994 injury would be unreasonable. It is the 2005 surgery that caused a two percent (2%) increase in the claimant's permanent anatomical impairment, and the surgery was the claimant's third for the condition in which compensability has already been determined. Therefore, claimant has proven major cause with regard to the increased two percent (2%) permanent impairment

rating due solely to the fact of her third surgery for her compensable spondylolisthesis.

I find the claimant has proven by a preponderance of the evidence an increase in her permanent whole body impairment of two percent (2%), over and above her previous thirteen percent (13%) whole body impairment rating. Respondents No. 1 are directed to pay the additional two percent (2%) whole body impairment along with the maximum statutory attorney's fees applicable to controverted indemnity benefits. I find the claimant would not have received the additional two percent (2%) whole body impairment but for the efforts of her counsel.

It must be noted that the respondents seemed to attempt to raise a statute of limitations argument at the full hearing, but then decided to abandon the argument. The statute of limitations defense was not raised at the prehearing conference or included in the Prehearing Order. This Administrative Law Judge rejected respondents' efforts to raise the statute of limitations defense at the full hearing due to the late juncture at which respondents brought it up; however, this Administrative Law Judge allowed the respondents to proffer their arguments, but the respondents instead decided to drop the statute of limitations and not offer a proffer.

THE COURT: And I'll just go ahead and rule on that now. I'm not going to address it when I render my decision because it was not raised at the prehearing conference. We outlined the issues and any affirmative defenses at that time and it was not raised, the surprise upon the claimant at this point to defend the affirmative defense of the statute of limitations. I will allow the respondents to

proffer whatever evidence they would like to regarding that issue but like I said, I'm not going to look at it when I render my decision.

MR. THOMAS: All right, Your Honor.

MR. MULDROW: For the record, rather than making a proffer, respondents would take the position that we have at all times contended that there has not been a compensable change of condition. The law is that aging and the effects of aging should not be considered in determining that. That is not an affirmative defense, that is simply the law.

It must also be noted that Respondents raised the statute of limitations defense in the context of Ark. Code Ann. § 11-9-713. However, the Prehearing Order never mentioned Ark. Code Ann. § 11-9-713. The claim for additional benefits could have also been brought under Ark. Code Ann. § 11-9-522(d). In any event, both Respondents only argued "no change of condition" with regard to the claimant's plea for additional benefits.

The claimant requested additional wage loss over and above her previous fifty percent (50%) wage-loss award or that she be considered permanently and totally disabled. As stated, the issues of permanent and total disability and wage loss were previously adjudicated twice by the Arkansas Court of Appeals. In both decisions, the Court of Appeals concluded that fifty percent (50%) wage loss was all the claimant was entitled. The Court's rationale behind the fifty percent (50%) wage-loss award was explained in detail in the prior opinion and will not be readdressed here. However, the claimant's condition since the last Court of Appeals decision is at issue, and it must be determined whether claimant's physical condition has changed.

As stated above, I find the claimant's condition has changed her whole body by an additional two percent (2%). However, the change was due solely because she underwent a third surgery. What must be determined is whether her wage loss has been impeded by the subsequent surgery in June of 2005. I find that it has not. In fact, the evidence shows the claimant's condition actually improved after her third surgery, which is exactly why one would undergo surgery. The claimant testified as follows regarding her condition after the third surgery:

Q Isn't it true that your right leg was giving you the most trouble when you went in for surgery?

A Yes.

Q And isn't it true that that surgery helped the condition of your right leg dramatically?

A Yes.

Q When you actually woke up from surgery, you told me that the pain in your right leg was almost entirely gone.

A Yes.

Q During the next six months to a year you testified that you were having an aching sensation in your groin and down both legs, but not the excruciating pain that you were experiencing before the surgery?

A Right.

Q Is that true?

A That's true.

The claimant testified that her right lower extremity was her primary problem before the 2005 surgery and that the 2005 surgery greatly improved her condition. Then, in July of 2006, over one year after her third surgery, she was getting up from

the breakfast table and pain arose in her left lower extremity. Nothing in the medical records after the claimant's July 2006 breakfast incident gives an indication as to what is causing the claimant's left lower extremity complaints. The claimant testified that she did not see anywhere in the medical records that were introduced an explanation of her current condition.

Q Did you see in any of those medical records any reference to what he told you that he believes is the nature of your condition?

A No.

The record shows that the claimant received significant benefits after her 2005 surgery. In fact, she testified she was better after the 2005 surgery than she was in 2000 when she was again seeking more wage-loss benefits. The Court of Appeals found in 2002 that the claimant was not entitled to additional wage loss over and above the her previous award of fifty percent (50%) wage loss, and I cannot find that the claimant has undergone a change in physical condition to warrant permanent and total disability or an increase in wage-loss disability benefits. In fact, since the fifty percent (50%) wage-loss disability awarded to the claimant, I find the 2005 surgery actually helped her functional ability. I do not totally disregard the claimant's testimony regarding left lower extremity pain; however, at this point, it is a mystery ailment according to the medical records. The claimant's testimony does raise some doubt because she testified that when she woke up from the 2005 surgery, her right leg pain was almost entirely gone. But, when claimant saw Dr. Nelson with Pain Care Consultants on February 14, 2006, she still

complained of right lower extremity pain and never mentioned that her right lower extremity problems had dramatically improved.

Q And isn't it true that the surgery helped the condition of your right leg dramatically?

A Yes.

The claimant's own testimony reflects that her condition greatly improved for over a year after the 2005 surgery, until she had the incident at the breakfast table. The medical records raise serious doubt as to whether the July 2006 incident is related whatsoever to her compensable back injury. The July 13, 2006 record from Dr. Alkire clearly states claimant complained of left pain after twisting her knee while getting up from the table. (Cl. Ex. 1, page 5). Dr. Alkire even stated:

I am not sure what's causing this patient's pain. I think it's more knee than back. (Cl. Ex. 1, page 5)

It is true that Dr. Alkire issued a letter in May of 2006 stating that the claimant was "100 percent unable to perform any kind of labor." However, Dr. Alkire said the same thing in 2000 and the Court of appeals disagreed. What makes Dr. Alkire's 2006 letter to be given little weight is that it was prior to July 2006 when the claimant testified her truly serious problems arose. In fact, Dr. Alkire issued his May 2006 report during the one year period after the 2005 surgery when the claimant testified the excruciating pain she was having before the 2005 surgery had gotten dramatically better (Trans. P. 41, L. 19-25).

After reviewing all the evidence in this matter impartially, I find the claimant has failed to prove by a preponderance of the evidence that her physical condition

has changed in such a way to justify a modification of the previous wage loss awarded in this claim. I further find the 2005 surgery actually helped the claimant's functional ability. Therefore, claimant's request for additional wage loss or a finding of permanent and total disability is denied.

**AWARD**

Respondents No. 1 are directed and ordered to comply with the Findings of fact and Conclusions of Law recited here.

**IT IS SO ORDERED.**

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HONORABLE DALE DOUTHIT  
Administrative Law Judge