BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103026

GARY GREEN, CLAIMANT	CLAIMANT
SCHILLI , CORPORATION, EMPLOYER and PACIFIC EMPLOYERS INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED FEBRUARY 28, 2007

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on December 5, 2006, at El Dorado, Union County, Arkansas.

Claimant represented by HON. STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by HON. BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HON. DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by HON. JUDY RUDD, did not participate in the hearing.

STATEMENT OF THE CASE

On December 5, 2006, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing order was entered in this matter on September 29, 2006. A copy of the September 29, 2006, prehearing order was marked as Commission

Exhibit No. 1 and made a part of the record without objection, subject to any modifications made at the full hearing.

The parties stipulated to the following at the December 5, 2006 full hearing.

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

2) The employer/employee/carrier relationship existed at all relevant times, including March 2, 2001.

3) The claimant's temporary total disability rate is $343.00 per week, and his permanent partial disability rate is $257.00 per week.

4) This claim has been the subject of two prior hearings before the Arkansas Workers' Compensation Commission, the last of which resulted in a Full Commission Opinion dated April 20, 2006, which was not appealed and is now res judicata to this claim.

5) Respondent No. 1 accepted the claimant's 10% whole body impairment rating.

6) The claimant reached maximum medical impairment on November 6, 2001.

The parties agreed at the full hearing to litigate the following issues:

1) Whether the claimant is permanently and totally disabled, or in the alternative, entitled to wage loss disability benefits in excess of his stipulated 10% whole body impairment, plus attorney's fees.

2) Whether claimant is entitled to additional medical treatment from Drs. Shahim, Hart, and Bryant.

3) Whether the Second Injury Fund has liability in this claim.

The claimant contended at the full hearing that he was an employee of the respondent employer and was involved in a work related injury on or about March 2, 2001. The claimant contended he is entitled to permanent total disability benefits, controversion and attorney's fees. Alternatively, claimant contended he is entitled to wage-loss disability benefits. The claimant further contended that respondents should be responsible for the reasonable and necessary treatment of Drs. Shahim, Hart and Bryant. Claimant contended the treatment from Drs. Shahim, Hart and Bryant was controverted and therefore medical authorization rules do not apply.

Respondent No. 1 contended at the full hearing that the treatment from Drs. Shahim, Hart and Bryant was not from authorized treating physicians and not the responsibility of Respondents No. 1. That Dr. Rutherford did not refer the claimant to Drs. Shahim, Hart or Bryant. That the April 20, 2006, Full Commission Opinion allowed additional treatment from Dr. Ackerman, but that when it was discovered Dr. Ackerman was no longer practicing in Arkansas, Respondent No. 1 offered Dr. Sprinkle. However, the claimant elected to treat on his own with Drs. Shahim, Hart and Bryant. Alternatively, Respondents No. 1 contended claimant has been provided all appropriate benefits to which he is entitled. Respondent No. 1 contended the claimant is neither permanently and totally disabled, nor entitled to wage loss disability benefits in excess of his impairment rating. Alternatively, Respondent No. 1 contended that if it is found claimant is permanently and totally disabled, or entitled to wage-loss disability benefits, that it is due to a combination of claimant's pre-existing conditions; and, therefore, the responsibility of the Second

Injury Fund.

Respondent No. 2, Second Injury Fund, contended at the full hearing that the claimant has received all benefits to which he is entitled; that his healing period ended on November 6, 2001, and he was assigned a 10% anatomical impairment rating. Respondent No. 2 contended that, if claimant has suffered any functional disability, it is attributable to the 2001 motor vehicle accident in and of itself and not a combination of conditions, and therefore the Second Injury Fund has no exposure in this claim.

Respondent No. 3, Death & Permanent Total Disability Trust Fund, contended that pursuant to A.C.A. §11-9-525(b)(1), Second injury Fund liability must be determined prior to consideration of the Death & Permanent Total Disability Trust Fund liability. Respondents No. 3 contended that if the Second Injury Fund is found not to have liability and the claimant is found to be permanently and totally disabled, the Death & Permanent Total Disability Trust Fund stands ready to commence weekly benefits in compliance with A.C.A.§11-9-502. Therefore, the Death & Permanent Total Disability Trust Fund has not controverted claimant's entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

1) The Arkansas Workers' Compensation Commission has jurisdiction of

this claim.

2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3) The claimant has failed to prove by a preponderance of the evidence that he is unable, because of the compensable injury, to earn any meaningful wages in the same or other employment.

4) The claimant has, therefore, failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

5) Upon consideration of all relevant wage-loss factors, I find claimant established a decrease in his wage earning capacity equal to 25% to the whole body, and is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. Respondents No. 1 are liable for wage-loss disability benefits in the amount of 25% to the body as a whole, over and above the claimant's 10% anatomical impairment rating.

6) Second Injury Fund has no liability in this claim.

7) Claimant's treatments from Dr. Hart, before April 20, 2006 were during a controverted period and therefore respondent or commission authorization did not apply.

8) Dr. Hart's pain management treatment prior to April 20, 2006, was reasonable, necessary and related to claimant's compensable injury and

therefore respondents' responsibility.

9) In light of Dr. Ackerman no longer practicing and the April 20, 2006 Commission Opinion, this claim is hereby referred to the Commission's Medical Cost Division for determination of the proper physician to take Dr. Ackerman's place as claimant's physician for pain management as directed by the Full Commission in its April 20, 2006 Opinion.

10) Claimant's requested treatment from Drs. Shahim and Bryant, was not reasonably, necessary or related to the compensable injury and therefore not respondents' responsibility.

11) The parties so stipulated and res judicata demands that any pain management after the April 20, 2006, Full Commission opinion should have been performed by Dr. Ackerman; therefore, respondents are not responsible for any requested treatment from Drs. Hart, Shahim or Bryant after April 20, 2006. Claimant asked the Commission for Dr. Ackerman and that's what the Commission granted. Claimant knew he was receiving treatment from Dr. Ackerman for the one year the claim was pending before the Full Commission, and took mo action to correct his request.

12) Claimant's attorney is entitled to the maximum attorney's fee under A.C.A. §11-9-715(a)(2)(A).

DISCUSSION

The parties agreed to incorporate by reference all previous opinions and orders issued by the Arkansas Workers' Compensation Commission related to this claim, specifically, the Full Commission Opinion filed April 20, 2006. In that April 20, 2006, Full Commission Opinion, the Commission provided an extensive background on the claimant's admittedly compensable injuries of March 2, 2001. The Commission, in its April 20, 2006 opinion, also provided an extensive synopsis of the claimant's medical history and condition from the date of the compensable injury up to the April 12, 2005 hearing before this Administrative Law Judge. The Full Commission history of the claimant from March 2, 2001 through April 12, 2005 is contained at pages three through eleven in its April 20, 2006 Opinion, and said history is hereby incorporated for the purpose of this Opinion/Order.

The Full Commission, in its April 20, 2006, Opinion, granted the claimant's request for additional pain management from Dr. Ackerman. However, when the Full Commission Opinion was handed down, Dr. Ackerman had ceased his medical practice in the State of Arkansas. Following the April 12, 2005 full hearing, the claimant treated with Drs. Shahim, Hart and Bryant; whose reports are contained in Claimant's Exhibit "1". Dr. Hart recommended the claimant try palattes, performed epidural steroid injections and other procedures for which the claimant testified he received little benefit. (T. pg. 48, lines 7-16) Respondents contended the medical treatment received by claimant from Dr. Hart, Shahim, and Bryant was unauthorized and therefore not its responsibility. Claimant contended the treatment from Drs. Shahim, Hart and Bryant was controverted and

therefore authorization was not needed. Claimant contends he is now permanently and totally disabled due to his compensable injury, or in the alternative, entitled to wage-loss disability in excess of his 10% whole body impairment.

II. Adjudication

A. Permanent Benefits

Claimant contends he is permanently and totally disabled. "Permanent total disability" is the "inability , because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. " (A.C.A. §11-9-519(e)). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability or impairment. (A.C.A. §11-9-102(4)(F)(ii)(a)).

Several factors weigh against the claimant's claim of permanent and total disability. The claimant testified at the hearing on December 5, 2006, that he was working part-time for a friend of his bagging ice. The claimant testified as follows regarding the part-time job he had around the time of the December 5, 2006, full hearing:

> Q. On an average how many hours a week do you work since then?
>
> A. I go almost every day, seven days a week. We'll go down and - a lot of mornings we just go down and bag some ice and then I go back home. It's better if we can bag some and we've got a delivery to make because than I can rest while we are driving. I can get in the passenger side of his truck with my brace

on and that helps some, it's not as painful. It only takes us about 10 minutes to load a box and everything.

Q. Are these those ten pound bags of ice?

A. Eight pounds.

Q. Eight pounds. Do you have any trouble lifting them?

A. No, not if I have my brace on. If I don't have my brace on then I feel - I can feel the weight in my back.

Q. As far as wages, what do you average out?

A. Some days nothing. I'd say on an average week, maybe $80 to $100 dollars. The last couple of weeks that I worked I was only getting like $50 or $54 a week. I was paid 10 cents a bag upon delivery, and of course with the kind of weather that we have now, that's slacked off. He really don't need much help now. (T. pg. 31, lines 1-25)

Additionally, vocational counselor Emily Harris Smith testified she believed the claimant to be employable. Ms. Smith testified that she met with the claimant, reviewed his medical records and had the benefit of a functional capacity assessment. Based on her evaluation, Ms. Smith recommended some jobs for the claimant and assisted him in the application process. Ms. Smith testified she assessed the claimant with the

ability to work a forty (40) hour week in the sedentary to light duty range. Ms. Smith also testified the claimant was more motivated to seek benefits than to return to work.

When taking into consideration the claimant's 10% whole body impairment, the Functional Capacity Evaluation, the testimony of the vocational counselor, the voluminous medical records, claimant's own testimony, and the fact the claimant could bag ice seven days a week for his friend; I find the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.

When addressing permanent and total disability, it is necessary to look into the possibility of wage-loss disability benefits. Claimant's entitlement to permanent disability benefits is controlled by Ark. Code. Ann. 11-9-522 (Repl. 2002), which states in pertinent part:

> (b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

The wage-loss factor is the extent to which a compensable injury has effected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. *Eckhardt v. Willis Shaw Express, Inc.,* 62 Ark. App. 224, 970 S.W. 2d 316 (1998) In considering factors that may affect an employee's future earning capacity, the court considers the claimant's motivation

to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W. 3d 769 (2000).

At the time of the hearing, the claimant was forty-eight (48) years old, and the parties stipulated to the claimant's 10% whole body impairment due to his admittedly compensable injury. The claimant testified he had worked for the respondent /employer as a truck driver for approximately six years prior to his March 2001 compensable injury. Prior to going to work for the respondent/employer in 1996, claimant testified he worked for coca-cola doing delivery as a truck driver. The claimant also worked for Pepsi Cola, Coors and RC Cola doing primarily truck delivery sales. In summary, the claimant's entire work history consisted of manual labor or truck driving with some sales involvement.

Ms. Smith testified she questioned claimant's motivation to return to work. Motivation to work is a legitimate factor to be considered when addressing wage-loss. However claimant, on his own, secured a part-time job bagging ice up to seven days a week in the recent past which shows a desire to work.

I have no doubt the claimant's ability to earn wages has been negatively impacted by his compensable injury. The very most any vocational expert or functional capacity evaluation can say is that the claimant could do light duty work. The restriction for light duty work clearly shows the claimant cannot do what he once could in the work force and as such it is incumbent upon the Commission to award some percentage of

permanent partial wage loss. No witness could state that the claimant could go back to work as a truck driver.

When taking into account the claimant's 10% permanent anatomical impairment, his age, education, work experience, medical records and other proper matters; I find the claimant sustained wage-loss disability in the amount of 25% over and above his anatomical impairment. Further, I find the claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. Claimant could clearly perform his job prior to the admittedly compensable injury and cannot now perform the physical labor he could beforehand. Claimant's compensable injuries of March 2, 2001, are therefore the major cause of his decrease in earning capacity.

B. Second Injury Fund Liability

The liability of the Second Injury Fund comes into question after three hurdles have been overcome. *Weaver v. Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990); citing, *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); see, also, *Chamberlain Group v. Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994). First, the employee must have suffered a compensable injury at his present place of employment. *Mid-State Construction, supra; Weaver, supra; Chamberlain, supra*. Second, prior to that injury, the employee must have had a permanent partial disability or impairment. *Mid-State, supra; Weaver, supra; Chamberlain, supra*. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction, supra; Weaver, supra; Chamberlain,*

supra. In addressing Second Injury Fund liability, the determination of whether an employee suffered a preexisting impairment in addition to any disability which resulted from a work-related injury is a factual one and to be made by the Commission. *Chamberlain Group v. Rios, supra*. However, before the Second Injury Fund can be liable to pay for an injury, the employee's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause of the impairment. See *Mid-State, supra.* As the court in Mid-State explained, "[i]t is the substantial nature of the impairment which is emphasized..." Id.

In the case at hand, it is undisputed the claimant suffered a compensable injury while employed with the respondent. However, the second and third hurdle for Second Injury Fund liability has not been met. Neither the medical records, nor the claimant's testimony proves he had a previous injury which was ratable under the AMA Guides. Additionally, the preponderance of the evidence fails to show that any of the claimant's prior conditions combined with his 2001 compensable injury to produce his current level of disability. This is supported by the fact that, although claimant had other medical conditions prior to his 2001 compensable injury, he was able to maintain employment with the respondent-employer for six years preceding his 2001 admittedly compensable injury. Further, the claimant testified it was solely the 2001 compensable injury that kept him from going back to his job with the respondent employer.

> Q. Would it be fair to say that the only thing that is keeping you from working is the pain and the

physical problems that you are having from your low back injury?

A. Yes. (T. pgs. 79 & 80, lines 24-25 & 1-3)

The claimant's 2001 compensable injury alone and of itself is the basis for the decrease in the claimant's wage earning capacity. Therefore, I find the Second Injury Fund has no liability in this claim.

C. Additional Medical Treatment

As stated earlier, this claim has been the subject of a few ALJ and Full Commission Opinions, which the parties agreed would all be incorporated by reference into the record of the December 5, 2006 hearing. In former ALJ McKinney's June 18, 2003 opinion, it was found that the claimant had exercised his right to a change of physician and had, in fact, changed his primary physician to Dr. Rutherford. Former ALJ McKinney also found that treatment from Dr. Bryant for the claimant's knee was not related to the claimant's compensable injury. There is nothing in the record to indicate Dr. Rutherford was ever removed as the claimant's primary care physician for his 2001 compensable injury. Nothing in the record shows Dr. Rutherford ever referred claimant to Drs. Hart, Shahim or Bryant. However, Dr. Rutherford did refer the claimant to Dr. Ackerman for pain management, which was the subject of this ALJ's April 12, 2005 hearing.

This ALJ declined claimant's request for additional pain management as a result of the April 12, 2005 hearing; however, the Full Commission, on April 20, 2006, reversed that decision and awarded the claimant additional pain management from

Dr. Ackerman. The parties agreed Dr. Ackerman was no longer practicing in the State of Arkansas by the time the Full Commission opinion was filed.

The claimant's medical records show that he never treated with Dr. Ackerman after the April 12, 2005 hearing before this ALJ. In fact, the claimant treated with Dr. Hart. The claimant was awarded pain management from Dr. Ackerman by the Full Commission because that is what the claimant asked. The claimant should have modified his request with the Full Commission during the nearly one year this claim was pending on appeal; however, the claimant did not notify anyone that Dr. Ackerman was no longer a viable option until the Full Commission Opinion was rendered on April 20, 2006. The claimant asked for Dr. Ackerman and that is what he received from the Full Commission on April 20, 2006. Res Judicata applies to the April 20, 2006 Full Commission opinion and any treatment by Drs. Hart, Shahim, and Bryant after April 20, 2006, would be unauthorized and therefore not the responsibility of the respondents. This claim is hereby referred to the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission to address the Full Commission's April 20, 2006 Opinion in light of the fact that Dr. Ackerman is no longer a viable option for pain management. As stated, claimant should have already made the Commission aware of his erroneous request back in 2005 when he started treating with Dr. Hart.

Even though the Full Commission eventually awarded pain management from Dr. Ackerman on April 20, 2006; the time preceding the Full Commission opinion was a controverted period and therefore authorization is not required. The spirit of the Full Commission Opinion from April 20, 2006 must be respected. In the Opinion the Full

Commission specifically stated on pages 14 & 15:

> "We find that the claimant's request for additional treatment in the form of pain management treatment should be granted. The medical records are clear that the claimant suffered extensive injury to his back and that he consistently complained of back pain from the time of the compensable injury. The claimant's testimony also indicated that his personal physician and another doctor, for which he was referred, have also recommended treatment in the form of pain management for his back. The evidence shows that the claimant had never received treatment for any back condition prior to his admittedly compensable injury. Absent any other explanation for the claimant's ongoing symptoms and considering no doctor has indicated he will not need the recommended treatment, we find that the requested treatment is reasonable and necessary and as a direct result of his admittedly compensable injury."

The Full Commission determined the claimant's need for additional pain management after the April 12, 2005 hearing was reasonable, necessary and related to the compensable injury. The Commission's findings and conclusions will not be second guessed herein; therefore, I find that Dr. Hart's treatment for pain management during the controverted period (prior to April 20, 2006) to be reasonably necessary and related to the claimant's March 2001 compenable injury and the responsibility of Respondents #1. Claimant also requested treatment from Drs. Shahim and Bryant before April 20, 2006; however, I cannot find such treatment not to be for pain management and therefore respondents are not responsible for treatment from Drs. Shahim or Bryant as it was not reasonably necessary.

AWARD

Respondents No. 1 are directed and ordered to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

All sums herein awarded are payable in 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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S. DALE DOUTHIT
Administrative Law Judge

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