

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F607675

| | |
|-----------------------------------------------|---------------|
| KENNETH LUDOLPH, Employee | CLAIMANT |
| CENTRA INDUSTRIES, Employer | RESPONDENT #1 |
| CONTINENTAL CASUALTY COMPANY, Carrier | RESPONDENT #1 |
| SECOND INJURY FUND | RESPONDENT #2 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT #3 |

OPINION FILED NOVEMBER 8, 2007

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

Claimant represented by GARY DAVIS, Attorney, Little Rock, Arkansas.

Respondent #1 represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

Respondent #3 not appearing at hearing.

STATEMENT OF THE CASE

On October 11, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 25, 2007, 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 employee-employer-carrier relationship existed between the claimant and respondent #1 at all relevant times.
3. The claimant sustained compensable injuries to his right lower extremity and lumbar spine on February 11, 2004.

4. Claimant has been assigned impairment ratings of 9% to the right lower extremity and 8% to the body as a whole for his back.

5. Claimant's healing period ended on December 27, 2005.

6. Claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$453.00 for total disability benefits and \$340.00 for permanent partial disability benefits.

At the time of the hearing the parties agreed to stipulate that respondent continued to pay claimant benefits at the temporary total disability rate through June 19, 2006.

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

1. Claimant's entitlement to permanent disability benefits.
2. Respondent #1's credit for overpayment of temporary total disability benefits.
3. Second Injury Fund liability.
4. Attorney fee.

The claimant contends he sustained admitted compensable injuries to his spine and right lower extremity on or about February 11, 2004. He contends he has been rendered permanently and totally disabled, or in the alternative he is entitled to a determination with respect to the extent of wage loss disability experienced over and above the admitted compensable impairments. Claimant contends he is entitled to a controverted attorney fee.

Respondent #1 contends that claimant suffered no permanent physical impairment to his lumbar spine as a result of the February 11, 2004 injury. Respondent #1 also contends that any wage loss awarded to claimant is the responsibility of the Second Injury Fund.

Respondent #2, Second Injury Fund, contends that it has no liability for compensation benefits in this claim.

Respondent #3, Death & Permanent Total Disability Trust Fund, 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 & Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and 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 his 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 July 25, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that respondent #1 continued to pay benefits at the temporary total disability rate through June 19, 2006 is also hereby accepted as fact. Respondent #1 is entitled to a credit for benefits paid after claimant's healing period ended on December 27, 2005.

3. Claimant has proven by a preponderance of the evidence that he has permanent impairment ratings of 9% to the right lower extremity and 8% to the body as a whole for the lumbar spine as a result of his compensable injury.

4. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled; however, claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 40% to the body as a whole.

5. Respondent #1 has failed to prove by a preponderance of the evidence that the

Second Injury Fund is liable for payment of benefits attributable to claimant's loss in wage earning capacity.

6. Respondent #1 has controverted claimant's entitlement to unpaid disability benefits.

FACTUAL BACKGROUND

The claimant is a 48-year-old man who began working for the respondent in early 2002 as the operator of a directional bore machine. The respondent is a company which works on pipelines, drilling beneath roads, rivers, and properties where a pipeline cannot be dug. According to claimant's testimony his job as a directional bore machine operator required a significant amount of physical activity.

The claimant suffered a compensable injury on February 11, 2004 as he was moving the drill bore machine across the highway and he was struck by a pickup truck. Claimant suffered injuries to his right lower extremity and his lumbar spine as a result of this accident.

As a result of the injury to claimant's right lower extremity he has undergone several surgical procedures, including surgery to repair a right tibia fracture and a closed ankle fracture. In addition, claimant has also received medical treatment, primarily from Dr. Knox, for his lumbar spine.

The parties have stipulated that claimant's healing period for his compensable injuries ended as of December 27, 2005. The parties have also agreed that claimant has been assigned impairment ratings in amounts equal to 9% to the right lower extremity and 8% to the body as a whole to his back.

Claimant has filed this claim contending that he is permanently totally disabled as a result of his compensable injury, or alternatively, that he is entitled to permanent disability benefits in excess of his impairment ratings. Respondent #1 contends that claimant has

not suffered any permanent impairment to his lumbar spine as a result of his compensable injury and that any liability for loss in wage earning capacity is the responsibility of the Second Injury Fund.

ADJUDICATION

Before considering the various issues in this case, it is first important to note that claimant had problems with his back prior to the injury in February 2004. On August 6, 1990, the claimant suffered an injury to his low back while employed by the Oklahoma Department of Corrections. After a period of conservative treatment, the claimant underwent surgery by Dr. Marouk on May 11, 1993. Subsequent to that surgery the claimant underwent an evaluation by Dr. Gillock on November 29, 1993 and was assigned a 13% impairment rating “to his back based on a surgically treated disc lesion with residual symptoms, loss of motion and pain in the right leg.”

The medical records indicate that in August 1995 the claimant returned to Dr. Marouk for an evaluation following complaints of low back pain radiating into the right leg. Dr. Marouk ordered additional testing but indicated that no additional surgery was needed at that time. Instead, Dr. Marouk treated claimant with muscle relaxants and a trial of epidural steroid injections.

Claimant eventually underwent a second surgical procedure on his lumbar spine by Dr. Marouk in January 1997. The medical reports indicate that claimant returned to Dr. Marouk for treatment of complaints of low back pain and pain in the right lower extremity. Claimant was last evaluated by Dr. Marouk on October 10, 2001, at which time he indicated that all of claimant’s physical activity was limited because of pain. Dr. Marouk diagnosed claimant’s condition as right L5 radiculopathy. Claimant did not seek any additional medical treatment for his lumbar spine until after the injury on February 11, 2004.

The initial issue for consideration involves the validity of the 8% rating to the body as a whole assigned to claimant for his lumbar spine injury by Dr. Knox. Respondent contends that the rating is not attributable to claimant's most recent injury, but rather is attributable to claimant's pre-existing condition; therefore, claimant cannot meet his burden of proving by a preponderance of the evidence that his injury was the major cause of the 8% impairment rating.

After my review of the evidence presented, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a permanent physical impairment in an amount equal to 8% to the body as a whole for his compensable low back injury.

The 8% rating was assigned by Dr. Knox in handwritten answers to questions from the respondent on November 22, 2004, and also in a letter report dated November 24, 2004. I find that Dr. Knox's rating is attributable to claimant's most recent injury, not to the pre-existing condition. In a fax dated November 22, 2004, Dr. Knox was asked to respond to three questions by an adjuster. The questions are prefaced by the fact that claimant was under Dr. Knox's care for a work-related injury which occurred on February 11, 2004, and he was asked his opinion as to the claimant's lumbar spine. One of those questions read as follows: "Impairment rating, if any, apportionment, if any:" In response, Dr. Knox indicated that claimant's impairment rating was 8%. Significantly, Dr. Knox did not apportion any of that 8% to the claimant's pre-existing condition.

Two days later on November 24, 2004, Dr. Knox again indicated that claimant's impairment rating equaled 8% to the body as a whole. Dr. Knox assigned this rating in a letter to Dr. Arnold. It should be noted that Dr. Knox indicates that the rating is based upon Table 15-7 on Page 404 of the *AMA Guides to the Evaluation of Permanent Impairment*. The Commission has adopted the AMA Guides, Fourth Edition, as the guides to be considered in assessing permanent impairment. The Fourth Edition of the AMA

Guides does not contain Table 15-7 at Page 404. Instead, that table and page number are contained in the Fifth Edition of the AMA Guides. However, my review of Table 15-7, Page 404, of the Fifth Edition of the AMA Guides reveals that it is virtually the same as Table 75 of the AMA Guides, Fourth Edition. The rating assigned by Dr. Knox is for a disc which has been “unoperated on” as reflected in the *Guides*. Claimant’s pre-existing condition involved a condition for which the claimant had undergone surgery. The fact that Dr. Knox assigned the impairment rating in accordance with an unoperated on disc again indicates that the impairment rating of 8% was attributable to claimant’s work-related injury, not a pre-existing condition.

Finally, I also note that claimant filed a claim for social security disability benefits. As a result, claimant underwent an evaluation by Dr. Pettingell on May 26, 2006. Dr. Pettingell relied upon the same table relied upon by Dr. Knox and noted that the impairment rating was above and beyond any previous impairment of the lumbar spine.

In short, claimant has the burden of proving by a preponderance of the evidence that he has suffered permanent physical impairment to his lumbar spine as a result of his most recent compensable injury. Here, the parties have agreed that claimant has been assigned a permanent physical impairment rating in an amount equal to 8% to the body as a whole. Based upon the medical evidence presented in the form of the opinions by Dr. Knox and Dr. Pettingell, I find that claimant has met his burden of proving by a preponderance of the evidence that his compensable injury was the major cause of the 8% impairment rating; therefore, respondent is liable for payment of permanent partial disability benefits in an amount equal to 8% to the body as a whole. I also note that this rating conforms with the *AMA Guides, Fourth Edition*.

The second issue for consideration involves the extent of claimant’s permanent disability. Claimant contends that he is permanently totally disabled. Claimant has the burden of proving by a preponderance of the evidence that he suffers an inability to earn

“any meaningful wage in the same or other employment.” A.C.A. §11-9-519(e)(2). In considering the extent of loss in wage earning capacity, the Commission may taken into account various factors. These factors include the percentage of permanent physical impairment, the claimant’s age, education, work experience, and other matters reasonably expected to affect their future earning capacity. A.C.A. §11-9-522(b)(1).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he is permanently totally disabled. However, I do find that claimant has suffered a loss in wage earning capacity in an amount equal to 40% to the body as a whole.

As previously noted, the claimant is 48 years old. He graduated from high school and has had some additional training, including some college. Claimant’s additional training has consisted of training involving firefighting and first responder medical training. The claimant was a volunteer firefighter/fire chief for approximately ten years. Claimant’s prior jobs include housing construction and work as a truck driver. Claimant also worked for Gearhart Industries where he learned to do logging and perforating oil wells, handling radioactive materials and explosives. He also worked for a construction company framing houses and he worked for the Oklahoma Department of Corrections from 1983 through 2001. Claimant began work as a correctional officer cadet before moving up to a sergeant. Claimant eventually moved over to the industrial division where he drove a truck and loaded and unloaded furniture and other products manufactured by the Department of Corrections. Claimant’s last job with the Department of Corrections was work as a correctional counselor.

Following his injury claimant went to work for another company as a consultant, teaching individuals how to operate a bore drilling machine. Claimant testified that he performed this job from approximately August or September 2006 until August 2007.

Claimant testified that he was paid \$100.00 per week, performed no physical activities, and continued to perform the job until the company went out of business.

Claimant testified that he could not perform any of the physical work he performed in the past due to the problems with his back and legs.

Claimant's primary treating physician for his injury has been Dr. Arnold who performed surgery on claimant's right lower extremity. Dr. Arnold ordered a functional capacities evaluation which was performed on December 27, 2005. A review of the evaluation report indicates that claimant gave 100 percent effort on all tests. According to the evaluation, the claimant can return to work at the "medium/heavy" work level with a permanent lifting restriction of 50 pounds. Claimant's primary limitation is to avoid excessive kneeling and crawling. According to the evaluation claimant can sit constantly with breaks every two hours and is frequently able to engage in standing and walking. In a report dated July 20, 2006, Dr. Arnold indicated that claimant could return to work within the restrictions of the functional capacities evaluation.

In summary, I find after consideration of the relevant wage loss factors, that claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled. Instead, I find after considering all relevant wage loss factors that claimant has suffered a loss in wage earning capacity in an amount equal to 40% to the body as a whole. While claimant testified that he is physically incapable of performing virtually any work, claimant's primary treating physician, Dr. Arnold, indicated that claimant could return to work within the restrictions outlined in the functional capacities evaluation. That evaluation indicates that claimant can return to work with a lifting restriction of 50 pounds and limitations of avoiding excessive kneeling and no crawling. The evaluation indicates that claimant can constantly sit with breaks every two hours and that he can frequently stand and walk. Accordingly, claimant has suffered a loss in wage earning capacity in an amount equal to 40% to the body as a whole.

The final issue for consideration involves respondent's contention that the Second Injury Fund is liable for payment of benefits attributable to claimant's loss in wage earning capacity. In order for the Second Injury Fund to be liable for compensation benefits, it must be proven: (1) that the employee 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; and, (3) the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988).

I find that the first two elements of Second Injury Fund liability have been met. Claimant did suffer a compensable injury at his present place of employment and he did have a permanent partial disability or impairment prior to his most recent injury. However, I do not find that the claimant's prior disability or impairment combined with the recent compensable injury to produce claimant's current disability status. Although the claimant had previously suffered an injury to his back for which he underwent two surgical procedures and had been assigned a permanent physical impairment rating in an amount equal to 13% to the body as a whole, there is no indication that claimant was having any problems physically with his back at the time of his injury on February 11, 2004. Although the claimant had returned to Dr. Marouk for additional medical treatment complaining of back pain, claimant did not seek any additional medical treatment for complaints of back pain after October 2001 until after the injury in February 2004. Furthermore, even with the claimant's prior back problems, the claimant continued to perform significant physical labor for various employers. For instance, claimant testified that in order to perform his job for the respondent he had to lift and load 30 to 45 bags of drill mud which weighed 50 pounds each. He also testified that he was required to move and handle reamers that weighed 50 to 100 pounds and use a pipe wrench that weighed approximately 45 pounds. Claimant testified that to perform his job he had to sit for 10 to 12 hours per day, and that he worked

12 hours per day, six days per week.

Claimant was also able to perform various physical activities around his home prior to the February 2004 injury such as mowing his yard with a push mower, repairing fences, digging holes, setting fence posts, painting his home, laying tile, and performing various mechanical repairs such as replacing water pumps and alternators. In addition, even after the claimant's prior back injuries, he was able to continue performing his work as a volunteer fire fighter.

In short, I find that claimant's current disability status is the result of the February 11, 2004 compensable injury, not a combination of claimant's pre-existing condition and his most recent compensable injury. Therefore, the Second Injury Fund is not liable for payment of compensation benefits in this claim.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

AWARD

As a result of his February 11, 2004 compensable injury, claimant has suffered impairment in the amount of 9% to his right lower extremity and 8% to the body as a whole for his lumbar spine. Claimant has failed to prove by a preponderance of the evidence that he is permanently totally disabled; however, claimant has suffered a loss in wage earning capacity in an amount equal to 40% to the body as a whole. Respondent #1 is

liable for payment of all compensation benefits. Respondent is entitled to a credit for benefits paid subsequent to the healing period through June 19, 2006.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$716.75.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE