

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E905547

JACK MCCLANAHAN, Employee	CLAIMANT
LLOYD'S TRUCK SERVICE, Employer	RESPONDENT #1
HARCO NATIONAL INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED MARCH 29, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by J. MATTHEW MAULDIN, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

Respondent #3 represented by JUDY RUDD, Attorney, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On February 26, 2007, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 13, 2006, and a pre-hearing order was filed on November 15, 2006. 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 a compensable injury to his right ankle on May 7, 1999.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$375.00 for total disability benefits and \$281.00 for permanent partial disability benefits.

5. Claimant reached maximum medical improvement on May 28, 2002.

Subsequent to the pre-hearing conference the parties have agreed to stipulate that claimant is permanently totally disabled. In addition, the respondent has accepted liability for payment of the prescription medical, Xenical, and also additional medical treatment by Dr. Walz. Respondent has agreed to pay a controverted attorney fee on these benefits.

At the time of the original pre-hearing conference several issues were expected to be litigated. However, because the parties now agree that claimant is permanently totally disabled and respondent has accepted liability for payment of prescription medication as well as additional medical treatment from Dr. Walz, the issues to be litigated have been narrowed to two. The first issue to be litigated involves whether the respondent or the Second Injury Fund is liable for payment of permanent total disability benefits. The second issue for consideration involves claimant's request that respondent pay for Dr. Fisher's witness fee incurred as a result of taking his deposition. It should also be noted that both the respondent and the Second Injury Fund have agreed that they have controverted liability and would owe an attorney fee if found liable for payment of permanent total disability benefits.

The claimant contends that respondent should pay the witness fee incurred in the taking of Dr. Fisher's deposition since the deposition was used at the hearing.

Respondent contends that claimant's pre-existing disability and impairment resulting from his bilateral upper extremities combined with his current compensable injury to produce his current level of disability; therefore, the Second Injury Fund is liable for payment of permanent total disability benefits. With regard to Dr. Fisher's witness fee, respondent contends that the deposition was taken at the request of claimant; therefore,

claimant is liable for the witness fee of Dr. Fisher. Respondent notes that it did pay the cost of the deposition transcript.

The Second Injury Fund contends that it is not liable for payment of claimant's permanent total disability benefits.

The Death and Permanent Total Disability Trust Fund defers to the outcome of litigation on the extent of the permanent disability issue.

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 November 13, 2006, and contained in a pre-hearing order filed November 15, 2006, are hereby accepted as fact.

2. The parties' stipulation that claimant is permanently totally disabled is also hereby accepted as fact.

3. Respondent is currently accepting liability for the prescription medication, Xenacal, which has been prescribed for treatment of claimant's reflex sympathetic dystrophy. Respondent has agreed to pay for additional medical treatment from Dr. Walz. Respondent has also agreed to pay claimant an attorney fee on these benefits.

4. Respondent has failed to prove that the Second Injury Fund is liable for payment of permanent total disability benefits; therefore, respondent is liable for payment of permanent total disability benefits to the claimant.

5. Respondent has controverted claimant's entitlement to indemnity benefits.

FACTUAL BACKGROUND

The claimant suffered a compensable injury on May 7, 1999 while working for the respondent. The claimant performed repair work to semi-trailers. On May 7, 1999, the claimant was on the top of a semi-trailer to install a new roof when one of the roof posts broke, causing him to fall approximately 15 feet and land on his right ankle, his back, and elbow. Claimant's ankle injury was treated conservatively before he underwent surgery by Dr. Coker on March 22, 2000. As a result of his compensable ankle injury the claimant developed reflex sympathetic dystrophy in first his right lower extremity and then his left lower extremity. According to claimant's testimony the reflex sympathetic dystrophy has now migrated into his abdomen area.

Claimant's medical treatment for his reflex sympathetic dystrophy has included the insertion of first a spinal cord stimulator and eventually a pain pump. Claimant is currently being treated for this condition by Dr. Fisher, a specialist in anesthesia and pain management. Dr. Fisher testified by deposition that claimant's pain pump medication must be refilled approximately every two months. He also noted that over time he has had to gradually increase the amount of medication claimant is given on a daily basis and that claimant is currently close to the maximum limit.

The parties have agreed that claimant is permanently totally disabled. The primary issue for consideration is the responsible party for payment of permanent total disability benefits.

ADJUDICATION

The respondent contends that the Second Injury Fund is liable for payment of all benefits in excess of the claimant's permanent impairment rating. The primary basis for this contention is a prior work-related injury the claimant suffered while working repairing trailers for Southwest Truck Services in the early 1990s. Claimant testified that he worked

for Southwest Truck Services repairing trailers beginning around 1989 or 1990, and he continued performing that job until approximately 1992. While working for Southwest Truck Services the claimant had a gradual onset injury to his upper extremities and was off work from approximately April 1992 until July 1993. As a result of that compensable injury the claimant was assigned a permanent physical impairment rating in an amount equal to 2% to his left upper extremity and a 25% impairment rating to the right upper extremity. Claimant settled his 1992 injury by joint petition on December 16, 1993.

In connection with that prior work-related injury, respondent notes various medical records from claimant's treating physicians indicating that claimant would not be able to return to the heavy manual labor he had previously performed. The medical records contain various opinions regarding the claimant's ability to return to work and indicate that claimant would not be able to "continue to do heavy manual labor. He has used his hands extremely heavily over the years and will not tolerate this any longer." The medical reports also indicate "... He will not be able to do manual labor with repetitious gripping as he has done in the past." and "... but he is not going to be able to do manual work requiring any lifting of significance and particularly use of power grip."

The medical records indicate that claimant indicated to various treating physicians subsequent to the 1992 injury that he had continued to have problems with both upper extremities.

In fact, claimant did not return to work to heavy manual labor for several years after his release. First, while claimant was off work for his injury Southwest Truck Services went out of business. When claimant was released, he obtained his GED and enrolled in a Bible study course at Faith Christian Center which he did for approximately four years.

Claimant did not return to work repairing trailers until March 5, 1999 when he became employed by the respondent and suffered his injury on May 7, 1999.

At the hearing claimant disputed the medical records of his prior treating physicians

and indicated that in his opinion the restrictions placed upon his ability to return to heavy manual labor were only temporary in nature, not long term.

In any event, it is clear that the medical records subsequent to claimant's 1992 injury indicate that claimant's treating physicians were of the opinion that he would not be able to return to heavy manual labor and the use of his hands to perform repetitive gripping as he had done in the past. It is this condition which respondent contends has combined with claimant's most recent injury to produce his current disability thus giving rise to Second Injury Fund liability.

In *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988), the Arkansas Supreme Court set forth a three-part test for determining Second Injury Fund liability. First, the employee must have suffered a compensable injury in his present place of employment. Second, prior to that injury the employee must have had permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

In this particular case, claimant obviously suffered a compensable injury at his present place of employment. Furthermore, I also find that prior to the claimant's most recent injury he did have a permanent partial disability or impairment. Claimant suffered a prior work-related injury in 1992 which resulted in impairment to both his left and right upper extremities. However, I find that the prior disability or impairment did not combine with claimant's most recently compensable injury to produce the current disability status. In other words, I find that claimant is permanently totally disabled as a result of his most recent compensable injury, irregardless of any prior disability or impairment.

As previously noted, claimant's primary treating physician at this time is Dr. Fisher, a specialist in anesthesia and pain management. Dr. Fisher testified in his deposition that in his opinion the claimant is 100 percent disabled. Dr. Fisher testified that the claimant could "barely move" and that claimant could not perform any type of weight bearing

activities.

During the deposition Dr. Fisher was presented with evidence of claimant's prior work-related injury in 1992 and was given the opportunity to review records indicating that claimant's treating physicians at that time had indicated that claimant could not return to work at manual labor and that claimant had continued to have problems with his upper extremities. Even after having had the opportunity to review the prior medical records, Dr. Fisher was of the opinion that claimant was permanently totally disabled as a result of the 1999 injury without consideration of the 1992 injury.

Q. Seeing those records, would you have done anything different in how you treated him for what you saw before the beginning of 2001?

A. Oh, no.

Q. And you told Mr. Sharum and Mr. Mauldin that you think Mr. McClanahan is 100 percent disabled?

A. Yes, sir. I do.

Q. Did you believe that when you saw him yesterday?

A. Yes, sir.

Q. Let me be a little more direct. Is he disabled because of this condition that you are treating him for?

A. Yes, sir. The pain.

Q. The pain that is the result of the condition that you were - - you began seeing him for after he saw Dr. Money and the other doctors?

A. That's correct.

In short, the claimant is permanently totally disabled. Claimant's permanent disability is not the result of a combination of his pre-existing disability or impairment and his most recent compensable injury. Claimant would have been permanently totally disabled even if he had only suffered his most recent compensable injury. Unless the

prior injury combines with the most recent compensable injury to produce the current disability status, there can be no Second Injury Fund liability. In my opinion, the prior pre-existing disability or impairment while significant did not combine with the claimant's most recent injury to produce his permanent total disability. Instead, claimant is permanently totally disabled as a direct result of his most recent compensable injury, not a combination.

Accordingly, for the foregoing reasons, I find that the Second Injury Fund is not liable for payment of compensation benefits. Respondent is liable for payment of permanent total disability benefits and a controverted attorney fee.

The final issue for consideration involves the witness fee of Dr. Fisher associated with his deposition. Rule 099.20 of the Commission indicates that the cost of reporting and transcribing depositions are to be borne by the respondent. In this particular case, the respondent did pay for the transcription expense of Dr. Fisher's deposition. Rule 099.20 also indicates that the charge for a witness fee shall be paid by the party who seeks to introduce or is relying upon the testimony of a witness. In this particular case, the deposition of Dr. Fisher was taken at the request of claimant and his attorney. This is evidenced by a letter submitted into evidence by the respondent from Attorney Sharum to Dr. Fisher dated November 9, 2006, indicating that claimant is requesting the deposition of Dr. Fisher.

Given the fact that the deposition of Dr. Fisher was requested by the claimant, I find pursuant to Commission Rule 099.20 that claimant is responsible for payment of Dr. Fisher's witness fee, not respondent.

AWARD

_____ The parties have stipulated that claimant is permanently totally disabled. I find that the Second Injury Fund is not liable for payment of permanent total disability benefits; instead, respondent is liable for payment of those benefits. Respondent has controverted

claimant's entitlement to permanent total disability benefits and is liable for the maximum attorney fee.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

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