

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F302078

RICKY PATE, Employee	CLAIMANT
PAT SALMON & SONS, INC., Employer	RESPONDENT #1
PACIFIC EMPLOYERS INSURANCE CO., Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED FEBRUARY 27, 2007

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

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent #1 represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On January 22, 2007, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 1, 2006, 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 on January 22, 2003.
3. The claimant sustained a compensable injury on January 22, 2003.

4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$440.00 for total disability benefits and \$330.00 for permanent partial disability benefits.

5. Respondent #1 has accepted an impairment rating of 6% to the shoulder.

6. Claimant's healing period ended by at least May 4, 2006.

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

1. Extent of claimant's permanent disability, including impairment and wage loss.

2. End of claimant's healing period.

3. Second Injury Fund liability.

4. Liability of Death & Permanent Total Disability Bank Fund.

5. Attorney fee.

The claimant contends that even though the parties have stipulated that claimant reached maximum medical improvement by at least May 4, 2006, that respondent #1 ceased paying temporary total disability benefits before that date. Accordingly, claimant requests temporary total disability benefits from the date last paid through May 4, 2006. Further, claimant contends that the permanent physical impairment rating for his compensable shoulder injury equals 25% to the body as a whole as assigned by Dr. Smelz. Claimant also contends that as a result of his compensable injury he is permanently totally disabled. To the extent that claimant's entitlement to disability benefits is limited by the 26 week period set forth in A.C.A. §11-9-113 for mental injuries or illness, claimant contends that this limitation is unconstitutional.

Respondent #1 contends that it is not liable for any additional temporary total disability benefits beyond those previously paid. Respondent #1 also contends that any disability benefits relating to claimant's mental injury are limited to 26 weeks pursuant to A.C.A. §11-9-113. Finally, respondent #1 contends that it has paid all benefits to which claimant is entitled and that in the event claimant is awarded any benefits for wage loss,

the Second Injury Fund is liable.

The Second Injury Fund contends that it has no liability for compensation benefits in that all requirements for Second Injury Fund liability have not been met. In addition, the Second Injury Fund also agrees that any disability benefits relating to claimant's mental injury are limited to the 26 weeks set forth in A.C.A. §11-9-113.

The 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 the 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 witnesses and to observe their 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 1, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant's healing period for his compensable right shoulder injury ended on April 13, 2004.

3. As a result of his compensable mental injury, the claimant is entitled to total disability benefits beginning April 14, 2004 and continuing for 26 weeks. Respondent #1 is entitled to a credit for any total disability benefits paid subsequent to April 13, 2004.

4. Claimant has failed to prove by a preponderance of the evidence that the limitation of 26 weeks of disability benefits codified at A.C.A. §11-9-113(b)(1) is unconstitutional.

5. As a result of claimant's compensable right shoulder injury, he suffered a permanent physical impairment in an amount equal to 19% to the body as a whole.

6. Claimant has failed to prove by a preponderance of the evidence that he suffered any permanent impairment as a result of his compensable mental injury; specifically, claimant has failed to offer objective and measurable physical findings supporting any permanent impairment.

7. As a result of claimant's compensable injury, he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

8. The Second Injury Fund is not liable for payment of permanent disability benefits attributable to claimant's loss in wage earning capacity.

9. Respondent #1 has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 58-year-old man who drove an 18-wheel truck for respondent #1. Claimant suffered a compensable injury while driving on January 22, 2003. On that date the claimant was driving in the left lane of an interstate highway when another driver driving a tractor only cut in front of him causing both vehicles to crash in the median. Following this accident the claimant had various complaints including severe headaches, shoulder pain, arm pain, and neck pain.

Claimant has come under the care of various treating physicians following his compensable injury. Claimant eventually came under the care of Dr. Jones, an orthopaedic surgeon, who after some conservative treatment performed surgery on

claimant's shoulder on July 16, 2003. Following that surgical procedure claimant's right shoulder improved, but he continued to have additional problems.

In addition to claimant's right shoulder injury, he has also been diagnosed as suffering from depression and post-traumatic stress disorder as a result of the January 22, 2003 accident. Respondent #1 accepted as compensable claimant's mental injury and claimant has received medical evaluations from Dr. Elizabeth Speck-Kern, a neuropsychologist; Dr. David Beare, a licensed psychologist; and Dr. Winston Wilson, a clinical psychologist.

Respondent #1 accepted claimant's physical and mental injuries as compensable and paid for medical treatment, temporary total disability benefits, and permanent partial disability benefits based upon a 6% rating to the claimant's right shoulder. Claimant has filed this claim contending that he is entitled to additional temporary total disability benefits as well as permanent total disability benefits as a result of his compensable work-related injury.

### ADJUDICATION

The initial issue for consideration involves the end of claimant's healing period. The parties have stipulated that claimant reached maximum medical improvement by at least May 4, 2006. However, claimant contends that respondent #1 terminated temporary total disability benefits prior to May 4, 2006, and requests temporary total disability benefits from the date last paid through that date. Payment records introduced by respondent #1 at the hearing indicate that temporary total disability benefits were paid through June 24, 2004.

In order to be entitled to temporary total disability benefits for an unscheduled shoulder injury, claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark.

244, 613 S.W. 2d 392 (1981). The healing period is defined as that period for healing of the injury resulting from the accident which continues until the employee is as far restored as the permanent character of the injury will permit. *J.A. Riggs Tractor Company v. Etzkorn*, 30 Ark. App. 200, 785 S.W. 2d 51 (1990). If the underlying condition causing a disability has become stable and if nothing further in the way of treatment will improve the condition, the healing period has ended. *Id.*

In this particular case, I find that claimant's healing period for his right shoulder injury ended as of April 13, 2004.

Dr. Jones performed the surgery on the claimant's right shoulder. In a report dated November 12, 2003 Dr. Jones indicated that claimant should continue undergoing physical therapy in order to increase his range of motion and strengthen his shoulder. Dr. Jones on that same date also completed a work slip indicating that claimant should remain off work until he was seen on January 7, 2004.

Apparently claimant did not return to Dr. Jones on January 7, 2004. Instead, claimant underwent an evaluation by Dr. Smelz at the VA on November 21, 2003. With respect to claimant's right shoulder injury, Dr. Smelz recommended that the claimant undergo a bilateral clavicular film for further evaluation. Dr. Smelz indicated that claimant would not be considered at maximum medical improvement until this was performed.

Claimant apparently did not undergo the test recommended by Dr. Smelz, but instead was evaluated and treated by Dr. Saffman on January 6, 2004. Dr. Saffman treated claimant with an injection in his right biceps tendon and also prescribed a home exercise program to stretch the claimant's right shoulder. Dr. Saffman also ordered physical therapy.

Although claimant was seeing Dr. Saffman for his physical complaints, Dr. Saffman also noted that the claimant was receiving medical treatment for a concussion and organic brain syndrome. Claimant was seen by Dr. Saffman on several occasions and on April

13, 2004, Dr. Saffman indicated that while he would await a psychiatric evaluation of the claimant before stating that claimant was at maximum medical improvement for his physical injury, he went on to note: “As far as treatment of his physical problem is concerned, he is at a maintenance level, ...”

Thus, although Dr. Saffman was not willing to state that claimant had reached maximum medical improvement because he was awaiting a psychiatric evaluation, he did indicate that as far as claimant’s physical injury the claimant was at a maintenance level. The medical evidence does not indicate that claimant underwent any additional significant medical treatment for his right shoulder injury after the April 13, 2004 report of Dr. Saffman. Furthermore, I believe it is important to note that in *Findley v. Pea Ridge School District*, Full Commission Opinion filed March 16, 2006 (F312557) the Full Commission noted that medical maintenance to retain a person at a particular level of healing does not necessarily mean that the condition has not stabilized.

I find based upon the evidence presented that claimant’s physical condition had stabilized as of April 13, 2004. While Dr. Saffman did not indicate that claimant had reached maximum medical improvement as of that date, he did acknowledge that with respect to claimant’s physical condition he was at a maintenance level. Furthermore, the medical evidence does not indicate that claimant received any significant medical treatment for his physical injuries subsequent to that date. Accordingly, for the foregoing reasons, I find that claimant’s healing period for his physical injuries ended as of April 13, 2004.

Even though I have found that claimant’s healing period for his physical injuries ended as of April 13, 2004, I nevertheless find that claimant is entitled to an additional 26 weeks of total disability benefits relating to his psychological condition beginning April 14, 2004. A.C.A. §11-9-113 provides that for mental injuries or illnesses a claimant may be entitled to 26 weeks of disability benefits. Significantly, the statute does not indicate that

these disability benefits are necessarily temporary total disability benefits. In *Hope Livestock Auction Company v. Knighton*, 67 Ark. App. 165, 992 S.W. 2d 826 (1999), the Arkansas Court of Appeals noted that A.C.A. §11-9-113(b)(1) does not include the term “healing period.” Instead, the court noted that the statute refers to disability. The court went on to note that “disability” is defined as “incapacity because of a compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” A.C.A. §11-9-102(9).

In this particular case, the medical records indicate that claimant continued to receive medical treatment for his psychological injury and that his medical providers were of the opinion that claimant was unable to work because of that injury. Therefore, claimant had an incapacity because of his mental injury to earn in the same or any other employment the wages he was earning at the time of his compensable injury. I find that this condition existed for 26 weeks beginning on April 14, 2004. Although claimant’s inability to work as a result of his mental injury existed prior to April 14, 2004, claimant was receiving temporary total disability benefits for his physical injury prior to that date. A.C.A. §11-9-113(b)(1) does not require the disability benefits to run concurrently. Therefore, pursuant to A.C.A. §11-9-113(b)(1), I find that claimant is entitled to 26 weeks of total disability benefits beginning April 14, 2004 and continuing for 26 weeks.

As previously noted, Respondent #1 introduced into evidence records indicating that it paid temporary total disability benefits through June 24, 2004. Respondent #1 is entitled to a credit for any temporary total disability benefits paid subsequent to April 13, 2004.

The next issue for consideration involves the extent of claimant’s permanent disability; including, impairment and wage loss. Respondent #1 has accepted and paid permanent partial disability benefits based upon a 6% rating to the right shoulder. Claimant contends that the correct impairment rating equals 25% as assigned by Dr. Smelz in the report of November 21, 2003.

According to A.C.A. §11-9-704(c)(1)(B) the determination of the existence or extent of physical impairment must be supported by objective and measurable physical or mental findings. Objective findings are defined by A.C.A. §11-9-102(16)(A)(i) as those findings which cannot come under the voluntary control of the patient.

A review of Dr. Smelz's medical report indicates that her 25% impairment rating included 13% for a loss of range of motion. This range of motion testing is not considered an objective finding; therefore, that portion of Dr. Smelz's impairment rating is not based upon objective findings. Dr. Smelz did however assign the claimant an upper extremity rating of 32% based upon the joint resection surgery. According to Table 3 on Page 3/20 of the *AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition*, a 32% rating to the upper extremity would equate to a 19% rating to the body as a whole.

I find that Dr. Smelz's opinion regarding the impairment to claimant's right shoulder is credible when one removes the range of motion rating. Although Dr. Jones performed the surgery on claimant's right shoulder, Dr. Jones apparently did not assign the claimant a permanent physical impairment rating. I also note that claimant eventually underwent an independent medical evaluation by Dr. Earl Peeples, an orthopaedist. Although Dr. Peeples indicated that the impairment rating assigned by Dr. Smelz was excessive, he did not assign a rating. In my opinion, the remainder of Dr. Smelz's opinion assigning the claimant a 32% rating to his right upper extremity is credible and supported by the *AMA Guides*. That 32% rating to the upper extremity equates to a 19% rating to the body as a whole.

I find that claimant has failed to prove by a preponderance that he has suffered any permanent impairment as a result of his mental injury. As previously noted, when assessing permanent impairment, the impairment must be based upon objective findings which are defined as those findings which cannot come under the voluntary control of the patient. A.C.A. §11-9-102(16). Furthermore, the fact that the respondent accepted the

claimant's mental injury as compensable does not automatically mean that objective findings are present which establish a permanent impairment. In *Coffman v. Jones Timber Company*, Full Commission Opinion filed May 13, 1999 (E511952), the Commission considered a claim where there were objective findings supporting a compensable mental injury but noted that those same objective medical findings do not necessarily establish a permanent impairment. The Commission stated:

Furthermore, as aptly noted by the administrative law judge, merely because there is a determination of objective medical findings which supports a claim for compensability does not mean that there are objective medical findings establishing a permanent impairment.

In this particular case, I find no objective findings establishing a permanent impairment with respect to claimant's mental injury. Although claimant has been diagnosed as suffering from a concussion, depression, and post-traumatic stress disorder, there are no objective physical findings establishing permanent impairment. The basis for these diagnoses has been neuropsychological testing. In *Watson v. Tayco, Inc.*, 79 Ark. App. 250, 86 S.W. 3d 18 (2002), the Arkansas Court of Appeals noted that neuropsychological testing alone is not sufficient to prove a compensable injury by objective findings. Instead, the court indicated that there must be some other objective evidence satisfying the objective requirement. Likewise, A.C.A. §11-9-704(c)(1)(B) requires objective and measurable physical findings in support of the existence or extent of impairment. In this particular case, all objective testing has returned negative. Claimant underwent an MRI of the brain on April 8, 2003, and that MRI scan was read as negative. Claimant underwent a second MRI scan of the brain "before/after gadolinium" on November 3, 2003. Again, the MRI scan was read as negative. Finally, the medical reports also indicate that an EEG of the claimant's brain was also read as negative.

In short, objective tests in the form of two MRI scans of the brain and an EEG of

claimant's brain have all returned normal. While claimant has undergone neuropsychological testing, that testing alone is not sufficient to satisfy the requirements of A.C.A. §11-9-704(c)(1)(B). If neuropsychological testing is not sufficient objective evidence to establish a compensable injury according to the court in *Watson*, it is likewise not sufficient to establish permanent impairment by objective findings.

Accordingly, for the foregoing reasons, I find that claimant has failed to prove by a preponderance of the evidence that he suffered any permanent impairment as a result of his mental injury; specifically, there are no objective findings supporting permanent impairment for claimant's mental injury.

The next issue for consideration involves claimant's request for permanent benefits associated with wage loss as a result of his compensable injury. First, I note that the Full Commission in *Branscum v. RNR Construction Company*, Full Commission Opinion filed November 18, 1996 (E406698), stated that the Workers' Compensation Act does not provide "for wage loss disability for mental illness." Furthermore, I believe that the respondent is correct in noting that an award of wage loss based upon claimant's mental injury would result in a disability award exceeding the 26 week period codified at A.C.A. §11-9-113(b)(1). As previously noted, the court in *Hope Livestock Auction Company v. Knighton, supra*, indicated that healing period is not required by A.C.A. §11-9-113(b)(1); therefore, the 26 week limitation does not apply specifically to temporary total disability benefits but to any disability benefits.

After consideration of the relevant wage loss factors presented in this case, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. As previously noted, the claimant is 58 years old. Claimant has worked primarily as a truck driver for more than 30 years beginning in 1973. In addition to his work as a truck driver the claimant also sold real estate for approximately two years beginning in

1982. Claimant began drawing social security disability benefits in July 2003 at the rate of approximately \$1400.00 per month. Claimant has made no effort to look for employment since his accident.

While claimant and his wife both testified that claimant is unable to drive a vehicle due to his condition, claimant's wife admitted that no physician has stated that claimant cannot drive. However, claimant's treating physicians have indicated that claimant would not be able to return to work as a truck driver due to the physical limitations relating to claimant's right shoulder injury. In his report of November 12, 2003, Dr. Jones indicated that he did not think that claimant could continue to drive a truck with his right shoulder injury. Likewise, Dr. Smelz in a report of November 21, 2003 indicated that physically claimant would not be capable of exerting the necessary force to drive a truck with his right arm injury. Thus, while claimant apparently is incapable of driving a truck due to his shoulder condition, there is insufficient medical evidence that claimant is incapable of driving any vehicle.

Other than the fact that claimant's treating physicians did not believe the claimant could return to work as a truck driver with his right shoulder, the medical records contain no real restrictions on the claimant's physical ability to return to work.

Based upon the foregoing wage loss factors, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole as a result of his compensable injury.

Respondent #1 contends that the Second Injury Fund is liable for payment of any benefits awarded for wage loss. According to *Mid-State Construction Company v. Second Injury Fund*, 295 Ark. 1, 746 S.W. 2d 539 (1988) the Second Injury Fund will only be liable for compensation benefits if three requirements are satisfied. First, the employee must have suffered a compensable injury at their present place of employment. Second, prior to that injury, the employee must have had a permanent partial disability or impairment.

Finally, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

In this particular case, even assuming that the first two requirements for Second Injury Fund liability have been satisfied, I find that the claimant's current disability status is the result of claimant's most recent compensable injury, not a combination of the recent injury and any prior disability or impairment.

The medical evidence indicates that claimant suffered from several pre-existing conditions. Most notable is the fact that claimant suffered an injury to his low back while working for UPS in 1982. Medical records indicate that claimant was treated conservatively for that injury with medication, injections, and physical therapy. Claimant did not undergo any surgery, but was assigned a permanent physical impairment rating in an amount equal to 5% to the body as a whole by Dr. Douglas Parker. Following the assignment of that impairment rating claimant entered into a joint petition settlement with UPS and the settlement was approved by the Commission. The transcript and order approving the joint petition settlement is contained in the documentary evidence. Although the claimant admittedly obtained his real estate license and sold real estate following that accident in part because he wanted lighter work, the claimant also continued to work as a truck driver. In fact, as time passed the claimant continued to perform physical labor and the medical records do not indicate that claimant sought any significant medical treatment for any further problems with his low back. In fact, the evidence introduced at the hearing does not indicate that claimant was limited from performing any work as a result of that prior low back injury.

The medical evidence also indicates that claimant had a problem with his cervical spine in 1998. Again, claimant did not undergo any surgical treatment for that condition. Although an MRI scan in 1998 was interpreted as showing a disc herniation at C5-6, a subsequent MRI scan performed after claimant's most recent injury dated February 14,

2003 reveals degenerative changes only with no focal disc herniation evident.

In addition, there is reference to other pre-existing conditions including an injury to claimant's knee and hearing loss.

After my consideration of all the relevant evidence, I find insufficient evidence that claimant's current disability status is the result of a combination of the claimant's recent compensable injury and any prior disability or impairment which existed before January 22, 2003. The claimant's current disability status is the result of the shoulder injury which claimant suffered and prohibits him from returning to work as a truck driver. Even if claimant had not suffered the prior pre-existing conditions, claimant would not be able to return to work as a truck driver. Accordingly, I find that the Second Injury Fund is not liable for payment of compensation benefits in this claim.

The final issue for consideration involves claimant's contention that the statute codified at A.C.A. §11-9-113(b)(1) limiting him to 26 weeks of disability benefits for a mental injury or illness is unconstitutional. An Act by the General Assembly is entitled to a presumption of constitutionality. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W. 2d 108 (1997). The party challenging a statute has the burden of proving that it is unconstitutional. *Lambert v. Baldor Electric*, 44 Ark. App. 117, 868 S.W. 2d 513 (1993).

While claimant has alleged that the statute limiting him to 26 weeks of compensation benefits is unconstitutional, claimant has offered no proof in support of that allegation; therefore, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that A.C.A. §11-9-113(b)(1) is unconstitutional.

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 temporary total disability 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

\_\_\_\_\_The claimant's healing period for his shoulder injury ended on April 13, 2004. Claimant is entitled to total disability benefits for his psychological injury beginning April 14, 2004 and continuing for 26 weeks pursuant to A.C.A. §11-9-113(b)(1). Respondent #1 is entitled to a credit for any disability benefits paid subsequent to April 13, 2004. As a result of the compensable injury to claimant's right shoulder, he has suffered a permanent physical impairment in an amount equal to 19% to the body as a whole. Claimant has failed to prove by a preponderance of the evidence that he has suffered any permanent impairment with respect to his mental injury. Claimant has proven by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. Respondent has failed to prove by a preponderance of the evidence that the Second Injury Fund is liable for payment of compensation benefits. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

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 temporary total disability 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.

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.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE