

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM. NO. F404830

TERRY GLADISH, EMPLOYEE	CLAIMANT
TENNECO AUTOMOTIVE, INC., EMPLOYER	RESPONDENT #1
ACE AMERICAN INS. CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JANUARY 3, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on October 5, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents #1 represented by the HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

Respondent #2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style claim to determine the claimant's entitlement to additional workers' compensation benefits. On July 31, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Terry Gladish, the claimant, coupled with the September 9, 2007, deposition testimony of Dr. Laverne Lovell and the October 5, 2007, deposition testimony of Dr. Kenneth Tonymon, along with medial reports and other documents comprise the record in this claim. The October 5, 2007, deposition of Dr. Kenneth Tonymon, which was received subsequent to the hearing has been bluebacked as an exhibit and made a part of this record.

DISCUSSION

_____Terry Steven Gladish, the claimant, with a date of birth of January 3, 1950, completed the seventh grade and later obtained his GED. Claimant commenced his employment with respondent #1 on March 8, 1979.

In describing his work history during his adult life, claimant's testimony reflects:

When I turned 18 I worked - - before that I worked at - - my father had a fish farm and I worked on it for several years, and then I got 18 and I went to work for the Wonder State which was a metal factory, built grain bins and cotton seed houses, and I quit there and went to work at Emerson and worked there for a year or so, and then I went to Parker lawn equipment to work, and I don't [done] that for a short period of time. The weather got bad, and so I went to work at Monroe equipment, worked there a year and half, two years and I quit. Then I went back within a year, and I've been there for about 26, 27 years. (T. 12-13).

Claimant explained that while all of his work has been manual labor type work, at Monroe Equipment he was a supervisor coordinator troubleshooter. Claimant described the afore as a "lead man". In describing the various jobs that he has performed during his twenty-six (26) years of employment by same, claimant testified:

Well, I was a material handler for a while. I think a pin operator, machine operator for a while, then I troubleshooted for coordinator for 18 years on one job and then I went to a press operator. That's where I was at the last. (T. 13-14).

Claimant earned \$543.00, per week in his last job.

Claimant testified that in the 1980/1981 time frame he injured one of his kneecaps however the same did not require surgical repair. The testimony of the claimant reflects that he sustained a work-related injury to his back in either 1989 or 1990, for which he underwent surgery in 1991 or 1992 by Dr. Olinger. The testimony of the claimant reflects that he had an uneventful recovery from the surgery:

I was doing good. I watched what I done. I didn't go back to work right off the bat. I stayed off for a while, but when I did go back to work, I watched what I done, and I made it real good. (T. 14-15).

Claimant's testimony reflects that he is not aware of receiving any kind of impairment rating following the surgery by Dr. Olinger. Further, claimant denies that he received any additional workers' compensation benefits after he returned to work following the surgery.

The claimant testified that he suffered another back injury in January 2002, and was seen by Dr. Fisher and Dr. Rodney Fields, a Memphis neurosurgeon. Regarding his recovery following the second back injury, claimant noted that while he was directed by the doctor to wear a back brace for six (6) months, he actually wore it longer. Claimant testified that the brace helped and that he made it "real good". (T. 15).

Claimant maintains that the year or so preceding his April 13, 2004, work related injury, he was not experiencing physical problems or limitations relative to his back or leg. Claimant testified that he was performing his job and doing pretty much whatever he needed to do. Health-wise, prior to the 2004 injury, claimant acknowledged that he suffered from high blood pressure for several years and that he had a heart murmur. Claimant asserts that neither of the afore conditions adversely affected him before 2004. Further, claimant maintains that he was

unaware of any arthritis prior to 2004. Claimant testified that any problems with his joints before April 2004 did not amount to anything.

On April 13, 2004, claimant sustained a compensable back injury. Regarding the mechanics of the accident, claimant testified:

Well, the machine I run has got a big hopper comes off the back end of it, and scraps runs into it, and it's got wheels on the bottom of it and two that's facing you or next to you would be solid, and the ones that's from you are rotating, and you have to rock this big tub and get it rolling and rock it in order for them wheels to turn where you can make it come backwards, and that's when I hurt my back. (T. 16-17).

The testimony of the claimant reflects that he experienced an immediate onset of back pain at the time of the injury. Claimant testified with respect to his medical treatment following the accident:

Well, the best I can recall they sent me back to work, I worked it might have been two or three days, and then I had to go up front to a meeting and Harold Diggs ordered an MRI done at the Paragould Hospital. They done that. I had to go back and see Dr. Shedd and he got the results on the MRI and took me off of work. (T. 18).

Dr. Shedd was respondent-employer's designated physician. Claimant was referred by Dr. Shedd to Dr. Tonymon, a Jonesboro neurosurgeon.

The testimony of the claimant reflects that while he experienced sever pain and limitations relative to his back and leg following the April 13, 2004, accident, prior to that date he experienced neither. Subsequent to his evaluation by Dr. Tonymon the claimant underwent surgery. Claimant's testimony reflects that the surgery helped to a certain extent. Claimant explained that while the symptoms were not as bad as they were prior to the surgery he was nevertheless "still having a lot of problems" with his back.

Claimant underwent surgery by Dr. Tonymon on April 21, 2005, and on October 8, 2005, Dr. Tonymon authored medical reports reflecting that the claimant had reached maximum medical improvement. Claimant maintains that after the October 8, 2005, date he continued to experience symptoms in his leg and back. Regarding the afore, the claimant's testimony reflect:

Well, I can't stay on my legs very long. I couldn't - - when I started to do housework and stuff, it bothered me a whole lot and I'd have to just lay down. I had a lot of problems with it. (T. 19).

The claimant returned to work for respondent #1 following his treatment by Dr.

Tonymon. Claimant explained :

Yes, sir. I went back to work for about seven or eight days. They called me and said that they had a couple of jobs and wanted to know if I was interested in it, and I told them I was. I talked to Harold Diggs and he told me what jobs he had and which one he recommended I would try, so I did.

One of them was tow motor job and I can't recall what the other one was, and then another one was they was having temporary people paint the factory and he wanted somebody to oversee them and separate paperwork up in the front office. So, I told him I would try it, I'll do the best I could do. I didn't know whether I could handle the work or not, but I would give it a shot. I did, and, you know, a couple of days went by and they kept adding more onto me and doing more stuff and different stuff, so I talked to the woman that was over me and I told her what they was putting on me was more than I could handle and that it was making my back hurt and my legs hurt and I was taking a lot of pain pills and muscle relaxers. So she talked to Harold Diggs or a person that - - when he's not there, she takes over. He talked with her and or she was, and they decided - - when I come back the next day, they decided that they was going to send me home. (T. 20).

Claimant's testimony reflects that he was having problems performing the assigned job with respect to walking. Claimant added that he was standing on his feet too much and he was unable to handle it. (T. 21). Claimant testified that once he was sent home by respondent #1, he was

never called back to work, nor was he offered any other kind of job by same.

Following his release by Dr. Tonymon, claimant maintains that he continued to have limitations on his activities which interfered with any housework he performed to include vacuum cleaning, and washing dishes. Claimant's testimony reflects that he quit all of his hobbies, with the exception of fishing, which he now does very infrequent. Claimant testified the he has a swimming pool that he uses quite a bit. Claimant also does his exercises. The testimony of the claimant reflects that due to the difficulty of attempting to perform his yard work, he finally had to hire someone to do it.

Claimant estimates that sitting for more than 20 to 30 minutes produces such pain and discomfort in his back and legs that he either has to lay down, get up and walk around, or take some pain pills. Claimant testified that during a typical day he has to lay down for several hours in order to obtain relief from back pain and discomfort in his legs. Claimant's testimony reflects, regarding his typical day:

Well, just mostly goofing around the house and I do go up and - - me and a couple of guys go out and we go out and do stuff, go out and eat occasionally. We just sit and talk more than anything else when we can, and just more or less something to get out of the house. That's basically about it. (T. 23).

Claimant testified that he has tried to find suitable employment in person, via telephone, and in talking contacts. Regarding the documentation of his job search efforts claimant acknowledged that while he did not whether or not he could the jobs identified he was willing to give them a try.

Claimant testified:

I looked in the newspaper, I went to the unemployment office and put my application in at the unemployment office. I went through on the StaffMark there in Paragould, I went to it. And they were pretty unruly there.

They wasn't real nice at all, so I didn't - - I left there and that was the last time I had checked with one of them, but I have been checking several different people in Paragould on jobs. (T. 23-24).

Claimant testified regarding the residuals of his injury which prevent him from sustaining work in any kind of job setting for eight hours a day five days a week:

Well, the only problem I would have basically I guess would be I do have a lot of trouble sitting, staying on my feet, and the concrete I absolutely can't handle it anymore. I done found that out.

But I would be willing to try to do something, whatever I could do to work..

I have a lot of trouble with my legs hurting. I do take medication for it every night. It does help and I have a hard time getting in a position to where I can get comfortable, and I may sleep for a little bit and then I'll wake up, and then I'm back at it again. That's just about everything. (T. 24).

The testimony of the claimant reflects that over the past months he has been required to take prescription medication. Claimant takes oxycodone for pain. Claimant explained that due to his understanding of the potency of the oxycodone and in an effort to avoid becoming dependant on it he takes it as needed and may take up to four (4) in one day. Claimant acknowledged that he has gone a day without taking pain medicine. Claimant observed that the oxycodone, while helping with his pain, adversely affects his clarity and concentration. As noted above, claimant takes a prescription anti-inflammatory [Tizanidine] medicine every night.

Claimant acknowledged that he is receiving Social Security disability benefits, however he is not receiving any long-term disability payments from respondent #1 nor is he receiving retirement disability payment from same.

The testimony of the claimant reflects that respondents #1 requested that he be seen by Dr. Lovell, a Memphis neurosurgeon. Claimant testified that at the time of the evaluation he

took all of the medical records that he had with him.

During cross-examination claimant testified that his current address is 3109 Chad Street, Paragould, and that his ex-wife now resides at the residence with him. The claimant's ex-wife remains employed by respondents #1, as does the claimant's son.

Claimant acknowledged that at one point he worked as a coordinator for respondent-employer in 2000 or 2002, and that he voluntarily left the position because he did not like the stress and pressure that went along with the position. The testimony in the record reflects that following the claimant's April 13, 2004, compensable injury he underwent a functional capacity evaluation which recommended employment in the medium work category.

Regarding the mechanics of his first back injury, which occurred in the 1989/90 time period, the claimant testified:

Well, sir, the best I can remember I was troubleshooting at that time. We had to pick the parts up and put them over our head. They were rod guides, and that's when I messed my back up the first time. (T. 30).

The claimant testified that he may have experienced "flare-ups" relative to his back prior to the 1989/90 back injury. (T. 31). Claimant underwent surgery following the 1989/90 injury and was off work for a period of time. Claimant's testimony reflects that upon his release following the afore surgery he was careful regarding any lifting endeavors involving his back.

Claimant testified that after returning to work following the 1989/90 injury he had back pain on some occasions. As a consequence of the afore, in 2000 or 2002, claimant was sent for an MRI scan of his back. Further, the claimant testified that he underwent several months of chiropractic treatments with Dr. Fisher. The testimony of the claimant also reflects that he was sent to Dr. Field, a Memphis neurosurgeon, who suggested that he wear the back brace, during

that time period. Claimant concedes that there were instances following 2002 when he would have back pain. Claimant acknowledged that in relaying his history to Dr. Tonymon he informed same that he had had back problems since his surgery in the 1990s. Claimant denies having any surgery on his back by Dr. Ward.

The testimony of the claimant reflects that he returned to the employment of respondent-employer and worked on light duty for “a pretty good little while”, although he does not recall the dates. With respect to his medical treatment following April 13, 2004, a summary of the claimant’s medical treatment reflects that he was seen by Dr. Tonymon and referred by same to Dr. Gera, who treated him with injections. Claimant benefitted from the afore treatment and was walking up to five (5) miles per day at the time he was returned to the care of Dr. Tonymon, who released him to return to work. Claimant returned to Dr. Tonymon once he again begin having problems [walking on concrete at work]. At that point the claimant was sent to Dr. Lovell.

Claimant later had a diskogram and surgery by Dr. Tonymon. Claimant’s testimony reflects that following the surgery he was not hurting as bad. Claimant has seen Dr. Tonymon periodically in follow-up and obtained prescription refills since having been declared at maximum medical improvement. Claimant’s testimony reflects that once or twice a month he goes out eat and that he occasionally goes out to the movies as well.

The testimony of the claimant reflects that the responsibilities of his assigned job duties subsequent to January 2005, became such that he was unable to continue working due to residuals of his injury. The testimony in the record reflects that the claimant was assigned a job of separating papers and of monitoring the printers. Claimant’s testimony reflects that his social security approval back dated to 2005. Claimant receives \$1370.00, per month in Social Security

disability benefits, after Medicare deduction.

Regarding his efforts at finding employment, claimant's testimony reflects that he did not follow a certain procedure but rather stopped and checked at businesses to inquire if they were hiring. Examples of businesses that he checked for employment included Auto Zone and other stores. Claimant concedes that he took the note of Dr. Tonymon regarding his physical restrictions with him during his job search and shared its contents with prospective employers.

(T. 41). Claimant testified:

Well, when I used that paper I asked them did they have anything that I could do that would be within these restrictions. (T. 41).

The testimony reflects that later, rather than go to the businesses claimant change the procedure and telephoned prospective employer to inquire about job openings. Claimant compiled a list of businesses that he contacted regarding employment, however there were no employment positions available. Claimant testified that while he does not know what he can or cannot do, if offered a job he would give it a shot.

During cross-examination by respondent # 2, claimant acknowledged supplying answers to interrogatories in August 2006 which disclosed his 1990 back injury and surgery, and his 1980 knee injury. Claimant's testimony reflects that while he received a 12% impairment for the 2004 back injury and surgery he did not receive an impairment rating following the 1990 back surgery by Dr. Olinger.

The testimony of the claimant reflects that during the 26 to 27 years of his employment by respondent #1 he worked as a material handler, and later as a troubleshooter coordinator.

Claimant performed the troubleshooter coordinator position 18 years. Following his surgery as a

result of the 1989 injury claimant returned to the troubleshooter coordinator job, and performed it for an additional seven to eight years. The claimant's job was not modified in any respects following his return to work. Claimant later switched job to that of a press operator, a more physically demanding job which paid less. Claimant obtained the press operator job through the seniority process. Claimant chose to change jobs, from the troubleshooter coordinator to the press operator, due to some stressful personnel problems. (T. 47).

Claimant experienced a flare-up of back pain in 2000 or 2002, which resulted in some chiropractic treatments. The testimony of the claimant reflects that he was referred by the chiropractor to a specialist. Claimant continued performing his regular job duties as a press operator during his chiropractic treatments. Claimant was never taken off the job on a permanent basis by any doctor. Claimant ceased wearing his back brace, and had not worn it for several years prior to the April 13, 2004, accident. Further, the testimony of the claimant reflects that he had not sought medical treatment for his back for two to three years prior to the April 13, 2004, accident. There is no evidence to reflect that the claimant was assessed any permanent impairment as a result of the 2000/2002 flare-up.

Claimant did not have surgery relative to the prior knee injury. Claimant testified that he was not provided a permanent impairment relative to the knee nor were permanent physical restrictions placed on him as a result of same. Claimant's testimony reflects that his employment was not adversely impacted as a result of either his knee or high blood pressure. Claimant testified that he was not aware that he had arthritis until after the April 13, 2004, injury.

Claimant testified regarding the mechanics of his job duties as a press operator as well as the physical demands of the position:

The hardest part of that job was changing the dies out. The dies weighted five or six hundred pounds. They had a big metal block on top of them the kind of locked them in the press. You had a little deal that's kind of like a tow motor that you got on a roll and you bought it around there and you go up and down and you can pull your die off on that, and then you'd load it down and take it back down and take it up to get sharpened or whatever. But basically you had to manhandle the dies, off the cart and into the dies. That was the worst part of the job. (T. 51-52).

Claimant explained that while he did not pick up the four to five hundred pound dies, he nevertheless had to push and pull on them to slide them in place. Changing over the dies varied, in terms of the number of times it was performed. On some days there were no change over, while on other days sever change overs may be performed. Another physical aspect of the press operator job that the claimant performed was loading the metal, which while not requiring a great deal of manual lifting did entail twisting and pushing. Claimant had the option of either sitting or standing during the day on the press operator job. (T. 53).

The testimony of the claimant reflects that he did perform some overtime work on the press operator job between 2002 and the 2004 accidental injury. Claimant testified that he availed himself to all to the overtime that was offered between 2002 and the 2004 accident. Further, claimant testified that during the two year period preceding the April 13, 2004, accident he felt that he could physically do any job that he had ever done in his work history.

Claimant never applied for Social Security disability benefits prior to the April 13, 2004, accident. Claimant's testimony reflects that he started the Social Security disability application process following his April 2005, surgery. Claimant testified that at the time he applied for Social Security Disability benefits he indicated everything that he had medically wrong regardless of whether it was prior to or subsequent to 2004.

Claimant testified that the most difficult aspect of the light duty job that he was provided following the April 13, 2004, accident was staying on his feet too much. Claimant acknowledged that he did not receive any physical restrictions from his treating physicians that restricted him from either standing on concrete or from standing for a particular period of time. (T. 57).

Claimant asserts that following his April 13, 2004, injury, the amount of the physical labor involved in the press operator job was too much for him to handle - specifically the pushing and pulling. Claimant was unaware of his sleep apnea problem prior to the April 13, 2004, accident. The claimant's sleep apnea is being treated with a C-pack machine. Claimant does not attribute his sleep apnea to his inability to work.

During re-cross examination, claimant acknowledged that while he did continue to perform his regular job duties following the 1990 injury and surgery, changes were by respondent-employer in the way the job was done:

Well, they eliminated the lifting parts over your head. They come up with a way to put them in a tub and then the tow motor would pick them up and put them into a hopper, and then all you had to do then was raise the door up and maybe slide it up into the machine. (T. 61-62).

Whether or not the changes cited by the claimant were the product of company-wide policy or instituted because of his injury claimant testified:

Well, a lot of the time out there, something happened and then they would see what they could do to eliminate that problem. (T. 62-63).

Mr. Ken Boling was present and prepared to testify on behalf of the claimant. The parties stipulated that if called to testify, Mr. Boling's testimony would corroborate and support the testimony of the claimant regarding his physical limitations before and after his injury of

April 13, 2004.

The medical in the record disclosed that on November 25, 1990, the claimant sustained an injury to his low back arising out of and in the course of his employment with respondent #1. Claimant received treatment under the care of Dr. Rodney G. Olinger, a neurosurgeon, and underwent treatment in the form of a right L5-S1 hemilaminotomy with excision of a herniated disc on January 22, 1991. (R1X1, p. 1-5).

On January 3, 2002, claimant sustained another work-related injury to his low back. (R1,X1, p. 13). Claimant was released to light duty work on January 4, 2002. Claimant underwent diagnostic studies in connection with the January 3, 2002, injury, in the form of a January 10, 2002, MRI of the lumbar spine and February 4, 2002, CT lumbar spine-post myelogram. (R1X1, p. 7-9).

On April 8, 2002, claimant initiated treatment under the care of Dr. William E. Fisher, a Paragould chiropractic physician, relative to the January 3, 2002, injury. While the May 6, 2002, narrative report of Dr. Fisher reflects that the claimant underwent back surgery in March 2002, under the care of Dr. Ward in addition to the 1991 surgery under the care of Dr. Olinger, as noted above, claimant denies any surgery by Dr. Ward. (R1X1, p. 18-19).

On April 13, 2004, the claimant was seen by Dr. Barry D. Hendrix, at Family Practice Clinic. The office note relative to the afore visit reflects the results of lumbar spine x-rays. (R1X1, p. 24). On May 10, 2004, the claimant was seen by Dr. Kenneth Tonymon, a Jonesboro neurosurgeon, pursuant to a referral of Dr. LL. Shedd, for evaluation of lower back and left leg extremity pain growing out of the April 13, 2004, on the job injury. The May 10, 2005, report of

Dr. Tonymon reflects the following impressions regarding the claimant's complaints: left S1 radiculopathy; central L5-S1 herniated nucleus pulposus; and mid line sacrococcygeal pain, possibly secondary to a compression of the bridging S2 roots. The claimant was referred to Dr. Gera for lumbar epidural steroid injections L5-S1. (R1X1, p.27-28).

While under the care of Dr. Sunil Gera, at the Pain Management Medical Clinic, pursuant to the referral of Dr. Tonymon claimant underwent epidural steroid injections on several occasions. (R1X1, p. 31-35). As September 22, 2004, office note of Dr. Tonymon relative to an office visit by the claimant of the same date reflects that the claimant was walking 5 miles a day, no longer had lower extremity pain, was attending work hardening at Arkansas Methodist Hospital 3 times a week, had no further therapy with Dr. Gera and had been placed on light duty on 8/19/04 - 8 hours per day. The September 22, 2004, office note concluded that the claimant felt that he could return to his regular job with some help with the heavy lifting and pulling of dies. Dr. Tonymon released the claimant to be seen on an as needed basis and expressed the opinion that the claimant did not require surgery. (R1X1, p. 36).

The claimant returned to Dr. Tonymon on November 3, 2004, with complaints associated with his April 13, 2004, accident. The November 3, 2004, office note relative to the claimant's visit reflects, in pertinent part:

Mr. Glisdish returns today to the office today. He returned to work on September 23, 2004 and was working eight hours per day. Within two days he had recurrence of his lower back pain. Up until that time he had been off work for approximately five months.

Today he worked four hours and he is currently experiencing right sciatica with burning on the bottom of his foot. He has had no new injuries at work. Of interest is the fact that he has no significant pain while he is "off concrete". His last MRI of April 2004 demonstrates a

right paracentral herniated nucleus pulposus at L5-S1 that appeared larger on the April 14, 2004 study than it did on the study done on January 10, 2002. In addition there was a caudally migrated fragment that appeared to compress the left S1 root against the hypertrophic left S1 superior facet. Symptomatically Mr Gladish experienced left sciatica in May of 2004, now his complaints are more right sided.

Impression:

1. Recurrent lower back pain and right sciatica with previous history of right paracentral L5-S1 HNP. (R1X1, p. 37).

The claimant underwent a MRI of his lumbar spine with and without contrast on November 8, 2004, at the Surgical Hospital of Jonesboro. (R1X1, p. 38). After obtaining the results of the afore study the claimant was again seen by Dr. Tonymon. In his November 24, 2004, report regarding the claimant's visit Dr. Tonymon noted that he saw no recurrent disc herniation on the right side at L5-S1. Dr. Tonymon released the claimant to return to full duty work December 1, 2004. Dr. Tonymon offered that the claimant "may have annular tears with his most recent lifting injury". Nonetheless Dr. Tonymon opined that the claimant was "probably at MMI" and could return to work. (R1X1, p.39).

The claimant was again seen by Dr. Tonymon on January 19, 2005, at which time Dr. Tonymon opined that the claimant "is probably not at MMI". Dr. Tonymon recommended that the claimant undergo discography. Pending approval of the afore, the January 19, 2005, office note of Dr. Tonymon reflects his plans to schedule a functional capacity evaluation.

On February 11, 2005, the claimant was evaluated by Dr. Laverne R. Lovell, a Memphis neurosurgeon, at the request of respondent #1. Dr. Lovell did not recommend the discogram or proceeding towards lumbar fusion, being of the opinion that the claimant's current level of symptom would not be improved with a major surgery. The report of Dr. Lovell concluded that

he would find the claimant at maximum medical recovery as of February 11, 2005, with no permanent physical impairment for his subjective complains. (R1X1, p. 42).

On March 14, 2005, claimant underwent a lumbar discogram at L3-4, L4-5, L5-S1 level under the direction of Dr. Sunil Gera. The March 14, 2005, report regarding the afore reflects, in pertinent part:

IMPRESSION:

There was no pain practically at L3-4 and L4-5 level. Then the disc looked almost normal in shape. There was no extravasation or leak of dye at L5-S1 after 2.5 cc of the injectate. There was a spread posteriorly suggestive of a tear and there was a uniform spread of dye throughout the disc suggested of cross-degeneration and with the pain score of 7. This is a positive discogram with pain generating disc at L5-S1. (R1X1, p.45).

The claimant was seen in follow-up by Dr. Tonymon during which time the results of the discogram were discussed and recommendations for treatment were discussed. Dr. Tonymon recommended proceeding with fusion surgery. The March 16, 2005, report regarding the afore, concludes:

Mr. Gladish understands the risks, technical aspects, and expected benefits of the surgery. This will be scheduled at SHJ pending workman's compensation approval. Historically Mr. Gladish stated that his pain with the diskogram was like the pain that he had with his most recent lifting injury. Therefore, I think that the annular tears that he most likely sustained with the lifting injury account for at least 50% of his pain. (R1X1, p. 46).

On April 21, 2005, Dr. Tonymon performed the fusion surgical procedure (ALIF exposure) on the claimant's lower back. (R1X1, p. 49-52). At the time of his follow-up appointment on June 1, 2005, claimant report improvement since the surgery, although he was still hurting some. The June 1, 2005, report of Dr. Tonymon, relative to the claimant, reflects:

I am going to allow him to return to work but will place a 20-pound weight restriction on him as well as instructions not to engage in activities, which involve repetitive bending, twisting, or stooping. I will see him back in six weeks on June 18, 2005 with repeat x-rays. He is to begin McKenzie extension exercises and back strengthening exercises at HealthSouth in Paragaould three times a week. (R1X1, p. 53).

At the time of the June 18, 2005, follow-up visit of the claimant, Dr. Tonymon noted that the claimant was using an external bone growth stimulator; that x-rays reflected an excellent beginning fusion at L5-S1 with stable appearance of the bone screws and plate construct; and his plans to allow the claimant work with 30 -pound weight restriction with no repetitive bending, twisting, or stooping. (R1X1, p. 55-56).

On September 6, 2005, the claimant under went a comprehensive functional capacity evaluation which disclosed that he could perform work in the light physical demand category. (R1X1, p. 58-68). Following the FCE claimant returned to Dr. Tonymon. After viewing the results of the FCE Dr. Tonymon recommended work hardening. (R1X1, p. 69).

The claimant underwent four (4) weeks of work hardening pursuant to the above recommendation of Dr. Tonymon. Claimant also underwent a repeat FCE in connection with the afore. At the time of a November 8, 2005, return visit Dr. Tonymon noted that the claimant did make improvement as a result of the work hardening and was designated to be able to perform medium work capacity. Dr. Tonymon placed a thirty-pound weight restriction on the claimant; determined MMI; and assessed a 12% permanent physical impairment. (R1X1, 70).

The claimant was seen in follow-up by Dr. Tonymon on April 6, 2006. After noting the results and status of the fusion and reviewing recent films, the April 6, 2006 office note relative to the visit reflects, in pertinent part:

Mr. Gladish has been receiving Social Security Disability Benefits, he has been off work since returning for a brief period of time. He actually has been off work since January 15, 2006.

His back pain has improved over its preoperative state and actually seems to do well, except when he engages in activities which cause him to have a flexed posture at the waist.

Mr. Gladish still takes intermittent Norco 10/325 for pain. I am going to have a prescription for this with refills. I will see him in the Paragould office in July 2006 with a return in April 2007 for his two year follow up in the Jonesboro office on the day that he has his repeat films at SHJ. (R1X1, p. 73).

The April 26, 2007, office note of Dr. Tonymon relative to the claimant's follow-up visit of the same date reflects:

Mr. Gladish returns to the office today having undergone lumbar spine x-rays at Surgical Hospital of Jonesboro on 4/26/07. I have compared these to previous x-rays done on 7/28/05 and there appears to be a good bony fusion at the L5-S1 interspace. In fact, bone can be seen deposited along the outer surface of S1 along the inferior edge of the Synthes ATB plate.

Mr. Gladish still takes intermittent medicine for pain and muscle relaxation even though he does not have to take it daily.

I am going to give him a refill on prescription for Oxycodone 5 mg/APAP 325 mg along with Zanaflex. (R1X1, p. 77).

The testimony of Dr. Laverne Lovell, a Memphis neurosurgeon, was obtained by deposition on September 9, 2007. (R1X2). The claimant was seen by Dr. Lovell on one occasion, February 11, 2005, for a second opinion. The claimant's treating neurosurgeon at the time of the afore visit was Dr. Tonymon. Dr. Lovell was provided a history by the claimant, to include a 1990 low back work-related injury and 1991 surgery by Dr. Rodney Olinger in the form of a right L5 hemilaminectomy with excision of herniated disk. Dr. Lovell reviewed the operative

report of Dr. Olinger regarding the claimant. (R1,X2, p. 12-13). The testimony of Dr. Lovell reflects that the type of surgery performed on the claimant by Dr. Olinger is one that would yield an impairment rating pursuant to the AMA Guides. In discussing the permanent physical impairment rating generated as a result of a fusion and applying the AMA Guides, Dr. Lovell testified:

If a person was not given a rating and received whatever money is required from that rating, then I would rate him as though he was having a lumbar fusion for the first time. And 12 percent is what I would have given him from the Fifth Edition.

Yes. In the Fourth Edition, it looks like it's a similar table and has the same number for twelve percent. (R1X2, p. 23).

Dr. Lovell also provided testimony regarding the impact of the claimant's fusion surgery on the claimant in light of the prior back surgery:

Well, we have a saying, you know, law of decreasing returns. The more often you're in there, the less likely you are to make the totally better because you've got multiple surgical procedures. The fact that he had a microdiscectomy before at that level, to me, and it was done posteriorly through the back of the back, I don't think should have too much effect on an anterior fusion because it's two different approaches. But again, it's sort of an accumulative effect. Anytime you do an operation on somebody, they have, you know, I guess, more chances of having residual symptoms. (R1X2, p. 24).

Dr. Lovell also testified that the claimant's prior 1991 injury and surgery had an effect on the April 13, 2004, injury.

At one point Dr. Lovell testified regarding the claimant's prior 1990 injury and subsequent surgery in connection with the bearing of same on the medical treatment the claimant received after April 2004:

. . . . So I really do feel I can say with a reasonable degree

of medical certainty that most all of his problems - - maybe there was some point where he twisted the upper, you know, muscles in his back and it wasn't related to the disk. But generally speaking, I just can't convince myself otherwise that his ongoing problems were all centered around that L5, S1 disk. (R1X2, p. 38).

As noted above, the parties were permitted to submit the deposition of Dr. Kenneth Tonymon subsequent to the October 5, 2007, hearing. The deposition was obtained on October 5, 2007, and the transcript of same submitted on October 15, 2007. Dr. Tonymon testified that he first saw the claimant on May 10, 2004, pursuant to a referral of Dr. Shedd for evaluation of lower back pain and left lower extremity pain thought to be the result of an on-the-job injury of April 13, 2004. The testimony of Dr. Tonymon reflects that he obtained a history from the claimant and that he was aware of the claimant's prior 1990 back injury and subsequent 1991 surgery for same by Dr. Olinger. Dr. Tonymon testified regarding his review of the claimant's prior diagnostic studies and findings in comparison to those generated subsequent to April 2004.

In addition to testifying regarding the results of diagnostic studies [MRI's] subsequent to April 2004, and comparison of same to the prior studies, Dr. Tonymon also testified regarding the discogram performed by Dr. Gera as well of the objective nature of the findings generated as a result of same. (Supplemental Exhibit #1, p. 7-13). Dr. Tonymon also testified regarding the claimant's work related injury of April 13, 2004, as the major cause of the need for surgery.

During cross-examination Dr. Tonymon offered that the claimant's prior surgery by Dr. Olinger in 1991, would yield a ratable impairment from 5% - 8%. (Supplemental Exhibit #1, p. 16). Further Dr. Tonymon noted that the 12% permanent physical impairment he assessed the claimant was separate and apart from the residual impairment growing out of the 1991 surgery by Dr. Olinger. (Supplemental Ex. #1, p. 39).

The testimony of Dr. Tonymon reflects that when the claimant was last seen on July 10, 2007, there were no changes in his physical restrictions relative to the compensable injury and surgery. With respect to restrictions on the claimant's activities of sitting or standing the testimony of Dr. Tonymon reflects that the same is mainly a comfort level matter:

I think, as I recall now, I don't have it specifically but it seems to me he can't stay in one position for very long. He will either, he might sit but he will have to get up and move around and if he is standing he will occasionally have to sit down and get relief.
(Supplemental Ex. #1, p. 25-26).

Regarding the impact of the claimant's prior injury and surgery on the resulting April 13, 2004, back injury, Dr. Tonymon testified:

I didn't say that. I didn't say that his previous, just to be clear, I don't think that his, I do think that his previous surgery and disk rupture did have something to do with it but in terms of causation of His most recent injury in April of '04, I think that was tugging on an eighteen hundred pound tub. I think it was a major contributor to his - - (Supplemental Ex. #1, p. 26).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On April 13, 2004, the relationship of employee-employer-carrier existed among the claimant and respondents #1.
3. On April 13, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$362.00/\$272.00, for temporary total/permanent partial disability.

4. On April 13, 2004, the claimant sustained an injury to his low back arising out of and in the course of his employment, for which he was paid appropriated temporary total disability and medical benefits.

5. The claimant reached the end of his healing period relative to the April 13, 2004, compensable injury on November 2005, with a 12% whole body permanent physical impairment. Respondents #1 accepted and paid permanent partial disability benefits to correspond with the claimant's 12% anatomical impairment.

6. When the claimant's age, education, work experience, permanent restrictions and other matters reasonably expected to affect his future earning capacity are considered, the claimant has sustained a loss of earning capacity in the amount of 65% in addition to his anatomical impairment.

7. On November 25, 1990, claimant sustained an injury to his low back, within the course and scope of his employment with respondent #1, in the form of a L5-S1 herniated disc and underwent a right L5-S1 hemilaminotomy with excision of herniated disc on January 22, 1991.

8. The claimant's current disability status is the product of the combination of the prior 1990 disability/impairment and the April 13, 2004, compensable injury. Respondent #2 is liable for the payment of wage loss disability benefits in this claim.

9. Respondent # 1 shall pay all reasonable hospital and medical expenses arising out of the injury of April 13, 2004.

10. Respondent #2 has controverted the payment of wage loss disability benefits to the claimant.

CONCLUSIONS

As reflected in the Pre-hearing Order, the parties have stipulated to the existence of the employment relationship on April 13, 2004, when the claimant sustained a compensable injury to his low back which resulted in surgery and a 12% permanent physical impairment. Claimant asserts that he has sustained a loss of earning capacity in excess of the anatomical impairment and for which he is entitled to corresponding permanent partial disability benefits. The respondents' contentions are as set forth in their respective Pre-hearing Questionnaire Filing. (CM #1).

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. At issue in the present claim is whether the claimant is entitled to wage loss benefits and, if so, whether the Second Injury Fund is liable for the payment of same.

Wage Loss/Permanent Partial Disability

The claimant, with a date of birth of January 3, 1950, completed the 7th grade and later obtained his GED. Claimant commenced his employment with respondent #1 on March 8, 1979, and remained in that employment through approximately January 15, 2006. The claimant sustained several work-related injuries during the course of his employment with respondent #1, to include injuries to his low back.

The evidence preponderates that the claimant successfully discharged the demands of his employment with respondent #1 without restrictions or physical limitation prior to April 13, 2004. In 1990 claimant suffered an injury to his back which ultimately resulted in surgery in 1991. Following the surgery claimant returned to his employment with respondent #1 without

medical restrictions or limitations. The claimant sustained an injury to his back in 2002, for which he sought and received medical treatment, however he continued to discharge his employment duties. The evidence preponderates that between 2002 and 2004, the claimant experienced back and leg pain.

On April 13, 2004, the claimant sustained the injury to his low back within the course and scope of his employment which ultimately resulted in fusion surgery under the care of Dr. Kenneth Tonymon, a Jonesboro neurosurgeon. In addition to Dr. Tonymon, claimant received treatment for the April 13, 2004, injury under the care of Dr. Sunil Gera, a pain specialist, and was seen on one occasion by Dr. Laverne Lovell, a Memphis neurosurgeon.

Following the initial comprehensive functional capacity evaluation of September 6, 2005, which concluded that the claimant could only perform work in the light physical demand category claimant underwent work hardening which raised his level to the medium work. Thereafter Dr. Tonymon imposed a thirty (30) pound lifting restriction. The residuals of the claimant's injury and surgery adversely impacts his ability to sit or stand for prolonged periods of time. Further claimant has difficulty standing and walking on concrete surfaces. Claimant continues to require prescription pain medication.

While it is undisputed that the claimant was provided a light duty job by respondent #1, following his injury and the end of his healing period which did not entail the heavy manual labor of his regular job duties, the credible evidence in the record reflects that the claimant was not physically capable of consistently performing duties the job entailed. Claimant noted the difficulty he experienced with walking on the concrete surface. Attempts to perform the job increased the claimant's symptoms growing out of the injury.

The claimant sustained a permanent physical impairment in the amount of 12% to the body as a whole as a result of the fusion surgery growing out of the April 13, 2004, compensable injury. The claimant has documented medical physical limitations and restrictions. The evidence reflects that since leaving the employment of respondent #1 claimant has sought employment however has been unable to obtain same. Claimant disclosed his permanent restrictions/limitations to prospective employer.

Wage-loss disability is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *SSI, Inc. v. Lohman*, 98 Ark. App. 294, ___ S.W.3d ___ (2007). When the claimant's age, education, work experience, permanent restrictions and limitations are considered as well as other matters reasonably expected to affect his future earning capacity, the evidence preponderate that the claimant has sustained a loss of earning capacity or permanent partial disability of 65%.

Second Injury Fund Liability

It is not disputed that the claimant underwent surgery under the care of Dr. Rodney Olinger, a Memphis neurosurgeon, relative to a 1990 low injury in 1991. The afore was the product of a work-related injury sustained in the employment of respondent #1. The claimant also suffered another work-related injury to his low back in 2002, for which he underwent diagnostic studies and received medical and chiropractic treatment. The single level disc surgery performed by Dr. Olinger was ratable at between 5 % to 8% to the body as a whole.

The purpose of the Second Injury Fund is to insure that an employer employing a handicapped work will not, in case the worker suffers a work-related injury, be held liable for a greater disability or impairment that actually occurred while the worker was in the employer'

employment. *Douglas Tobacco Product Co. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999). In order to establish Second Injury Fund liability, the claimant must have suffered a compensable injury at his present place of employment; prior to that injury the employee must have had a permanent partial disability or impairment; and the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In the instant matter, the claimant suffered a compensable injury April 13, 2004, which resulted in a 12% permanent physical impairment. The evidence preponderates that claimant suffered a work-related injury in 1990 which resulted in a single level disc surgery in 1991. The 1991 single level surgery was ratable at between 5% to 8% to the body as a whole, although no rating was generated by the 1991 treating surgeon. While it is undisputed that the claimant returned to the employment of respondent #1 following the 1990 injury and subsequent surgery, earning comparable or greater wages than he was at the time of the injury, impairment does not necessarily mean that a claimant has suffered wage loss. *Second Injury Trust Fund v. White Consolidated*, 317 Ark. 26, 875 S.W.2d 832 (1994). The claimant also suffered an injury to his back in the employment of respondent #1 2002. The evidence preponderates that the claimant's current disability status is the product of a combination of the recent April 13, 2004, injury with pre-existing impairment of the 1990 injury and 1991 back surgery. Respondent #2 is liable for the payment of wage loss disability benefits to the claimant in excess of the 12% anatomical impairment. Respondent #2 has controverted the payment of wage loss benefits.

AWARD

Respondent #2 is herein ordered and directed to pay to the claimant permanent partial

disability benefits in the amount of 65% to the body as a whole as a result of the claimant compensable injury of April 13, 2004. Said sums accrued shall be paid in lump without discount.

Respondent #1 shall pay all reasonable necessary medical, hospital, nursing and other apparatus expenses, to include medical relate travel, growing out of the April 13, 2004, compensable injury.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE