

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F102835 (02/28/01)

HARLAN PENNINGTON, EMPLOYEE	CLAIMANT
SERVICE EXPERTS OF ARK. LLC., EMPLOYER	RESPONDENT #1
AMERICAN MOTORIST INS. CO., CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED SEPTEMBER 10, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 19, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents #1 represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represent by the HONORABLE DAVID E. SIMMONS, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE CHRISTY L. KING, 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 May 13, 2008, 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. Respondent #2, the Second Injury Fund, contends that the claimant's present injury did not combine with any of his previous injuries to create the current disability status. Respondent #2 further contends that the claimant's knee injury is a scheduled injury and would not be subject to wage loss.

The testimony of Harlan Pennington - the claimant, Elizabeth Mazingo, coupled with medical reports and other documents comprise the record in this claim. Additionally, the record of the prior November 16, 2004, hearing is incorporated in and made a part of the present hearing record.

DISCUSSION

Harlan Oliver Pennington, the claimant, with a date of birth of August 8, 1945, has a seventh grade education. Claimant commenced his employment with respondent #1 July 14, 1993, as a Master Plumber over its commercial plumbing division. The claimant continued in the employment of respondent #1 until his October 3, 2003, "lay-off".

The evidence in the record reflects that while in the employment of respondent #1 the claimant sustained several compensable injuries to include a May 2, 2000, left knee injury which resulted in a May 26, 2000, surgical procedure under the care of Dr. James S. Mulhollan; and injuries to his right wrist, left shoulder, and left knee in a February 27, 2001, fall. Claimant reached maximum medical improvement on June 21, 2001, relative to his right wrist injury growing out of the February 2001, accidental fall with a residual 10% anatomical impairment to the right upper extremity. Respondent #1 accepted and paid appropriate corresponding permanent partial disability benefits with respect to the right wrist injury. The claimant

underwent total knee replacement surgery relative to the left knee on February 20, 2004, and a left shoulder arthroscopy on August 13, 2004. Both procedures grew out of injuries sustained by the claimant in the February 27, 2001, accidental fall, and were performed by Dr. William F. Hefley, Jr.

The refusal of respondent #1 to authorized the claimant's medical treatment under the care of Dr. Hefley was the subject of the November 16, 2004, prior hearing before the Arkansas Workers' Compensation Commission. The ruling growing out of the prior hearing found that respondents #1 were responsible for the medical treatment received by the claimant under the care of Dr. Hefley, as well as referral therefrom, subsequent to May 15, 2002, in connection with the February 27, 2001, compensable injuries. Further the claimant was found to be within his healing period and temporarily totally disabled commencing October 3, 2004, and continuing until such time as the claimant reached the end of his healing period or was released to return to appropriate work.

The claimant reached the end of his healing period relative to his compensable right wrist injury on June 22, 2001. The claimant reached the end of his healing period with respect to the compensable left knee injury on February 9, 2005. Finally, the claimant reached the end of his healing period relative to the compensable left shoulder injury on March 14, 2006.

The claimant has not worked any place since his employment was terminated by respondent #1 on October 3, 2003. Claimant receives regular social security benefits. At the time of the November 16, 2004, prior hearing the claimant had already undergone the surgery relative his left shoulder and the total left knee replacement procedure. The present claimant for nursing and attendant care services grow out of the time frame that the claimant was recovering

and recuperating following the surgical procedures.

The testimony of the claimant reflects that Ms. Mazingo is a home health care giver who had previously provided services for his wife. Claimant utilized the services of Ms. Mazingo following the February 20, 2004, total left knee replacement surgery. In describing the services performed by Ms. Mazingo, the claimant's testimony reflects:

Everything around the house and taking care of me, changing bandages, lifting that big old heavy machine that I had to have in bed for exercising my leg, cooking, everything that needed to be done, you know, for me to get out of the hospital instead of being in rehab at the hospital. (T. 12).

The testimony of the claimant reflects that for a period of six (6) weeks following the February 20, 2004, knee replacement surgery Ms. Mazingo moved into his residence to care for him twenty-four (24) hours a day. Following the claimant's August 13, 2004, left shoulder surgery Ms. Mazingo transported the claimant to the hospital. Claimant's testimony reflects:

She took me to the hospital for all my surgeries, to all my health care visits. She done all the driving. I didn't have a vehicle I could even drive. (T. 13).

The claimant lives in Redfield, Arkansas. Dr. Hefley and all of the claimant's medical providers are located in Little Rock. Ms. Mazingo used her vehicle to transport to the claimant to each of his medical appointments. The claimant paid \$4,800.00, for the nursing and attendant care services for Ms. Mazingo. Regarding the afore, the claimant explained:

It was by the week. And sh just said what she would charge me to take care of me because I didn't have anybody else to do it. I was either that or the hospital. I couldn't afford to stay in the hospital. I didn't have nothing but insurance. The hospital bill was humongus on me at that point in time. I just couldn't afford it. (T. 14).

The testimony of the claimant reflects that following the ruling by the Full Commission

growing out of the November 16, 2004, hearing he submitted documentation to respondent #1 regarding his out-of-pocket expenses for nursing and attendant care services for reimbursement. Respondent #1 refused to pay same. The testimony of the claimant reflects that he did not receive a response for respondent #1 regarding the reimbursement:

Not a word. They asked for it and then as far as I know they terminated the woman that was handling my case because when I called back to inquire as to why I had not heard nothing our of it, they was ordered to pay a reasonable amount and she asked for me to get receipts made up for the amounts I was out, cause at the time all of this happened I didn't need receipts cause I thought it was just my loss and my expense. I did what they asked for and then the girl that worked with the insurance company, she was very nice and all, but she got terminated they said. (T. 16).

The claimant testified that he has not been physically able to work since he last worked for respondent #1 in October 2003. Claimant described a typical day since his injuries and recovering from the surgeries in connection with the injuries:

Well, I go out in the yard and walk around a little bit, go sit on the back porch, listen to the radio. Get out of the house. I can't stand to be penned in . Just around the house most of the time. Just outside, may be just sitting out under a shade tree. That's where I stay. (T. 16).

The testimony of the claimant reflects that he receives \$1,135.00, per month in Social Security retirement benefits. Claimant testified that he commenced receiving Social Security retirement benefits in December 2007. Claimant is sixty-two (62) years of age.

During cross-examination, the claimant testified that Ms. Mazingo now lives with him full time in a girlfriend/boyfriend relationship. The afore was not the case prior to March 14, 2006, when the claimant reached maximum medical improvement relative to the August 2004, shoulder surgery. Claimant acknowledged that in addition to the nursing services and transporting him to his medical appointments, Ms. Mazingo also cooked meals, and cleaned the

house.

Claimant acknowledged that the receipts that he produced evidencing payment for the nursing and attendant care services provided to him by Ms. Mazingo were constructed after the fact because at the time of the services he was unaware of entitlement to the benefits. Further, the claimant testified that he does not write checks and that he paid Ms. Mazingo in cash for her nursing and attendant care services.

Claimant acknowledged a prior injury to his left knee in 1978 in which he underwent two (2) surgical procedure in the treatment of same. Following the May 2000, left knee injury the claimant underwent another surgery regarding the left knee. Claimant was off work for six (6) weeks following the May 2000, injury and surgery. The testimony of the claimant reflects that while at on time he as a foreman for respondent #1, at the time of the February 27, 2001, injury he had return to the field in a non-supervisory position. Claimant estimated that he moved from the supervisory position a “few months” before the February 27, 2001 injury.

The testimony of the claimant reflects that he has not sought employment since his employment with respondent #1 was terminated in October 2003. Claimant explained regarding the availability of employment in his profession:

Well, there’s plenty of job openings out there if I was physically able to get out and do the work.

Just what little bit of walking I do around the house and having to stop and rest my leg and stuff like that, I know I can’t do it. (T. 22).

Claimant acknowledged that he has not been to the unemployment office since his employment was terminated by respondent #1 in October 2003, when he learned that he had to be physically able to work in order to draw unemployment benefits.

The testimony of the claimant reflects that he owns three (3) pieces of property in Little Rock and one piece of property in Redfield in addition to the property that he lives on. Claimant's residence is located on a 68 acer piece of property. The claimant testified that he had equipped his four wheeler with hand shift on the right side in order to ride it on his property. The testimony of the claimant reflects in the 1990s he tried to do some fish farming but gave it up shortly after commencing his employment with respondent #1.

Claimant acknowledged that he has not looked into any sort of training to get back in the work force. Claimant concedes that there is nothing that he can think of that he would be interested in doing. Claimant has not attempted to get a GED. Claimant can read ,write and do math.

Claimant is able to fish. During the 2007 deer season the claimant hunted from his back yard, explaining:

No. My back yard is, I've got a hillside back there that I can step out the back, on my back porch and watch, is the main thing I do. (T. 25).

Claimant has current hunting and fishing licenses. Claimant also has a current Master plumber license. Claimant explained why he has not considered teaching other to be plumbers in the form of an apprenticeship program:

No. Because in order to do that you have got to, you're putting your license on the line and you've got to be there to keep up with the jobs and stuff to know what is going on because you are responsible solely. When you put your license up, like I did for Service Experts, that was because I could keep up with the group, kind of, employees was working under my license and all. I was solely responsible. If they did something wrong I got fined. You can't just let somebody go off and work on your plumbers license. (T. 26-27).

The testimony of the claimant reflects that he does not take any medication of his knee or

shoulder. Claimant added, “medications don’t agree with my system”. (T. 27). As a consequence of the afore claimant testified that he does not take any medicine, even over-the-counter medicines.

The claimant testified that his left knee is very stiff in the morning when he gets up. Claimant usually exercises the left knee every morning. Claimant concedes that his left shoulder does not cause him much difficulty unless he tries to pick up some very heavy or if he tries to use it too much doing anything.

During further cross-examination the claimant testified that he first hurt his left knee in 1978 when he tripped over a root in the dark and took a fall. After surgery and recovery the testimony of the claimant reflects that he returned to work and did not have any further problems with the left knee until the 2000 injury. The claimant suffered the 2000 left knee injury when an extension cord caught his foot and jerked it out from under him causing him to fall. Claimant asserts that following left knee surgery he recovered and returned to work. Claimant denies experiencing any problems with the left knee at the time he hurt in again in February 2001, injury. Claimant testified that as far as he knew he had fully recovered and was not having any troubles at the time of the February 27, 2001, accidental fall and injuries.

The testimony of the claimant reflects that prior to the February 27, 2001, fall he had never injured his left shoulder. Claimant testified that he has not other conditions like diabetes or heart trouble. Further, claimant’s testimony reflects that prior to February 2001 he was not on any medication. The claimant is left hand dominate.

The testimony in the record reflects that the claimant’s son has only lived in close proximity to him since 2007. Prior to the afore claimant’s son lived outside of Houston, Texas.

Further, the testimony reflects that the time Ms. Mazingo provided nursing and attendant care services to the claimant she was not romantically involved with him. Claimant's testimony reflects:

No sir. No sir, I had just lost my wife and she had lost her husband. (T. 34).

Claimant estimates the length of the romantic involvement with Ms. Mazingo at one and one-half to two year explaining:

We got together, couldn't afford to keep up two households, decided to get together and share living expenses. (T. 34).

The claimant testified regarding the impact of his residual anatomical impairment on his activities. Specifically, the testimony of the claimant reflects that when he walks he has to stop and rest after a short period. Claimant testified that the area of his right wrist is still numb and describes a sensation in the wrist of feeling broken or bruised. The testimony of the claimant reflects that there is no hardware in his wrist from the surgical repair which was done in the treatment of same. In discussing the injury which most adversely impacts on his ability to perform any physical work claimant's testimony reflects:

My knee. Its my biggest problem. If I'm up on it too much it just tightens up and don't want to work and goes to hurting and I go sit down. You can't do that out there, I can't climb in and out of ditches and walk through mud and go up on roofs and ladders and that kind of stuff that would be required to be a working plumber out in the field. (T. 35).

The claimant was working out in the field as a plumber in October 2003, when he was laid off by respondent #1. Claimant testified:

Yes sir. I was out in the field physically working. When Service Experts decided that whoever was in my position over there, over the employees and stuff, had to be able to go in the office and run computers

and that, well, I wasn't qualified to do that kind of work. So that's where Mr. Penny became my boss and I went back out and went to full time physical work, because I could not do the office work that they required of somebody in my position. So that's how I go demoted. (T. 35).

Ms. Elizabeth Mazingo testified that she has worked as a home health aide since 1993.

The evidence in the record reflects that Ms. Mazingo received certifications as a result of her training as a home health aide. The testimony in the record reflects that Ms. Mazingo provided home health aide services for the claimant's wife from 2000 through 2001. Ms. Mazingo testified that at the time she worked through an agency however the claimant hired her personally to care for his wife. Ms. Mazingo explained that she live in Redfield and that the claimant knew that she was employed in the home health care field. With respect to the services that she performed for the claimant's wife as a home health aide, Ms. Mazingo testified:

For his wife, it was total care. She was bedfast. She had Alzheimers. (T. 37-38).

Ms. Mazingo testified that after the claimant's wife passed she was contacted by the claimant following his total knee replacement surgery. The testimony of Ms. Mazingo reflects regarding her arrangement with the claimant:

Well, he called and asked if I would do it, basically stay with him, and I said well, how much time are we talking. He said he wouldn't be able to do anything for himself for awhile, so I live with him for six weeks. And I did health care, transported him back and forth to the doctor's appointments and all of his therapy appointments and used my vehicle and he paid me in cash. \$600.00 a week. (T. 38).

Regarding the specific home health services provided to the claimant during the six (6) week period Ms. Mazingo testified:

That included everything, the bandages, the bed, gave him his medication. I changed his clothes I wiped him when he was dirty. Carried

the bedpan and urinal. Cleaned house for him. Took him to his doctors appointments, transfer him from the bed to a wheelchair, and just everything. I did housekeeping, cooking. Basically just about everything for him because he wasn't able. (T. 38-39).

Later on the claimant underwent surgery relative to his left shoulder. Ms. Mazingo provided home health services to the claimant following the left shoulder surgery:

Yeah. But it wasn't twenty-four hour thing. I would pretty much come in early and check on him, stay all day with him, do some cleaning and go home at night, come back the next day and do his laundry. If he needed help for therapy, I took him back and forth to his therapy treatment. (T. 39).

The testimony of Ms. Mazingo reflects that she has worked as a home health aide through several agencies. Ms. Mazingo testified that she earned \$12.00, per hour at the last agency that she worked through as a home health aide. Regarding the afore Ms. Mazingo's testimony reflects:

Yes sir. Home health and I helped at the facility through an agency. My husband was a disabled veteran and I had full coverage medical, you know, so I worked for an agency because it was more money that if you were working for the actual facility there.

This is the reason for the \$12.00 an hour. (T. 39).

Ms. Mazingo's husband passed away on April 29, 2003.

During cross-examination Ms. Mazingo testified that when she was taking care of Ms. Pennington she was paid \$8.00, per hour. Ms. Mazingo was paid in cash weekly during the period she provided home health aide on behalf of Ms. Pennington. During the six (6) week period that Ms. Mazingo cared for the claimant following the total knee replacement surgery she testified that they both provided food:

He did and I did, you know, we both did. If there was something I wanted I picked it up at the store. (T. 41).

The testimony of Ms. Mazingo reflects that following the claimant's shoulder surgery she provide four (4) weeks of home health aide services to the claimant at a rate of \$300.00 per week. Ms. Mazingo acknowledged the now she and the claimant are romantically involved, and that she basically does the same things for the claimant that she did as a home health aide in terms of cooking, cleaning and transporting him wherever he needs to go.

During further cross-examination Ms. Mazingo testified that she had know the claimant for approximately ten (10) years. Ms. Mazingo had an opportunity of observe the claimant both before and after the February 2001 work-related accident in the employment of respondent #1. In comparing the claimant's physical condition, base on her observation, before and after the accident, Ms. Mazingo testified:

Well, before the injury he could do anything he wanted to do, you know, and now, I mean, heavy type stuff and plumbers work, he worked on the job and after he come home he worked. I had a candle business and I didn't see him very often then, he was so busy. (T. 42).

Ms. Mazingo further testified regarding the nature of home health care:

Yes, sir. Thank you. When we say home health care, and when people, like I worked for hospice for a number of years and home health care consists of the all around picture. Not just the physical take care of him. It's the environment around the parson and in my opinion the day health care doesn't fall under it, we've got problems. (T. 46).

The record reflects the presence of as statement from Ms. Mazingo regarding the services she rendered on behalf of the claimant following the claimant's total knee replacement surgery and left shoulder surgery. The record reflects the presence of certificate issued by the State of Arkansas Department of Human Services reflecting that the claimant was certified as a nursing assistant as of March 10, 1997. Further, there is contained in the record a Hospice Home Care,

Inc. Certificate that was present to Ms. Mazingo reflecting that she completed the necessary training for certification as a Hospice Aide as a March 12, 1993. Ms. Mazingo also completed the necessary training to maintain her certificate as a certified nursing assistant on September 12, 1996. (CX. #1).

At the conclusion of the hearing respondent #1 relayed that the appropriate corresponding indemnity benefits has been paid with respect to the claimant's anatomical impairment. The medical in the record reflects that on November 1, 2005, Dr. Hefley assessed the claimant with a 37% impairment to the left lower extremity and a maximum medical improvement date of February 9, 2005. (CX. #1). On March 24, 2006, Dr. Hefley assessed the claimant with a 8% impairment to the body as a whole as a result of the claimant's compensable left shoulder injury and a maximum medical improvement date of March 14, 2006. (CX. #1).

A February 9, 2005 report of Dr. Hefley relative to the claimant reflects, in pertinent part:

SUBJECTIVE: Mr. Pennington is now 1 year out from left TKR. He is 5-1/2 months from left shoulder arthroscopy. With respect to the left knee, it is doing rather well. He has some morning stiffness and tightness on most days but once he is up and around and he stretches the knee it does loosen up and it will feel better for the rest of the day. It does not interfere with his sleep. He gets around well on it.

With regard to the left shoulder it is feeling well much of the time. It does get a bit sore and achy if he overuses it. He can do some overhead reaching and even some lifting up to 15 to 20 pounds to shoulder level but he has been avoiding doing any lifting or heavy work overhead.

* * *

EXAMINATION: Today he demonstrates a normal gait without limp. Exam of the left knee does not reveal any effusion, erythema or warmth. His surgical scars are well healed. He has excellent range of motion from 0 to 135 degrees. The knee is stable on exam.

With regard to the left shoulder, he has good active and passive ROM. He has 170 degrees forward elevation, 170 degrees abduction, 50 degrees external rotation and internal rotation to T12 on both active and passive range of motion. He has good strength on manually resisted internal and external rotation.

* * *

PLAN:

1. Unless he has any problems with the knee or shoulder we'll see him back in about three years and make x-rays of the knee at that time. (R1X1, p. 15).

The claimant was seen by Dr. Hefley on March 14, 2006, relative to his left shoulder.

The office note generated as a result of the afore visit reflects, in pertinent part:

IMPRESSION: He is 19 months (8-13-2004) post left shoulder arthroscopic superior labrum anterior posterior repair, subacromial decompression, and distal clavicle resection, doing well. (R1X1, p. 17).

The claimant was again seen by Dr. Hefley on January 2, 2008, relative to his left knee. The office note regarding the afore visit reflects, in pertinent part:

SUBJECTIVE: He is 3.9 years out from his left total knee replacement. He lets me know that he is able to get around on it fairly well; however, he does notice some popping with ambulation that concerns him a lot.

* * *

EXAMINATION: On exam he demonstrates a normal gait. His knee alignment is neutral. The collateral ligaments are intact. There is no effusion and no erythema. He has good strength in flexion and extension. His range of motion is 0 to 130 degrees. Neurosensory exam is intact. Pedal pulses are palpable.

* * *

IMPRESSION:

1. He is 3.9 years status post left total knee replacement, doing well.
2. He is 3 years post left shoulder arthroscopic superior labrum anterior posterior repair subacromial, decompression and distal clavicular

resection.

PLAN:

1. I explained to him that the popping in his knee is the metal parts colliding with the plastic parts within his implant and he understands this.
2. Activities as tolerated.
3. We will have him return in 2 years for new x-rays and followup of his left knee. (R1X1, p. 19)

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 or about February 27, 2001, the employment relationship between the claimant and respondents #1, when the claimant sustained compensable injuries to his left lower extremity, his right upper extremity, and his left shoulder resulting in permanent physical impairments of 37% to the left lower extremity, 10% to the right upper extremity, and 8% to the body as a whole, respectively.
3. On or about February 27, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$410.00/\$308.00, for total/permanent partial disability.
4. With respect to the injuries growing out of the February 27, 2001, compensable accident, the claimant reached the end of his healing period relative to his right wrist injury on June 21, 2001; with respect to his left knee injury on February 9, 2005, and with respect to his left shoulder injury on March 14, 2006.
5. Nursing and attendant care services rendered to and on behalf of the claimant by

Ms. Elizabeth Mazingo, was reasonably necessary and causally related to the treatment of the claimant's compensable injury of February 27, 2001.

6. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of February 27, 2001.

7. When the claimant's age, education, work history, permanent restriction and limitations are considered the evidence preponderates that the claimant has been rendered permanently and totally disabled within the preview of the Arkansas Workers' Compensation Act as a result of the compensable injuries of February 27, 2001.

8. Respondent #2 has no liability in this claim.

9. Respondents #1 have controverted the claimant's entitlement to permanent total disability benefits and the cost of nursing and attendant care growing out of the February 27, 2001, compensable injury.

CONCLUSIONS

The compensability of the claimant's injuries growing out of the February 27, 2001, work-related accidental is not disputed. There are several issues before the Commission at this juncture. Claimant asserts entitlement to reimbursement for nursing/attendant care relative to his compensable injury. Further, claimant asserts that as a result of his compensable injury he has been rendered permanently and totally disabled from engaging in gainful employment. Respondents deny that the claimant is entitled to nursing care, as contemplated under the Arkansas Workers' Compensation Act. Further, respondents deny that the claimant is entitled to wage loss benefits or that he has been rendered permanently and totally disabled. Respondents #1 assert that if the claimant has sustained wage loss disability the same is the responsibility of

respondent #2, the Second Injury Fund.

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.

NURSING SERVICES

As reflected above, the claimant asserts entitlement to reimbursement for nursing services totaling \$4,800.00. The claimant underwent two (2) surgical procedures during which time he utilized the services of a certified nursing assistant, Elizabeth Mazingo. At the time the claimant underwent the surgical procedures the compensability of his claim was being contested by respondent #1.

On February 20, 2004, the claimant underwent a left total knee replacement surgery, relative to the February 27, 1991, compensable injury. As a consequence of the afore surgery, claimant contracted with Ms. Mazingo to provide total nursing care services at a weekly rate of \$600.00, for a six (6) week period. The services rendered to the claimant by Ms. Mazingo during the afore period included providing health care, transporting the claimant to his doctor's appointment and physical therapy and utilizing her vehicle in doing so. Ms. Mazingo changed the claimant's bandages, gave him his medication, changed his clothing, cleaned him and changed his bedding, carried out the bed pan and urinal, assisted/transferred him from his bed to his wheelchair. Ms. Mazingo also did housekeeping and cooking during the six (6) week period while the claimant recovered from the left total knee replacement surgery.

At the outset is noted that the time Ms. Mazingo provided the above services to the claimant she was a licensed CNA. Further, had the claimant not been able to secure the services

of Ms. Mazingo following the February 20, 2004, left knee replacement surgery the length of his stay in the hospital would have been greater as well as the amount of the bill for the hospital admission. Ms. Mazingo was not the claimant's spouse nor was she romantically involved with him at the time she provided the nursing services/attendant care to the claimant.

Realistically, in the instant claim, the claimant had undergone total knee replacement surgery relative to his compensable February 2001, injury. The evidence preponderates that the services rendered to the claimant by Ms. Mazingo was reasonably necessary in connection with and in the treatment of the compensable injury. The claimant was severely restricted physically during his recovery following the surgery. The claimant was unable to drive, though he still had to attend scheduled doctor's appointments and physical therapy.

These services rendered to the claimant by Ms. Mazingo which do not fall under the definition of nursing services were simple household tasks of house cleaning and cooking. There is a distinction between nursing services and custodial services. Nursing services entail such things as helping administer medication, helping with physical therapy and home exercised. Custodial services generally are services which include assistance with household and personal tasks. *Powell v. Producers Rice Mill*, Full Commission opinion filed May 16, 2008 (F410313); *Pickens-Bond Construction Co v. Case*, 266 Ark. 323,584 S.W.2d 21(1979).

In the instant claim, Ms, Mazingo was a licensed health care aide who was unrelated to the claimant. The evidence preponderates that Ms. Mazingo performed primarily nursing care services on behalf of the claimant during the six (6) week period following the February 20, 2004, left total knee replacement surgery in connection with the claimant's compensable February 27, 2001. Excluding the non-nursing services that Ms. Mazingo performed of behalf to

the claimant, to include cooking and house clearing , given her level of skill and training , time transporting the claimant to medical appointment (physical therapy and doctor appointments), I find that an hourly wage rate of \$12.00, for a forty (40) hour week which would generate a weekly rate of \$480.00, would be appropriate for the six (6) week post-surgical period. Respondent #1 have controverted the afore.

Following his August 2004, left shoulder injury the credible evidence in the record reflect that the claimant paid Ms. Mazingo \$300.00, per week for nursing services for a period of four (4) weeks. Ms. Mazingo described the nature of the services provided on behalf of the claimant to include coming in early in the morning, checked on him, doing some clearing and laundry. Ms. Mazingo assisted the claimant with his therapy and transported the claimant back and forth to his doctor appointments and physical therapy. As noted above, the cleaning, cooking, laundry would not fall in the definition of nursing services, and as such respondents would not be liable for the cost of same. Ms. Mazingo did perform nursing services with respect to assisting the claimant with his therapy, transporting the claimant to his doctor appointments and physical therapy following the August 4, 2004, left shoulder surgery. The claimant resided in the city of Redfield and his physician and medical care providers were located in Little Rock. Allowing 4 hours per day for nursing services at an hourly rate of \$12.00 per hour would yield a weekly rate of \$280.00. The evidence preponderates that the claimant should be reimbursed for the four weeks of nursing services for which he paid Ms. Mazingo following the August 2004, left shoulder surgery. Respondents #1 have controverted the claimant's entitlement to nursing services.

Permanent Total Disability

The claimant has been assessed with permanent physical impairments in the amount of 10% to the upper extremity, 37% to the left lower extremity, and 8% to the body as a whole relative to his left shoulder injury and surgery, all growing out of the February 27, 2001, compensable injury in the employment of respondent #1. The claimant has not worked since his employment was terminated by respondent #1 in October 2003. The claimant has a 7th grade education and is a licensed master plumber. The claimant is left hand dominant.

The claimant presents credible testimony regarding his physical limitations attributable to residuals of the February 27, 2001, compensable injury. While the claimant discussed limitations of his physical activities attributable to the left shoulder injury and surgery component of the February 2001, work-related accident, he acknowledged that his greatest physical limitations and impact on his ability to be employed grow out of the left knee residuals.

Ark. Code Ann. §11-9-519(e)(1) provides, in pertinent part:

“Permanent total disability” means inability, because of compensable injury or occupational disease, to earn any meaningful wage in the same or other employment.

Further, the burden of proof is placed on the employee to prove inability to earn any meaningful wage in the same or other employment. Ark. Code Ann. §11-9-519(e)(2). In the present claim, the evidence preponderates that the claimant has limited formal education, having completed the 7th grade. While the claimant performed supervisory work at one point during his employment with respondent #1 the evidence reflects that when the position grew to entail more office work as well as knowledge of and capability of computer usage the claimant was replaced and returned to the field performing plumbing duties. The claimant is left hand dominant. The claimant worked as a Master plumber during his employment with respondent #1.

In performing duties in the field as a plumber claimant was required to perform the physical tasks of walking on uneven surfaces, climbing , bending, working overhead, lifting his tools, equipment and material. Claimant also engaged in the physical activities of kneeling , squatting, and working in awkward positions as he discharged his employment duties. The claimant has a residual of 8% anatomical impairment to the whole person relative to his left shoulder injury and surgery. Additionally, the claimant has sustained a 10% permanent physical impairment relative to the right upper extremity with respect to the fracture to his right wrist growing out of the February 17, 2001, work-related fall. As a result of the left total knee replacement surgery the claimant has sustained a 37% impairment to the left lower extremity.

The claimant is unable to stand for prolonged periods of time, unable to work significant distances, and suffers from stiffness in the joint of the left knee. While the claimant does experience pain in the affected extremities attributable to residuals of the compensable injuries, he is nevertheless unable to take prescription medications of address same. The claimant's work history consist of manual labor jobs. While the claimant sustained both scheduled and unscheduled injuries in the February 27, 2001, work-related accident which has resulted in permanent physical impairments that are scheduled and unscheduled the credible evidence reflects that the greatest impact of his ability to return to gainful employment rest with scheduled left lower extremity injury. The same does not prohibit a finding a permanent total disability. *McDonald v. Batesville Poultry Equipment*, 90 Ark. App. 435,206 S.W.3d 908 (2005). The claimant's residual left shoulder impairment and right wrist impairment also contribute to his inability to earn any meaningful wages in the same or other employment.

When the claimant's age, education, work experience, permanent restrictions and

limitations are considered the evidence preponderates that he has been rendered permanently totally disabled within the preview of the Arkansas Workers' Compensation Act as a result of the February 27, 2001, compensable work-related accident. Respondents #1 have controverted the claimant's entitlement to permanent total disability benefits.

Second Injury Fund Liability

The evidence in the record reflects that prior to the February 27, 2001, work-related injury in the employment of respondents #1 the claimant sustained an injury to his left knee which required surgery. The evidence preponderates that following arthroscopic surgery on the left knee and a period of recovery the claimant returned to the employment of respondent #1 and continued to discharge his assigned job duties without restrictions or limitations until the February 27, 2001, compensable injury.

The test to determine whether the Second Injury Fund, respondent #2, has liability is as set forth in *Mid-State Construction v. Second Injury Fund*, 295 Ark. 1,746 S.W.2d 539 (1988):

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to the injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

Id., at 5,746 S.W.2d 541. The evidence preponderates that the claimant sustained compensable injury in the employment of respondents #1 on February 27, 2001. Further, it is undisputed that the claimant sustained a prior injuries to his left knee which resulted in surgeries. The claimant first sustained an injury to his left knee in 1978 when he tripped and fall. He later under went surgery as a result of the afore. In 2000 claimant suffered another injury to the left knee and

under the care of Dr. James Mulhollan. The claimant returned to work following his recovery for the surgery growing out of the 2000 left knee injury. The claimant's ability to return to work following his prior injury is not determinative of Second Injury Fund liability. *Hawkins Construction Co. v. Maxwell*, 325 Ark. 133,924 S.W.2d 789 (1996). However, the disability or impairment must combine with recent compensable injury to produce the current disability status. In the present claim, the evidence does not preponderate that the claimant's present disability status is the product of a combination of the prior disability or impairment with the February 27, 2001, compensable injury. Accordingly, the Second Injury Fund does not have liability in this claim, and are respectfully dismissed.

At the time of the June 19, 2008, hearing in this claim respondent #1 relayed that payment of the claimant's anatomical impairment had been made. (T.47). Nevertheless there is an indication that a check covering indemnity benefits relative to the claimant's left knee and shoulder impairments was not received until after the hearing. The afore is not an issue that was before the Commission at the time of the June 19, 2008. In light of the date that the claimant reached maximum medical improvement, one must assume that if indeed the corresponding indemnity benefits were not made until 2008, respondents #1 also tendered the appropriated penalty in accordance with Ark Code Ann §11-9-802(b) in addition to the indemnity installments to the claimant.

AWARD

Respondents #1 are herein ordered and directed to pay permanent total disability benefits to the claimant at the rate of \$410.00, as a result of the claimant having been rendered permanently and totally disable as a result of the February 27, 2001, compensable injury. Said

sums accrued shall be paid in lump without discount.

Respondents #1 are further ordered and directed to pay all reasonable necessary medical, hospital, nursing and other apparatus expenses growing out of the claimant's compensable injury of February 27, 2001, to include medical related travel. Respondents #1 are further ordered and directed to reimburse the claimant for nursing services totaling \$3,840.00.

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