

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606753 & F706367

WAYNE ROBERTS, EMPLOYEE	CLAIMANT
CRAIN CHEVROLET OLDSMOBILE, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 16, 2008

Matter before Chief Administrative Law Judge David Greenbaum submitted on June 27, 2008, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Terence C. Jensen, Attorney-at-Law, Benton, Arkansas.

Respondent #1 represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 waived participation.

STATEMENT OF THE CASE

The above-styled claims have been submitted on stipulations and legal briefs submitted by the parties.

A prehearing conference was conducted on the claims on May 21, 2008, and a Prehearing Order was filed on May 22, 2008.

As reflected by the Prehearing Order, it is undisputed that the employe/employer relationship existed between the claimant and Crain Chevrolet Oldsmobile at all relevant times, including May 1, 2006, as well as May 30, 2007; that the claimant sustained two (2) separate injuries to his low back on said dates;

that he earned sufficient wages to entitle him to the maximum applicable compensation rates for each claim, specifically, \$488.00 per week for temporary total disability and \$366.00 per week for permanent partial disability for the May 1, 2006, injury and \$504.00 per week for temporary total disability and \$378.00 per week for permanent partial disability related to the May 30, 2007, injury. It was further agreed that the claimant's healing period for the May 1, 2006, injury ended on or before January 17, 2007, at which time respondents accepted, and began paying a ten percent (10%) permanent partial impairment rating; that respondents suspended payment of permanent impairment benefits and began paying temporary total disability for the second injury beginning May 31, 2007, which were continuing, to date.

The issue presented for determination was whether a claimant can receive permanent impairment benefits contemporaneous with receipt of temporary total disability on a second and separate claim.

The parties agreed that the issue presented for determination was not based upon any factual dispute and could be decided based upon stipulations, together with legal arguments. Respondent #2, the Second Injury Fund, waived its right to participate in this dispute.

By agreement of the parties, the following deadlines were established:

- 1) On or before June 6, 2008, the parties were to submit a comprehensive set of stipulations.
- 2) On or before June 16, 2008, the parties were to submit legal arguments in

support of their respective positions.

- 3) Response briefs were due on or before June 23, 2008, at which time the claim would be submitted on the record.

The record, which has been blue-backed, consists solely of the Prehearing Order filed May 22, 2008; the Joint Stipulations agreed to by the parties; Claimant's June 16, 2008, letter-brief; Respondents' June 16, 2008, trial brief; Claimant's June 23, 2008, response trial brief; and Respondents' June 27, 2008, letter advising that it would not be filing an additional brief in response to Claimant's June 23, 2008, filing.

Based upon the foregoing, I hereby make the following:

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant is entitled to receive payment of his permanent partial impairment rating attributable to a May 1, 2006, compensable injury while receiving temporary total disability for a second and separate claim which resulted from a May 30, 2007, injury.
4. Respondents #1 have controverted the balance of claimant's permanent impairment rating after the May 30, 2007, injury.
5. All additional issues are, by necessity, specifically, reserved.

#### DISCUSSION

This case involves two (2) separate low back injuries and resulting claims against the same employer. The claimant's first injury and resulting claim occurred when he fell while getting out of a pick-up truck on May 1, 2006. Respondents #1 accepted the claim for which it paid appropriate medical benefits and temporary total disability benefits. The claimant underwent a laminectomy at L4-5 on October 9, 2006. The claimant received temporary total disability until returning to work for the employer herein at full-duty on November 16, 2006. Subsequently, claimant's treating physician, Dr. Phillip Kravetz, assigned a ten percent (10%) permanent physical impairment on January 17, 2007. Permanent partial disability benefits were instituted on January 17, 2007, and continued until the claimant sustained a second work-related injury on May 30, 2007. The claimant's second injury occurred while he was attempting to lift a truck bed with some co-workers. Again, respondents #1 accepted the second injury as a new injury and claim. Claimant underwent a L5-S1 discectomy on November 9, 2007. The claimant remained within his healing period and was receiving appropriate temporary total disability benefits at the time the immediate dispute was raised. The claimant, by and through his attorney, requested a hearing, maintaining that he should receive the balance of his permanent partial impairment rating for the May 1, 2006, admitted injury while receiving temporary total disability for the second injury and claim. Respondents have resisted the payment of permanent impairment benefits contemporaneous with payment of temporary total disability on a second and

separate claim.

At first blush, respondents' position appears reasonable. However, after full consideration of the facts, issues, and the law, it appears that the claimant's request is supported by the facts and the law.

As reflected above, the parties requested that the agreed issue be submitted based upon legal arguments.

The claimant concedes that the Arkansas Workers' Compensation Act prohibits the claimant from receiving temporary total disability benefits and permanent disability benefits at the same time in regard to the same claim. He maintains that the Act does not prevent receiving permanent disability benefits at the same time he is receiving temporary total disability benefits for two (2) separate and distinct claims. Respondents contend that the claimant's request is specifically prohibited under the provisions of the Arkansas Workers' Compensation Act. First, in its brief, respondents maintain that the Act provides for maximum weekly compensation rates which would be exceeded under the claimant's proposal citing A.C.A. §11-9-501. Respondents further maintain that the provisions of A.C.A. §11-9-525 prohibit the claimant from receiving concurrent temporary total and permanent partial disability benefits. Again, at first blush, a visceral interpretation of the sections cited might support respondents' arguments. However, a careful reading of the law does not support respondents' conclusions.

Respondents maintain that the claimant's request runs contrary to the

provisions of the Act dealing with maximum compensation rates and the decisions of our Courts. First, respondents cite A.C.A. §11-9-501(b)(2) for the proposition that it establishes the “maximum weekly benefit” that a claimant can receive while arguing that when adding the maximum temporary total and permanent partial rates together, a claimant would be receiving benefits well in excess of the allowable maximum weekly benefit. Respondents argument would be well founded for a single injury and resulting claim, but has no application for multiple claims.

Respondents also cite A.C.A. §11-9-525, maintaining that the provisions of said section prevent the claimant from receiving the benefits requested, specifically, A.C.A. §11-9-525(d)(1) & (2) which state:

- 1) If more than one (1) injury in the same employment causes concurrent temporary disabilities, weekly benefits shall be payable only for the longest and largest paying disability.
- 2) If more than one (1) injury in the same employment cause concurrent and consecutive permanent partial disability, weekly benefits for each subsequent disability shall not begin until the end of the compensation period for the prior disability.

Respondents argue that the language adopted in the aforementioned statute clearly indicates legislative desire that permanent partial disability and temporary total disability benefits not overlap. Respondents further maintain that if two (2) injuries with the same employer were to be handled as two (2) separate claims, and if the maximum weekly benefits limitation above were not a factor, then there would be no reason to have a statute limiting temporary total disability when two (2) injuries overlap and preventing the payment on two (2) ratings at the same time.

Respondents' argument would have merit for multiple injuries arising out of the same claim such as both a back and lower extremity injury which occurred as the result of the same work-related incident. However, the argument has no merit when dealing with two (2) separate claims that were the result of two (2) different work-related incidents that occurred more than one year apart. Likewise, respondents' argument would have merit if the claim for additional benefits was the result of a recurrence of a prior admitted injury, which is not the case in the subject claims.

By extension of the respondents' arguments, if a claimant sustained the loss of a body part (a scheduled injury) in one incident and then returned to work and sustained a second unrelated injury, the claimant would be precluded from receiving the permanent impairment for the loss of the body part while drawing temporary total disability on a subsequent claim. This is simply not the current law. Loss of the use of one's body (permanent impairment) can be received contemporaneous with temporary benefits.

Admittedly, under the prior law, Ark. Code Ann. §81-1313(f) which was the Second Injury law before it was amended by Act 290 of 1981, respondents' arguments had merit. In fact, the provisions of the prior law stated:

(f) Second Injury: In cases of permanent disability arising from a subsequent accident, where a permanent disability existed prior thereto:

(1) If an employee receive [sic] a permanent injury after having previously sustained another permanent injury in the employ of the same employer, for which is is receiving compensation, compensation for the subsequent injury shall be paid for the healing period and

permanent disability by extending the period and not by increasing the weekly amount. When the previous and subsequent injuries received result in permanent total disability, compensation shall be payable for permanent total disability, but the sum total of compensation payable for previous and subsequent injuries shall not exceed 450 weeks or nineteen thousand five hundred dollars (\$19,500.00) (Emphasis supplied)

However, the Arkansas Supreme Court, in *Nelson v. Timberline International, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998) held that A.C.A. §81-1313(f)(1) was repealed by Act 290 of 1981. See, also, *Birtcher v. Arkansas Highway & Transportation Department and Death and Permanent Disability Trust Fund*, (E108137), Full Commission Opinion filed October 1, 1998.

Accordingly, there is no statutory or case authority preventing a claimant from receiving his impairment benefits (loss of his body) from one injury and claim while receiving temporary total disability from a second and unrelated injury and claim.

#### AWARD

Respondent, Risk Management Resources, is hereby directed and ordered to pay, to the claimant, permanent partial impairment benefits at the rate of \$366.00 beginning January 17, 2007, and continuing for 45 weeks, representing a ten percent (10%) permanent partial impairment rating for the May 1, 2006, injury.

All benefits having accrued, respondents are directed and ordered to pay the impairment benefits in lump sum and without discount. Respondents may claim credit for any permanent impairment benefits previously paid, specifically, any impairment benefits paid before May 30, 2007.

Additionally, claimant's attorney, Mr. Terence C. Jensen, is hereby awarded the maximum statutory attorney's fee on the unpaid permanent partial impairment benefits, one-half (1/2) of the fee to be paid by respondents and one-half (1/2) of the fee to be paid deducted from claimant's benefits, pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge