

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410457

TIMOTHY F. WILLIAMS, EMPLOYEE

CLAIMANT

HUTCHISON TRUCKING,
EMPLOYER/AMERICAN HOME
ASSURANCE/AIG CLAIM SERVICE
INSURANCE/CARRIER/TPA

RESPONDENTS #1

SECOND INJURY FUND

RESPONDENT #2

OPINION FILED AUGUST 1, 2008

Hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS,
in Harrison, Boone County, Arkansas.

The claimant was pro se.

Respondents #1 were represented by The Honorable Jarrod S.
Parrish, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by The Honorable David Simmons,
Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on July 9,
2008, in Harrison, Arkansas. A Prehearing Order was previously
entered in this case on June 10, 2008. This Prehearing Order set
forth the stipulations offered by the parties, the issues to be
litigated, and the parties' respective contentions.

The following stipulations were submitted by the parties,
either in the Prehearing Order or at the start of the hearing,
and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The prior Opinion of December 20, 2006, and the Full Commission Opinion dated November 27, 2007, are the law of the case.

By agreement of the parties, the issues to be presented at the hearing were as follows:

1. Wage-loss disability.
2. Second Injury Fund liability.

The claimant contends that he is entitled to wage-loss disability.

Respondents #1 contend that all appropriate benefits have been paid with regard to this matter. Judge Frank Arey's Opinion of December 20, 2006 and his findings regarding the medical records and claimant's testimony are now the law of the case. Medical documentation does not support entitlement to additional indemnity benefits associated with this claim. Respondents #1 further contend that any diminution in the claimant's ability to work is related to subsequent events rather than his compensable injury.

Respondent #2 contends that there is no combination of prior impairment or disability with the current injury to create a greater disability than the last injury, in and of itself, to prove Second Injury Fund liability pursuant to Midstate Construction Co. v. Second Injury Fund, 295. Ark. 1, 746 S.W.2d 539 (1988); and if

indeed the record is found to warrant any wage-loss disability, the Second Injury Fund joins with respondents #1's contention that Judge Frank Arey's Opinion of December 20, 2006, and his findings regarding the medical records and claimant's testimony are now the law of the case. Medical documentation does not support entitlement to additional indemnity benefits associated with this claim.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of June 10, 2008; the claimant's Prehearing Response; respondents #1's Prehearing Response; and respondent #2's Prehearing Response, as these were all marked as Commission Exhibit No. 1. Respondents No. 1's Medical Packet was marked as Respondents No. 1, Exhibit No. 1. Respondents No. 1's, Non-Medical Packet was marked as Respondents No. 1, Exhibit No. 2. Respondents No. 1's Hearing Exhibit Packet, was marked as Respondents No. 1, Exhibit No. 3. Respondents No. 1's Surveillance Videotape of Claimant was marked as Respondents No. 1, Exhibit No. 4. A letter dated November 19, 2004, from Mr. John Marsh was marked as Claimant's Proffered Exhibit No. 1. This document was not considered in the adjudication of the issues presented in this matter.

The following witness testified at the hearing: the claimant.

DISCUSSION

The claimant, age 62 (4/18/46), has a 10th grade education. He had worked for the respondent-employer as a local truck driver for approximately five months, at the time of his compensable injury of September 1, 2004. According to the claimant, he was responsible for picking up loads and delivering loads to the proper destinations. He estimated his working hours to be approximately 60 hours per week. The claimant admitted he was not required to do very much lifting. However, he testified that it was the strain of the truck and disconnecting it that caused him problems. He testified that his weekly gross pay was estimated to be around \$700.00 per week. The claimant finally admitted that he could not recall what his pay was.

Prior to going to work for the respondent-employer, the claimant testified he worked for Nash Trucking out of Missouri. He worked for this company twice for a total of seven months with a separation time of approximately one month. In this position, the claimant testified he had to unload approximately 3,000 boxes, as each box weighed from 5 to 35 pounds, but nothing real heavy. He estimated his weekly bring home pay to be around \$700.00. Before going to work for this company, the claimant testified he worked for a construction company, A-1. According to the claimant, his bring home pay was \$500.00 per week. For this company, the claimant essentially testified that he ran a flatbed, heavy equipment, but did not do anything really hard or any heavy

lifting. He testified that he worked for this company off and on for approximately four years. He could not recall the name of the company that he worked for before working for A-1.

As of the date of the hearing, the claimant admitted he was drawing Social Security disability. He testified that he has been drawing this since Dr. Raben gave him the 2% rating for his back. The claimant denied having any other impairments, for which he is receiving Social Security disability, other than his compensable injury.

The claimant admitted he has started having problems with his vision approximately eight months ago and that he is not able to drive very much. However, he denied that his vision problems are related to his claim for Social Security disability.

He maintains that he holds a commercial driver's license, but is unable to work as a truck driver solely because of his back. According to the claimant, the lower part of his back that he injured during the compensable injury of September 2004, is what is keeping him from working. The claimant testified:

Q. Yes. What are your restrictions?

A. Well I believe that the restrictions are not to be around films and slippery stuff not to, he knows the heaviness of the work and getting up and down in the truck, you know, things like that. A DOT check, the walk around, and cranking the dolly down, the hooking up, cranking it up. Sometimes you just got to put all your guts into it to crank the thing up off of a dolly.

Q. What other injuries, Mr. Williams do you have other than your back injury that is preventing you from

returning to your previous employment?

A. Well I - - I don't know how to answer that, Your Honor, I don't know.

Q. Okay. What medications are you currently on?

A. Pain.

Q. Who's prescribing that?

A. Dr. Chu.

Q. What other conditions do you suffer from, other than a bad back, Mr. Williams?

A. If I told you, Your Honor, it has nothing to do with my working ability. Nothing else has nothing to do with my working ability. If I had a cracked, a broken foot once upon a time, it's not going to stop me if I could do the job.

The claimant admitted a personal friend drove him to the hearing. He testified that it had been a while since his physical for his commercial driver's license. Although he admitted this was up for renewal every two years, he could not recall his last physical. According to the claimant, he holds a valid driver's license, but he does not drive very much.

On cross examination, the claimant testified:

Q. Is it not true that you were treating with Dr. Kelly Danks, a neurosurgeon, and that at one point surgery was an option to treat the problems you were having in your neck and spine?

A. You mean because of the injury?

Q. The 2001 injury, before all this.

A. I don't know no Dr. Danks.

Q. You have no recollection of seeing Kelly Danks in

Fayetteville?

A. I don't think so. I don't know.

Q. Okay. Well if we - -

A. I don't recall that, either.

Q. Well if we have a report that we've introduced from Dr. Danks showing that you were in his office and that those statements were made to you, do you have any reason to dispute that?

A. I think Dr. Danks is what you guys, what - - someone there on the staff, they sent me, if I recall that.

Q. The time I am talking about is in 2001 long before you even went to work for Hutchison.

A. I don't even recall that.

Q. Okay. Do you have any reason to dispute that you did see Danks in 2001 at this point?

A. I don't recall Dr. Danks and I don't remember somebody telling me that there.

The claimant admitted to having only a strained back previously, after which he recovered and went back to work. He did not recall surgery being recommended for his back after the 2001 injury or seeing Dr. Danks.

A review of the medical evidence shows that the claimant received conservative treatment for his cervical and back injury from Dr. Van Ore and Dr. Cyril Raben.

On October 13, 2004, the claimant underwent an MRI of the lumbar spine, with the following impression:

1. Osteoarthritis and degenerative disc disease, most pronounced at L2-L3.
2. No HNP identified.

3. Spinal stenosis is suggested, which may be a combination of congenital and acquired spinal stenosis. This appears most pronounced at L4-L5.

An MRI on the cervical spine on that same date revealed "diffuse osteoarthritis and multiple degenerative disc disease."

Subsequently, the claimant underwent physical therapy treatment for his compensable injury. On January 14, 2005, the claimant was discharged from physical therapy treatment, with "excellent" progress toward established goals.

Dr. Raben reported on January 31, 2005 that the claimant would not be allowed to return to driving a truck or work heavy equipment.

The claimant underwent a functional capacity evaluation on February 8, 2005. He demonstrated the ability to perform sedentary duty work on a full time basis. However, the claimant was found to have exhibited inconsistent performance and self-limiting behavior with testing components.

Dr. Raben released the claimant to light or sedentary type duty work on February 14, 2005.

On March 1, 2005, Dr. Raben reported:

I would suggest at this particular point in time that he see Daniel for a back brace. We will also matriculate him through his conservative therapy. I would then suggest that he work out in a gymnasium situation and continue to do the exercises that PT has established for him.

I will be happy to see him back with us as needed. Other than this, we will have him seek pain management with Dr. VanOre (sic).

The claimant received additional physical therapy treatment for his compensable injury from March 7, 2005, through April 4, 2005.

On March 15, 2005, Dr. Raben reported:

Thank you very much for your kind inquiry with regard to my patient/your claimant, Timothy Williams. I feel that Mr. Williams has reached maximum medical intervention as of his January 31, 2005, clinic visit with regard to conservative care. I would suggest that he continue with pain management.

I can also see in the future for him a two-level fusion for his cervical spine. After further work up including discography for the lumbar spine, future intervention may include a one or two-level 360 fusion here, as well.

A partial permanent impairment rating for a non-operated spine at this point with the findings of disc herniation and disc degeneration of his cervical lumbar spine would be two percent (2%) of his body as a whole according to the *Arkansas Modifications of the AMA Guidelines*.

If I can be of any further assistance, please do not hesitate to contact me.

According to the prior Opinion of December 20, 2006, the Administrative Law Judge notes that the claimant returned to the emergency room on July 10, 2005 due to an onset of back and left leg pain while getting out of a car on said date. The Administrative Law Judge found that the need for additional medical treatment sought by the claimant was a result of this incident, rather than his compensable injury. This opinion was affirmed and adopted by the Full Commission and no further appeals were taken in this matter.

Dr. Moffitt reported, in pertinent part, the following on May 4, 2006, after reviewing the claimant's history, performing an examination, and reviewing the claimant's diagnostic testings and a surveillance report from April of 2005:

To summarize, diagnoses for Mr. Williams include osteoarthritis and degenerative disc disease of the cervical and lumbar spine. He also has cervical stenosis of the lumbar spine that is possibly both congenital and acquired. There is no evidence of any herniated disc or pinched nerves.

In your letter dated March 7, 2006, you asked four specific questions. I would like to address those in their order at this time.

You wanted to know whether the problems found on the diagnostic studies are due to an acute injury suffered on 09-01-04 or unrelated degenerative and osteoarthritic changes. My answer is that they appear to be unrelated degenerative and osteoarthritic changes.

Whether the incident reflected in the narratives from 07-10-05 when he injured himself getting out a car walking up stairs would be causally related to the accident occurring on 09-01-04 or unrelated and due to degenerative and osteoarthritic changes. In my opinion, they are most likely unrelated and due to degenerative and osteoarthritic changes.

Whether the claimant is unable to return to his job as a truck driver and, if not, whether the difficulties that prevent his returning to that line of work are due to the work related accident of 09-01-04 or due to degenerative and osteoarthritic problems. In my opinion, based on the report from the private investigator and on Mr. Williams' history, I feel that there is no reason why he should not be able to return to duties of an over-the-road driver.

Whether the possibility of a fusion surgery being needed would be related to the incident on September 2004 or due to degenerative disc

disease and osteoarthritic problem. My opinion is that if he were to need surgery on his cervical or lumbar spine, it would be most likely due to degenerative disc disease and osteoarthritis of the spine.

The claimant underwent nerve conduction velocity studies of the cervical spine and lumbar spine, on May 8, 2006, with the following impression:

1. Normal NCV, NO EVIDENCE OF NEUROPATHY IN LUE. 2. NORMAL EMG, NO EVIDENCE OF CERVICAL RADICULOPATHY L. 3. NORMAL NCV OF THE LLE WITH NO EVIDENCE OF NEUROPATHY. 4. NORMAL EMG OF THE LLE, NO EVIDENCE OF LUMBAR RADICULOPATHY.

ADJUDICATION

The instant claimant asserts that he sustained wage-loss disability in excess of his assigned and accepted 2% anatomical impairment rating for his compensable injury of September 1, 2004.

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. § 11-9-522(b) (1). In considering factors that may affect an employee's future earning capacity, the Court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes an assessment of the claimant's loss of earning capacity. Ellison v.

Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

After weighing the evidence impartially and without giving the benefit of the doubt to any party, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained any wage-loss disability, in excess of his 2% permanent physical impairment.

The claimant was 62 years old as of the date of the hearing. He has a 10th grade education, and has held a commercial driver's license. He has prior work experience as a truck driver for approximately 15 years. The claimant has worked for various employers. At the time of his compensable cervical and back injury of September 1, 2004, the claimant worked for the respondent-employer as a truck driver. The claimant had performed these job duties for about five months when his compensable injury occurred.

The claimant has primarily treated with Drs. Ore and Raben for his compensable injury. He has undergone extensive conservative treatment for his compensable cervical and back injury, which includes, but is not limited to extensive physical therapy treatment and a medication regimen.

An MRI of the lumbar spine taken in October of 2004, revealed osteoarthritis and degenerative disc disease, most pronounced at L2-L3, no HNP, but spinal stenosis was suggested, most pronounced at L4-5. An MRI of the cervical spine, also taken in October of 2004, revealed diffuse osteoarthritis and multiple level

degenerative disc disease.

The claimant underwent normal conduction velocity studies on May 8, 2006, of the neck and back. Specifically, these studies revealed normal NCV, no evidence of neuropathy in the left upper extremity, normal EMG, no evidence of cervical radiculopathy, normal EMG of the left lower extremity, and no evidence of lumbar radiculopathy.

Dr. Raben assigned the claimant a 2% permanent impairment rating for his compensable cervical and back injury, in a letter dated March 15, 2005. Respondents #1 accepted and paid this rating.

In an opinion dated December 20, 2006, the Commission found the claimant's healing period ended as of January 31, 2005, and it further found that the claimant was not entitled to any additional medical treatment in connection with his compensable injury. Hence, the Commission found that the claimant only required medical treatment after some other incident not related to his work, which occurred on July 10, 2005. These findings were affirmed and adopted by the Full Commission, and no further appeals were taken from this Opinion and Order of November 27, 2007.

On February 8, 2005, the claimant underwent a functional capacity evaluation, which revealed the claimant had the ability to work in the sedentary classification of work according to the guidelines established by the U.S. Department of Labor over the

course of a normal workday. However, the evaluator noted that the claimant exhibited self-limiting behaviors and inconsistent performance with testing components.

There is no probative evidence of record demonstrating that the claimant is unable to perform work as a truck driver or other suitable work. In fact, in May of 2006, Dr. Moffitt opined that he saw no reason as to why the claimant should not be able to return to work as an over-the-road driver, after reviewing the claimant's history, performing a physical examination, and reviewing the claimant's diagnostic testings, and a surveillance report from April of 2005 of the claimant's activities outside of his home. I find this opinion persuasive, in light of the surveillance footage of April of 2005, outside of the claimant's residence, wherein he is performing various activities to his mobile home and a van. Specifically, in this surveillance footage, the claimant is able to carry a large step ladder above his right shoulder, climb the ladder, make adjustments to the roof, push and pull an air compressor several feet, make repairs to electrical boxes utilizing both hands, wash the van using a pole brush, among other activities, which included, but not limited to reaching, lifting, stooping and bending. During the aforementioned physical activities, the claimant displayed absolutely no apparent discomfort whatsoever.

While I recognize that in January of 2005, Dr. Raben opined

that claimant was unable to return to driving a truck and working heavy equipment, and in February of 2008, he restricted the claimant to light or sedentary duty work, considering the subsequent surveillance footage of the claimant's residence in April of 2005, which demonstrates the claimant's ability to engage in various strenuous physical activities, I attach minimal weight to this opinion.

The claimant essentially admitted that at least as of the date of Dr. Raben's rating, he has been drawing Social Security disability. There is no evidence of record demonstrating that the claimant has looked for or sought any work as a truck driver or other possible suitable work, after the date of this rating. In light of all the foregoing, I find that the claimant's lack of motivation and interest in pursuing suitable work impedes assessment of his loss of earning capacity.

During the hearing (as also demonstrated during the first hearing), the claimant gave vague and evasive testimony, particularly with respect to concerns relating to his vision problems and other possible limiting conditions. Although the claimant displayed problems with his vision during the hearing, he vehemently denied that problems with his vision had any bearing on his claim for Social Security disability or his alleged inability to work. However, the claimant admitted he had been driven to the hearing by a personal friend, and he further admitted that he does

little driving on his on. The claimant was also unable and/or refused to produce a copy of a valid driver's license.

Considering the claimant's age, education, work experience, 2% anatomical impairment rating, his lack of motivation or interest to return to work, the surveillance footage, Dr. Moffitt's expert opinion, and all other factors which make up wage-loss disability, I find that the claimant has failed to prove by a preponderance of the evidence that he suffered any wage-loss disability, in excess of his 2% anatomical impairment rating.

As a result, the issue of Second Injury Fund liability is hereby rendered moot, and has therefore not been addressed herein this Opinion. This claim is hereby respectfully denied and dismissed in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The prior Opinion of December 20, 2006, and the Full Commission Opinion dated November 27, 2007, are the law of the case.
3. The claimant has failed to prove by a preponderance of the evidence that he suffered any wage-loss disability in excess of his 2% permanent physical impairment.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml