

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F11186

GEORGE WILSON, EMPLOYEE	CLAIMANT
BAPTIST HEALTH, EMPLOYER	RESPONDENT #1
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT#1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PTD TRUST FUND	RESPONDENT #3

OPINION FILED SEPTEMBER 11, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on June 13, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents #1 represented by the HONORABLE GAIL P. GAINS, Attorney at Law, Little Rock, Arkansas.

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

Respondent #3 represented by the HONORABLE CHRISTY KING, Attorney at Law, Little Rock, Arkansas. Ms. King's attendance at the hearing was excused.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional permanent partial disability benefits or permanent total disability benefits and attorney's fees.

At issue is whether or not the claimant has suffered a loss of earning capacity pursuant to Ark. Code Ann. §11-9-522, §11-9-505 and Rule 34; and whether or not the Fund has any liability pursuant to Ark. Code Ann. §11-9-525, Rule 24, §11-9-527 and Rule 28.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee relationship on September 21, 2001 at which time the claimant sustained a compensable back injury at a compensation rate of \$276.00/\$207.00. Medical expenses, temporary total disability benefits until the end of the healing period on March

15, 2004 and a 27% anatomical impairment rating to the body as a whole have been accepted . The claimant receives Social Security Disability benefits.

The claimant contends that he is permanently and totally disabled or entitled to wage loss disability in excess of the impairment rating. The claimant is willing to undergo vocational evaluation but does not feel he is a viable candidate.

Respondent No. 1, Crockett Adjustment, contends all appropriate indemnity benefits have been paid. Any wage loss is the responsibility of the Fund.

Respondent No. 2, the Second Injury Fund, contends the claimant's disability is the result of the last injury considered alone.

Respondent No. 3, the Permanent Total Disability Trust Fund, defers to the outcome of litigation.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the depositions of the claimant (taken May 21, 2008) and Dr. Shahim (taken November 4, 2004), incorporated by reference.

The following witnesses testified at the hearing: the claimant, who was using a cane to walk; his brother, Elijah Wilson; his niece, Ana Rogers; and neighbors, Kim Taylor and Perry Franklin. The claimant was visibly shakey and became emotional during the testimony. He was slow in responding to questions and seemed confused. The witnesses testified the claimant is no longer able to be physically active (gardening, fishing, traveling) and his mental condition has deteriorated. However, the witnesses did not seem to be aware of the claimant's prior back injuries in the 1990's and motor vehicle accidents (MVAs). The claimant's brother moved in with him in 2001 to take care of him, (Claimant's Depo. p. 15-16).

The claimant, (D.O.B. October 8, 1961), has an 11th grade education. His work experience includes jobs as a punch press operator in a metal shop dyeing and weaving cotton, delivery driver and nurse's aide and orderly in hospitals and nursing homes. The claimant's health history includes

diabetes, anemia, renal insufficiency, sleep apnea, high blood pressure, obesity, a hernia, arthritis in his hand, MVAs in 1985 and 1994, and a history of back trouble in the 1990's, diagnosed as chronic back strain, a muscular soft tissue injury. In 2002, he began receiving Social Security Disability benefits of \$902.00 monthly.

The claimant worked for the respondent-employer for seven years before he injured his back on September 21, 2001 when he fell with a patient in the shower. The claimant came under the care of Dr. Shahim and ultimately had five back surgeries. He now uses a pain pump but the medications have caused side effect such as forgetfulness, mental confusion, hallucinations, nervousness, diarrhea, and an inability to concentrate, (Claimant's Depo. p. 42). Since the compensable injury, the claimant has also been treated for anemia and kidney failure.

The claimant testified he would be willing to try to return to work if he could lose some weight (he is 5'11" and weighs 360 pounds), and regulate his narcotic medication, (Claimant's Depo. p. 28, 69-74).

Counsel for respondent #1 questioned the claimant at length about his general health history which does include numerous accidents (Claimant's Depo. p. 45-67). Medical records show the claimant complained of back pain on several occasions from both work-related and personal injuries. He missed some time from work, was treated conservatively, but always returned to work at full duty (Claimant's Depo. p. 54-56, 76, 78-79, 83-85). With the exception of x-rays, no diagnostic testing was performed. These injuries were all diagnosed as strains, muscular soft tissue injuries.

1986	low back bilateral leg pain	lifting incident	Dream Weavers
Feb. 1992	thoracic back strain	transferring pt.	St. Vincents
Mar-Nov 1992	low back, chronic lumbar strain	lifting pt./ elevator incident	St. Vincents
Mar. 1994	back, right leg pain		St. Vincents
Dec. 1994	back	slip & fall	Apt. Complex
May 1996	back	lifting pt.	Baptist
Sept. 1998	low back, left leg		
Mar. 2000	back, right leg	lifting pt. & dog bending over at work	Baptist

On two occasions, the claimant was referred to specialists but apparently there was no follow-up. The claimant also worked part-time in hospice care, sitting with veterans. He worked

three times a week for 4 hours each visit and was paid \$120.00 weekly, (Claimant's Depo. p. 34-36). He continued this employment even after the compensable injury. Eventually his brother had to help him watch the clients so he voluntarily left their employ.

MEDICAL EVIDENCE

The claimant has received treatment from his family physician, Dr. Ken Johnston, neurosurgeon, Dr. Reza Shahim, and pain management specialists, Dr. Mahmood Ahmad and Dr. William Ackerman.

An MRI scan conducted September 29, 2001 revealed a left herniated nucleus pulposus (HNP) at L5-S1 with nerve root involvement, along with a mild bulge and spurring at L4-5 on the left. The claimant complained of low back and radiating left leg pain. Therefore, Dr. Shahim performed a microdiscectomy on October 11, 2001 for the HNP at L5-S1.

Dr. Shahim expected the claimant to be able to return to work in two months but the claimant returned in November, 2001 complaining of back pain after coughing for several weeks with bronchitis. The MRI was repeated in November 2001, but no recurrent disc herniation was found at the L5-S1 surgical site. There was evidence of scar tissue at L5-S1 and mild disc bulge with spurring. At L4-5 a posterior annular tear was identified. Despite muscle spasms, the claimant was released on December 18, 2001.

The claimant returned to the doctor in January 2001 with symptoms and another MRI scan in February, 2002, revealed a recurrent disc protrusion at the L5-S1 surgical site. A second discectomy at L5-S1 was performed on March 20, 2002.

In April, 2002 the claimant reported right-sided back pain. Another MRI scan in May, 2002 showed collapse of the disc at L5-S1 and degenerative disc disease at L5-S1. Dr. Shahim recommended treatment for pain management in an effort to avoid surgical fusion at L5-S1.

Dr. Shahim's report of 6-13-02:

I believe Mr. Wilson is symptomatic from disc disease at L5-S1 resulting in radicular symptoms and mechanical back pain. This was not a pre-existing condition. His disc herniation was related to a work related injury and was clearly not a chronic, ongoing condition....At his age, a lumbar fusion at L5-S1 would clearly

accelerate the adjacent level disease and I have explained that to him, that in the long run he might have disc rupture adjacent to the level of the fusion.

The claimant complained of back and bilateral leg pain. On August 14, 2002, Dr. Shahim performed a third surgery, fusion with a redo discectomy for a recurrent disc herniation at L5-S1.

Another MRI scan on October 4, 2002 revealed a left paracentral disc protrusion at L4-5 impinging on the left L5 nerve root.

Dr. Shahim's report of 10-8-02:

I obtained an MR (sic) of the lumbar spine on Mr. Wilson because he has a progression of his left leg pain... Previous MRI's have shown tears in the disc space at L4-5 and severe degeneration of the disc at this level. He has not had a herniation until this MR (sic) that was done. There is a disc herniation on the left side at L4-5 which results in thecal sac compression. He does have epidural scar formation at L5-S1. Some of his back symptoms certainly are related to the epidural scar formation at L5-S1 at the previous site of surgery. The fusion now at this level has caused further stress at the adjacent level with the progression of the degeneration at L4-5.

Mr. Wilson has never achieved complete pain resolution even since the posterior interbody fusion. His leg and back symptoms have persisted to cause his problems. I think this is all related to his initial injury and the surgical management of this disease.

Dr. Shahim's report of 12-3-02:

Mr. Wilson is now status post posterior lumbar interbody fusion at L5-S1. He has an adjacent level disc herniation at L4-5. He has had a disc protrusion at this level all along related to his work related injury months ago.

Another MRI scan in January, 2003, showed a large disc herniation at L4-5 on the left with nerve root and thecal sac compression.

Dr. Shahim's report of 1-23-03:

I believe Mr. Wilson is symptomatic from a left L5 radiculopathy due to a disc herniation. He had disc protrusion at that level before, but I think with the stress of the adjacent level fusion, he has developed increasing disc disease at L4-5.

A fourth operation, removal of instrumentation at L5-S1 and posterior lumbar fusion at L4-5, was performed on May 13, 2003.

An EMG/NCV study on September 8, 2003 showed "acute and chronic left L5 or S1 radiculopathy."

A CT/myelogram in September 2003 showed scar tissue at the previous surgical sites. The claimant came under the care of Dr. William Ackerman for pain management.

Dr. Shahim cautioned that a fifth surgery might be needed to remove instrumentation after x-rays in November, 2003 showed possible irritation of the nerve root by a pedicle screw at L4. Dr. Shahim recommended surgery again in his report of March 15, 2004 which the claimant declined. Dr. Shahim rated the claimant's impairment at 25% for left L5 radiculopathy, foot weakness, and four surgical procedures at L4-5, L5-S1. Dr. Shahim stated that the claimant would require long-term chronic pain management.

In 2004, Dr. Shahim recommended the claimant live in an assisted living facility or have family members help with his personal care. In a report dated November 8, 2005, Dr. Shahim once again recommended surgery to remove hardware, explore the L4-5 surgical site, and perform a laminectomy at L3-4 for stenosis. On July 11, 2006 Dr. Shahim assessed an additional 2% impairment rating for the fifth surgery.

In 2007, both Dr. Shahim and Dr. Ahmad recommended weight loss to improve the claimant's symptoms.

In his deposition, Dr. Shahim explained that the initial surgery at L5-S1 never healed properly ("possibly" because of the claimant's obesity and habit of cigarette smoking), resulting in the protracted course of treatment and surgeries, (Depo. p. 10). He felt the problem at L4-5 was the result of the stress of surgery at the adjacent level superimposed on degenerative disc disease.

Dr. Shahim assessed a 27% impairment rating. The bulk of the rating was for the L5-S1 disc, rather than degenerative disc disease, (Depo. p. 50). He recommended the claimant avoid bending, twisting, and lifting more than 40-50 pounds. He thought the claimant could perform light duty but doubted he could handle a full work week. He deferred to the pain management specialist to comment on the claimant's ability to drive while taking narcotics.

VOCATIONAL REHABILITATION

Bob White conducted an evaluation of the claimant on May 5, 2008, however, he relied on the claimant's oral history rather than a review of the medical records. He commented, "while a pain pump may give him some relief from the intense, grinding pain he now suffers, it makes no difference in his physical anatomical ability to perform work, assuming the pump actually gives him some relief."

FINDINGS AND CONCLUSIONS

Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). Factors to be considered in assessing wage loss include the claimant's, age, education, work experience, medical evidence and other matters which may reasonably be expected to affect the workers' future earning power such as motivation, post-injury income, bona fide job offers, credibility, or voluntary termination. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984), Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990), and Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Considering the claimant's 5 surgeries with resultant scar tissue, side effects from pain medication, need for a cane, history of physical labor with a limited education, I find the claimant to be permanently and totally disabled.

The elements of proof for Second Injury Fund liability are set forth in Ark. Code Ann. §11-9-525:

1. The employee must have suffered a compensable injury at his present place of employment;
2. prior to that injury the employee must have had a permanent partial disability or impairment ;
3. the disability or impairment must have combined with the recent compensable injury to produce the current disability status. Mid-

State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 5, 746 S.W. 2d 539, 541 (1988).

Ark. Code Ann. §11-9-102 defines “disability” as the “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” A numerical impairment rating on pre-existing diseases, illnesses, or conditions is not a pre-requisite for finding a pre-existing “impairment or disease” when determining Second Injury Fund liability, Johnson v. Gen. Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Because the parties stipulated that the claimant suffered a compensable back injury, the first element of proof has been met. I find the medical evidence does not show that the claimant was suffering from a permanent partial disability or impairment at the time of his injury that contributed to his current level of disability. Therefore, the second and third elements of proof have not been met.

Although the claimant had suffered numerous back strains (soft tissue injuries), and had missed some time from work, he was always treated conservatively and returned to work at full duty with no permanent work restrictions or permanent impairment rating, or reduction in wages. He was hired to work for the respondent-employer with no disability or impairment. He was able to perform strenuous physical labor (lifting and bathing patients, restraining unruly psychiatric patients, etc.) travel, fish and work in his garden prior to the 2001 injury at Baptist. The compensable injury at L5-S1 required four surgeries and, as a compensable consequence, the fusion surgery produced stress on the adjacent disc levels, resulting in surgery at the L4-5 level. These surgeries and complications, scar tissue, and side effects from his pain management are the major cause of his disability. Therefore I find the Second Injury Fund has no liability.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed between the claimant and respondent #1 on September 21, 2001 at which time the claimant sustained a compensable back injury at a compensation rate of \$276.00/\$207.00. Medical expenses, temporary total

disability benefits, and a 27% impairment rating to the body as a whole have been accepted. The claimant's healing period ended March 15, 2004.

2. The claimant has proven by a preponderance of the evidence that he is permanently and totally disabled based on his age, education, work experience, 5 back surgeries, work restrictions, and side effects from pain management. The major cause of his disability is the compensable injury with the respondent-employer.
3. The Second Injury Fund has no liability in this case as the claimant suffered no disability or impairment prior to the 2001 compensable injury.

The respondent-employer remains solely liable for the claimant's medical expenses and indemnity benefits until reaching the statutory cap, at which time respondent #3, the Trust Fund will assume liability for indemnity benefits.

4. If they have not all ready done so, the respondents are directed to pay the court reporter, Pamela St. Clair's, fees and expenses within thirty days of receipt of the bill.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49

Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge