

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105602

WILLIE J. RAINEY, EMPLOYEE	CLAIMANT
CHILDRESS LOGGING, INC., EMPLOYER	RESPONDENT NO. 1
AMERICAN INTERSTATE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED OCTOBER 6, 2003

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE GREG FALLON, Attorney at Law, Monticello, Arkansas, and HONORABLE KENNETH A. HARPER, Attorney at Law, Monticello, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 3, 2003.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the parties stipulated to an employee-employer-carrier relationship with Respondent No. 1 on April 9, 2001 at which time the claimant sustained a compensable neck injury at a

compensation rate of \$410.00/\$308.00. Medical expenses, temporary total disability benefits (until October 17, 2001) and a 2% rating to the body as a whole, as assessed by Dr. Rutherford, have been paid.

2. The claimant sustained a compensable neck injury in 1999, resulting in a 15% rating to the body as a whole.

3. Respondent No. 1 has paid all appropriate benefits for the compensable injuries.

4. Dr. Simpson's rating of 35% is invalid as it does not conform to the AMA Guidelines as required by Ark. Code Ann. §11-9-102 and Rule 34.

5. The claimant has failed to prove by a preponderance of the evidence of record that he was not offered an opportunity to return to work as required by Ark. Code Ann. §11-9-505(b). The claimant has, in fact, returned to work in a supervisory capacity, and is therefore, not entitled to a program of rehabilitation.

6. The claimant has failed to prove by a preponderance of the evidence of record that he is entitled to wage loss as defined by Ark. Code Ann. §11-9-522(b)(2). The claimant has returned to work at wages equal to or greater than his average weekly wage at the time of the accident.

7. Since the claimant is not eligible for wage loss, the Second Injury Fund is not liable for any benefits and is hereby dismissed as a party to this claim.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the

Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that claimant is entitled to benefits for a permanent anatomical impairment of only 2% to the body as a whole. However, I would modify the Administrative Law Judge's opinion to award benefits for a permanent anatomical impairment of 9% to the body as a whole.

In March 1999, claimant sustained his first work-related cervical injury, which resulted in a cervical fusion at C6-7 and a permanent anatomical impairment of 15% to the body as a whole. The second cervical injury (which is the subject of the present claim) occurred in April 2001 and resulted in a fusion at C7-T1.

The Commission, relying on the Guides and Dr. Rutherford's opinion, has awarded claimant benefits for a permanent anatomical impairment of 2% for the second surgery utilizing Table 75 of the Guides. I believe this particular section applies to multiple operations on the same disk, see White v. Gregg Agricultural Enterprises, 72 Ark. App. 309, 37 S.W.3d 649 (2001), and that when a second disk is injured in a new accident, the injury to the disk should be treated separate and apart from the prior or preexisting impairment to a different disk.

In the present case, I find that since the injury to C7-T1 resulted from a separate injury to a different disk, claimant should be entitled to benefits for a permanent anatomical impairment of 9% to the body as a whole, as opposed to the 2% awarded by the Commission.

For the foregoing reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner