BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009818

CRAIG EDGMON, EMPLOYEE	CLAIMANT
MALONE'S MECHANICAL, EMPLOYER	RESPONDENT NO. 1
TRANSPORTATION INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 7, 2004

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE JAY KUTCHKA, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an administrative law judge's opinion filed August 21, 2003. The administrative law judge found that the claimant had suffered wage loss in an amount equal to 50% to the body as a whole, for which the Second Injury Fund was liable. After

reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

Craig Edgmon, age 47, testified that he was educated through the 12th grade. The claimant testified that his employment history included operating a forklift for Crown Zellerbach, loading horses at Blue Ribbon Downs, and performing ranch work at Turkey Track Ranch. The claimant testified that he was thrown from and kicked by a horse at Turkey Track in 1994. Dr. Michael Standefer's impression after evaluating the claimant in June 1994 was "Severe right hip and associated lower extremity pain secondary to L4 disc protrusion." Dr. Standefer diagnosed "Right S1 radiculopathy secondary to L5 disk protrusion with associated free extra dural disk fragment." Dr. Standefer performed "#1 Right L5-S1 hemilaminotomy. #2 L5 diskectomy. #3 Removal of free extra dural disk fragment impacted ventral to right S1 root. #4 Right S1 foraminotomy."

Dr. Standefer noted in October 1994, "He notes occasional pain, but overall feels much improved. He may increase his level of activity in accord with how he feels, but should continue to avoid heavy lifting and repeated

bending....” Dr. Standefer wrote in March 1995, “Based upon his history, clinical exam and previous surgery, an impairment rating of 10% as regards the body as a whole has been applied to the patient.” The claimant testified that he never completely recovered from the 1994 surgery.

The claimant’s testimony indicated that he did not return to work until becoming employed with Malone’s Mechanical in about 1997. The claimant was an apprentice plumber, and he described his work duties as involving occasionally heavy manual labor.

The parties stipulated that the claimant sustained a compensable injury to his back on August 16, 2000. The claimant testified, “We were putting a pipe through a wall in a room just about like this that’s got the drop-in ceiling, and I was on a ladder and I leaned back to stick the pipe through a hole in the wall and my back popped.” Dr. W.E. Wood saw the claimant on August 28, 2000 and noted, “In 1994, he had a related injury with surgery one year later by Dr. Standefer. He had been fine since 1994.” Dr. Wood assessed “L5-S1 disk protrusion with right sciatica to right buttock, no neuropathy.”

The claimant returned to Dr. Standefer on September 13, 2000:

> Forty-four year old white male who has a past medical history of lumbar disc disease. He is status post lumbar disc surgery, this having taken place in 1994 for treatment of low back and associated right lower extremity pain. He was released from the office 03-29-95 in stable and improved condition. He has not been seen since that time. He advises me that he was working as a pipe fitter and welder at the time of his back injury. Apparently he was on a ladder inserting a pipe through a wall when he lost his balance and fell backwards. He did not fall but he did note the rather abrupt onset on focal pain in the right paralumbar region. Shortly thereafter he began to note pain radiating into the right hip and along the lateral aspect of the right lower extremity. Since that time he has had persistent pain which has not really responded well from medication. His pain is somewhat variable during the course of the day and at times he will develop a severe jolt of pain which is quite severe. He has been unable to resume employment.

On October 24, 2000, Dr. Standefer diagnosed "Recurrent L5 disc protrusion with lateralization to the right." Dr. Standefer performed "1. Reopen previous lumbar incision. 2. Lysis of adhesions. 3. Extension of patient's previous right L5-S1 hemilaminotomy. 4. L5 diskectomy. 5. Complete decompression dural tube and right S1 root including foraminatomy."

The claimant testified that the results of the second surgery were "Not real good. It still yet bothers me."

Dr. Standefer wrote on April 24, 2002:

> In the interim since previous clinic visit he has had follow-up MR scan which looks largely unchanged from our previous scans. The previously noted disc protrusion at the L5 level is not nearly as large. Degenerative changes effecting the L5 disc are clearly present. Overall, I believe the degree of disc disease at both L4 and L5 is sufficiently severe to account for the patient's ongoing symptoms and to this extent consideration for surgical treatment remains a viable option for him. As in the past, a lumbar laminectomy at L4 and L5 with L4-5 discectomy and L5-S1 discectomy followed by posterior lumbar interbody fusion and pedicle screw fixation should provide the patient with a good chance for relief of his pain....In addition, the other available treatment options which include continued conservative care and/or supplementation with lumbar epidural steroid injections has been reviewed as well. From a practical standpoint, if the patient does not undergo surgical treatment and continues with conservative regimen I would not anticipate dramatic change in his symptoms. I have advised him of this. One other point worthy of note is that the patient will not be able to resume manual labor occupation independent of whether he has surgical treatment or not. I have advised him of this. In the future he will need to avoid heavy lifting (i.e., no more than 25-35 pounds and only then on occasion), avoid repeated bending, alternate sitting, standing and walking, and pursue a vigorous exercise program as well as walking program. Long-term, this will provide him with his best chance for continued improvement whether he has surgery or not. We will plan to release him from clinic as of today....

Dr. Standefer wrote to the claimant's attorney on September 12, 2002:

> He has been released from neurosurgery clinic. No plans are underway for any further surgical intervention. Mr. Edgemon underwent lumbar disc surgery 06-30-94 for treatment of an L5 disc protrusion with lateralization to the right. He was released from clinic 02-02-95. He received an impairment rating of 10% as regards the body as a whole 03-29-95. He returned for re-evaluation 09-13-00 with complaints of low back and associated right lower extremity pain and was found to have a small focal L5 disc protrusion with lateralization to the right. This was felt to be a recurrent disc protrusion and in view of the patient's failure to improve he underwent a second operative procedure 10-24-00. As time passed, his symptoms of low back and right lower extremity pain persisted and became associated with intermittent left lower extremity pain. He underwent further evaluation and in view of the recurrent disc protrusion at the L5 level (a third recurrence) and diffuse disc bulging at L4-5, it was felt reasonable to consider a third operative procedure for him. In addition, the patient had severe degenerative change at the L5 level. The third operative procedure was never conducted as the patient opted not to have any further surgery after having found out that instrumentation would be employed.
>
> With the above facts in mind, the patient should receive an additional 2% impairment rating for his second operation. As outlined our records, he developed worsening pain and was found to have a recurrent disc protrusion at the L5 level in concert with severe degenerative change and rather prominent disc bulging at L4-5.

> Based on the AMA Guidelines to the Evaluation of Permanent Impairment, Table 75, page 113, section 2C and F, I believe it would be reasonable to assign an additional impairment rating of 8% for complaints and radiographic findings of sufficient severity to justify consideration for the third operation. With these facts in mind, a total impairment rating of 20% as regards the body as a whole would appear to be appropriate for Mr. Edgemon.
>
> Restrictions regarding Mr. Edgemon's physical activities have been outlined in previous records and I really would not amend these.

The parties stipulated that Respondent No. 1 was paying permanent partial disability benefits based on a 10% impairment rating.

Dr. Vincent B. Runnels independently examined the claimant on April 22, 2003:

> His problems began around 1993 when he was doing some rodeoing and working for a man on a ranch. He was thrown by a horse. He developed a herniated disc at 5-1 on the right and some disease at 4-5. This led to surgery in 1994 by Dr. Standefer with good relief of his leg pain. He went back to work doing construction. He continued to work until he developed recurrence of leg pain secondary to an on-the-job injury which led to a second operation on the right at 5-1, although 4-5 had a significant bulge, and it looked worse than before, along with lateral recess stenosis. He thinks this was in the winter of 2001, this operation. The second operation did not relieve him as the first one. The patient has been unable to work since and has been on workers' compensation....

> He appeared to be, at first glance, a tough and stoic individual but I think he is developing some depression and has had a bad experience with his last operation. However, on purely radiological grounds, I could not disagree with the operation Dr. Standefer proposed, that of a two level diskectomy and fusion. The only thing worrisome about it is hysterical overlay and the workers' compensation situation. Were I his doctor, I would try nonoperative things for a while....At some point, he may well need a carpal tunnel release and a two level anterior cervical fusion at 5-6 and 6-7. Again, right now, with the psychological overlay, I would first try nonoperative treatment for a long time, some cervical massage, heat, and a neck pillow.
>
> I would agree he has a 10% disability for the first operation. The second operation would add 2% and an additional 1% for the 4-5 level, making a total of 13% permanent disability to the body as a whole. I would see no problem with either getting him on Social Security or retraining him. After the dust has settled from the worker' (sic) compensation situation and one year or so has passed of nonoperative treatment, if he still is symptomatic, I would think that the two level anterior fusion proposed by Dr. Standefer would be reasonable. I would want him to be free of the hysterical findings as mentioned. I have instructed him it would be well if he could cut out the tobacco usage before he would have any sort of bone fusion operation due to the increased risk of nonunion....

Mr. Edgmon claimed entitlement to additional worker's compensation, and a pre-hearing order was filed with the Commission on May 22, 2003. The claimant contended that he was entitled to a period of temporary total disability

compensation, wage-loss benefits, and an attorney’s fee. Respondent No. 1 contended that the claimant could not prove he was entitled to temporary total disability, and that the claimant could not prove he was entitled to wage-loss benefits. Respondent No. 2, Second Injury Fund, contended that the claimant could not prove he was entitled to permanent total disability. Respondent No. 2 contended that there was no “combination of disabilities or impairments” as would require Second Injury Fund liability.

Hearing before the Commission was held on July 28, 2003. The claimant testified:

> Q. Now, tell us in your own words what is wrong with you that causes you not to be able to work.
>
> A. Well, I can’t even bend over and put my shoes on, so that would be one on a job.
>
> Q. How do you get them on?
>
> A. I just leave them unlaced and slip them on....
>
> Q. What else is wrong with you?
>
> A. My hands, they’ll get numb. My leg hurts. It will get numb sometimes like it’s asleep. I can’t feel it. And that pain down my leg there, it kind of bothers me all the time....
>
> Q. Can you do any of the jobs that you have done in the past in your present physical condition?
>
> A. No, sir.

> Q. Do you know of any job that you could do on a regular sustained basis in your present physical condition?
>
> A. No.

The administrative law judge found that the claimant failed to prove he was entitled to temporary total disability compensation; the claimant does not appeal this finding. The administrative law judge found, "3. As a result of his compensable injury, claimant has suffered a loss in wage earning capacity in an amount equal to 50% to the body as a whole. 4. The Second Injury Fund is liable for payment of permanent partial disability benefits in the amount of 50% to the body as a whole based upon claimant's loss in wage earning capacity." Respondent No. 2, Second Injury Fund, appeals to the Full Commission.

II. ADJUDICATION

A. Refusal to submit to operation

Both respondents cite Ark. Code Ann. §11-9-512:

> Except in cases of hernia, which are specifically covered by §11-9-523, where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Workers' Compensation Commission, in fixing the amount of compensation, may take into

> consideration such refusal to submit to the advised operation.

The respondents cite this statute for the first time on appeal to the Full Commission; however, the claimant does not object to this issue being raised on appeal. As we understand their briefs, Respondent No. 1 and Respondent No. 2 appear to argue that the claimant's wage-loss award should at least be significantly reduced by the Full Commission, because the claimant "unreasonably refused" to submit to another operation from Dr. Standefer. We do not attach significant weight to this argument. The claimant had already undergone two surgeries from Dr. Standefer, and he reported little improvement from either operation. At the time of the third scheduled surgery, the claimant was being transported to an operating room, when an aide told the claimant that Dr. Standefer was going to insert "instrumentation" on and around the claimant's lumbar spine. The claimant balked, and Dr. Standefer did not perform surgery. We are unable to attach significant weight to the respondents' argument that another surgery would have (1) improved the claimant's condition, or (2) allowed the claimant to return to work. The Commission notes that Dr.

Runnels recommended that the claimant attempt additional conservative measures before undergoing a third operation. The claimant informs the Commission that the respondent-carrier disallowed further conservative modalities after Dr. Runnels' recommendations. Based on Ark. Code Ann. §11-9-512, the Full Commission finds that the respondents failed to prove that the claimant unreasonably refused to submit to a surgical operation.

B. Wage loss

The wage-loss factor is defined as the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, including age, education, work experience, and other matters reasonably expected to affect the claimant's future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

The administrative law judge determined that the instant claimant had suffered 50% wage-loss disability. The administrative law judge found that the Second Injury Fund was liable for the claimant's wage-loss disability. The

Full Commission affirms these findings. The claimant was educated through only the 12th grade and has performed almost exclusively manual labor. After being thrown and kicked by a horse in 1994, the claimant underwent lumbar surgery from Dr. Standefer. The claimant testified that this surgery really did not make him better. Dr. Standefer assigned a 10% anatomical impairment rating in 1995, and the claimant began working for the respondent-employer in about 1997. The parties stipulated that the claimant sustained another back injury in August 2000. The claimant underwent a second lumbar surgery from Dr. Standefer, and another impairment rating, but afterward the claimant was not able to return to work. The claimant credibly testified that he could not even bend over and tie his shoes after the second injury. Based on a preponderance of evidence before us, the Full Commission affirms the administrative law judge's award of 50% wage-loss disability. We find that the claimant's compensable injury was the major cause of his disability, pursuant to Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

Liability of the Second Injury Fund comes into question after three hurdles have been overcome. First, the employee must have suffered a compensable injury at his present place

of employment. Second, prior to that 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. See, Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). The instant claimant sustained a compensable injury at his present place of employment in August 2000. The record indicates that, prior to the compensable injury, the claimant had sustained a prior anatomical impairment. The Full Commission affirms the administrative law judge's determination that the prior impairment and most recent compensable injury "combined" to produce the claimant's current disability status. Although the claimant did not improve after either surgery, he was not prevented from returning to work until after the second surgery. The claimant's symptoms increased after the second compensable injury, and Dr. Standefer opined that the claimant would not be able to resume manual labor. Dr. Standefer also increased the claimant's anatomical impairment rating following the second surgery. Dr. Runnels also opined that the claimant was unable to work following the second injury.

The claimant credibly testified that he was unable to perform the same level of manual labor. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 50%. We find that the Second Injury Fund is liable for the claimant's wage-loss disability. The Full Commission therefore affirms the opinion of the administrative law judge. The claimant's attorney is entitled to a statutory fee for legal services, pursuant to Ark. Code Ann. §11-9-715(a)(Repl. 1996). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of $250.00, pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.