

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F100650

LONNIE RICHARDSON, EMPLOYEE	CLAIMANT
ELDRIDGE TIRE & WHEEL, EMPLOYER	RESPONDENT NO. 1
CAMBRIDGE INTEGRATED SERVICE, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MARCH 12, 2004

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

Claimant represented by HONORABLE KRISTOFER E. RICHARDSON,
Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by HONORABLE JEREMY
SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

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

Decision of the Administrative Law Judge: Affirmed as
modified.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's
opinion filed June 18, 2003. The administrative law judge
found that the claimant had sustained a wage-loss disability
of fifty percent (50%) to the body as a whole in addition to
the claimant's 10% anatomical impairment. The
administrative law judge found that the claimant's
disability was attributable solely to the December 20, 2000

admitted injury, and that the Second Injury Fund was not liable. After reviewing the entire record *de novo*, the Full Commission affirms, as modified, the opinion of the administrative law judge. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 25%. We further find that the Second Injury Fund bears no liability in the claim.

I. HISTORY

Lonnie Richardson, age 56, testified that he had gone to school through only the eighth grade. Mr. Richardson testified that he had worked on a farm picking peaches and in a factory cutting sheet metal. The claimant worked in the factory about seven years and then worked in a fast-food restaurant for about three years. The claimant worked in a bottling plant. The claimant had also received on-the-job training in welding, and he worked as a welder in a bicycle factory for about nine years. The claimant testified that he worked for the respondent-employer for about 20 years, starting as a janitor and working his way up to being a mechanic and general "helper" for the company owner. The claimant testified that he had never held a job which did not require strenuous physical activity.

The parties stipulated that the claimant sustained a compensable low-back injury on December 20, 2000. The claimant testified that he slipped and "fell on my tailbone....The next morning I was twisted. My left side was up and my right side was down, and I was walking sideways, and I couldn't correct it." The claimant described the pain following the compensable injury as "like you're laying on a bed of nails, and that's in between your waist and your stomach. And you move the wrong way, it's a sharp, hot pain, just coming from your back up to the back of your neck."

An MRI of the lumbar spine was taken on January 16, 2001, with the following conclusion:

1. Posterior disk bulging at L3-L4 with mild left neural foraminal and lateral recess stenosis, with questionable impingement upon the descending left L4 nerve root.
2. Mild bilateral lateral recess stenosis at L4-L5 secondary to posterior disk bulging.
3. Degenerative disk desiccation L3 through S1 with posterior disk bulging at L4 through S1 without significant spinal canal or neural foraminal stenosis.

On September 17, 2001, Dr. Dewayne Eubanks performed a "Left L3-4 microdiscectomy (with medial facetectomy)." Dr. Eubanks reported on December 5, 2001, "I think he has reached maximum medical improvement. I am going to ask Dr.

Braden to perform a disability evaluation for his disability rating. I am going to release him from my care at this point, unless he were to develop further problems. I doubt this man is ever going to be able to go back to manual labor."

Dr. Terence P. Braden, III evaluated the claimant and assessed the following on January 7, 2002:

Mr. Lonnie Richardson is a 54-year-old, African-American male who has had multiple low back injuries at his current employment with the worst being in December of 2000. He sustained a herniated nucleus pulposus at L3-4 with compression on the nerve root, which required a left L3-4 diskectomy and medial facetectomy on 09/17/01.

He has had continued discomfort and mild weakness in the left lower extremity since that time.

Dr. Eubanks has ascertained that Mr. Richardson has reached maximum medical improvement for the injury that he reports to have sustained as well as his surgical intervention.

His impairment, based upon the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, would be a DRE Category III, Radiculopathy, as outlined on Page 102 of the Guides. This would correspond to a 10% impairment to the whole person.

The parties stipulated that the claimant's healing period ended on January 7, 2002, and that the respondents accepted and paid the 10% impairment rating.

The claimant was hospitalized on July 5, 2002 after complaining of dizziness and chest pain. The claimant was discharged on July 10, 2002 with diagnoses of "atypical chest pain," "transient ischemic attack," "hypertension," "diabetes mellitus," "obesity," and "coronary artery heart disease."

A vocational assessment was conducted by Richard Marron on February 10, 2003. Mr. Marron recommended a functional capacity evaluation, on-site job analysis, gathering of labor market information, and training in resume preparation and interview skills.

Dr. Eubanks corresponded with Respondent No. 1's attorney on February 20, 2003:

As you know, I have not seen him in quite a while, but I did get my records from your firm. In answer to your question, I think that Mr. Richardson's permanent disabilities or impairments that existed before his 12/20/00 injury have combined with his permanent disability from his current 12/20/00 injury to limit his overall physical capabilities. It does not seem likely to me that Mr. Richardson would be able to go back and perform the duties of his job as I understand them to be.

Mr. Richardson claimed entitlement to additional worker's compensation. The claimant contended that he was permanently and totally disabled, or, in the alternative, that he had sustained "substantial wage-loss disability in

excess of the impairment rating accepted by respondents #1." The claimant contended that he needed additional medical treatment, which the respondents "wrongfully terminated."

Respondent No. 1 contended that it had paid all appropriate benefits, and that it had not denied reasonably necessary medical treatment. Respondent No. 1 contended that if the claimant had sustained wage-loss disability, then Respondent No. 2 was liable for same. Respondent No. 2, Second Injury Fund, contended that the claimant's disability resulted from the December 20, 2000 injury and was not a combination of conditions; therefore, that the Fund was not liable.

A Functional Capacity Evaluation was carried out on March 6, 2003, with the following conclusions sent to Richard Marron on March 10, 2003:

Mr. Richardson demonstrates the ability to work in the Medium work category over the course of an 8 hour work-day. A job description for the position of rural Mail Carrier was reviewed and compared with Mr. Richardson's functional abilities. Mr. Richardson does meet all the Physical Demand characteristics of this position including Strength in the Medium category, frequent reaching, frequent handling and frequent fingering. He also possess' (sic) the functional ability to perform repetitive work. His eye/hand/foot coordination is also within acceptable limits as is his motor coordination, finger dexterity and manual dexterity. He does benefit from occasional change in postural

position from sit to stand. It was also recommended to the client, that he see his family physician to further assess his blood pressure. Please refer to the chart below for the definition of Medium level work.

The chart included in the evaluation indicated that the claimant could lift 21-50 pounds occasionally, 11-25 pounds frequently, and 1-10 pounds constantly.

Richard Marron informed Respondent No. 1's attorney on March 11, 2003 that he had obtained employment opportunities for the claimant with the U.S. Postal Service. Mr. Marron identified purported opportunities in "casual carrier" and "rural carrier" positions.

Dr. Eubanks corresponded with Respondent No. 2's attorney on March 13, 2003:

I am in receipt of your letter of 2/27/03, with some further questions regarding Mr. Richardson, who was a patient of mine with a lumbar herniated disc. My understanding from reviewing his records in totality (including Dr. Moore's note from 2/10/97), is that Mr. Richardson had had some previous back problems with documented disc degeneration, etc. A review of my records shows that my impression on 2/27/01, was that he had marked degenerative disc disease at L3-4, L4-5 and L5-S1, along with his disc herniation at L3-4 on the left. Your question is, "What permanent condition did Mr. Richardson experience before his 2000 injury and what rating would you assign for that condition?". I do not think I am going to be able to answer that question. I had never seen him before his 2000 injury and of course, cannot give you any firsthand opinion about what his condition was. I can say that according to Dr.

Moore, he did not appear to have degenerative disc disease back then, which he apparently did have by the time I saw him in 2001. I do not have any of his MRI scans from 1997 and I cannot give you any opinion therefore about that, other than the report of Dr. Moore's. It is certainly possible that his disc degenerated significantly in the four years between the MR s. I do not have any information as to what his physical condition was during that time. That makes it impossible also for me to give him any sort of a rating for that condition.

I suppose the most appropriate thing may be to contact Dr. Moore and ask him if he has an opinion as to what permanent condition he had and what rating he would have assigned him for condition....

After a hearing before the Commission, the administrative law judge found, "The claimant has sustained a wage-loss disability of fifty percent (50%) to the body as a whole in addition to his physical impairment for an overall permanent partial disability of sixty percent (60%) to the body as a whole." The administrative law judge found that the claimant's permanent disability was attributable solely to the December 20, 2000 compensable injury, and that the Second Injury Fund was not liable in the claim. Respondent No. 1 appeals to the Full Commission.

II. ADJUDICATION

A. Wage Loss

The wage-loss factor is the extent to which a compensable injury has affected an employee's ability to earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). Ark. Code Ann. §11-9-522(b) provides:

(1) 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.

In the present matter, the Full Commission finds that the claimant sustained wage-loss disability in the amount of twenty-five percent (25%) in excess of the claimant's ten percent (10%) anatomical impairment. The claimant is age 56 and was educated only through the eighth grade. The claimant has an extensive and varied work history consisting almost exclusively of unskilled manual labor. The claimant sustained a compensable injury in December 2000 and subsequently underwent a lumbar microdiscectomy. Dr. Eubanks pronounced maximum medical improvement in December 2001, but stated, "I doubt this man is ever going to be able to go back to manual labor." Dr. Braden assessed a 10% anatomical impairment rating in January 2002, which rating Respondent No. 1 accepted and paid. We do not agree with

the respondents' assertion that the claimant is entitled to zero wage loss disability in excess of the claimant's physical impairment. We recognize that Mr. Marron identified two prospective mail carrier positions for the claimant. Nevertheless, the listed requirements for these positions included necessary skills in mathematics, algebra, and geometry. The Commission again notes that the claimant was not educated beyond the eighth grade.

However, the Full Commission also finds that the claimant was not motivated to return to work. A lack of interest in returning to work impedes our assessment of the claimant's lack of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Although he was doubtful that the claimant could return to manual labor following surgery, Dr. Eubanks did not totally preclude the claimant from ever returning to work. The Functional Capacity Evaluation indicated that the claimant could perform medium work for eight hours daily. It was specifically noted that the claimant could lift 21-50 pounds occasionally, 11-25 pounds frequently, and 1-10 pounds constantly. The claimant has shown an ability to perform work in a number of different settings, even though the claimant may not be able to return to heavy manual labor.

When the Full Commission considers the claimant's age, education, work experience, and the compensable injury, we find that the claimant sustained wage-loss disability in the amount of twenty-five percent (25%).

B. Second Injury Fund

Respondent No. 1 contends that the Second Injury Fund should be solely liable for any wage-loss disability for which the claimant is entitled. The Arkansas Supreme Court has set forth a tripartite test for determining Second Injury Fund Liability: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury, the employee suffered from a permanent partial disability or impairment; and (3) the prior disability or impairment has combined with the recent compensable injury to produce the employee's current disability status. See, Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988).

In the present matter, the only part of the test met to invoke Second Injury Fund liability was the claimant's compensable injury at his present place of employment. Although the claimant testified that he had sustained a number of prior injuries before the December 2000 compensable injury, the record does not show that the

claimant suffered from any prior disability or impairment. We note that Dr. Jim J. Moore had seen the claimant in February 1997 and described a degenerative condition, but Dr. Moore did not state that the claimant suffered from an impairment or disability. Even if the record did show that the claimant had a prior disability or impairment, which we do not find, there certainly was no "combination" with the most recent injury to produce the claimant's current disability status. The Full Commission affirms the administrative law judge's opinion that the Second Injury Fund is not liable in the claim.

Based on our *de novo* review of the entire record, the Full Commission affirms, as modified, the opinion of the administrative law judge. The Full Commission finds that the claimant proved he was entitled to wage-loss disability in the amount of twenty-five percent (25%) in excess of the claimant's ten percent (10%) anatomical impairment. We affirm the administrative law judge's finding that the Second Injury Fund is not liable. The claimant's attorney is entitled to a fee pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an

additional fee of two-hundred fifty dollars, (\$250.00), pursuant to Ark. Code Ann. §11-9-715(b)(2).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority substantially reducing the Administrative Law Judge's wage-loss disability benefit award for loss in earning capacity. In my opinion, the Commission's award is inadequate to compensate claimant for his loss.

While the Majority recognizes that claimant's only job skills and experience is in heavy manual labor, they nevertheless conclude that "claimant has shown an ability to perform work in a number of different settings, even though the claimant may be able to return to heavy manual labor." Such reasoning is contradictory and seemingly ignores Dr. Eubanks' conclusion that claimant could probably never return to manual labor, which is the only type of work he has ever had.

Further, I find that the majority's reliance on Mr. Marron's recommendations and the Functional Capacity Evaluation is misplaced. I find, as did the Administrative Law Judge, that Mr. Marron's testimony regarding claimant's ability to reenter the work force is not credible because Mr. Marron formed his opinion without conducting any tests of claimant's intellectual aptitudes. The only position for which Mr. Marron thought claimant qualified for clearly required skills in excess of his minimal reading and mathematics skills.

It is evident that Claimant's earning capacity has been substantially reduced as a result of his compensable injuries. I find that the factors favoring a wage-loss disability award are satisfied and the Administrative Law Judge appropriately awarded Claimant 50% wage-loss disability. Claimant's physical condition as a result of the compensable injury, coupled with his limited education and training, will greatly impair Claimant's ability to obtain future employment. Claimant has worked as a manual laborer his entire life. Due to Claimant's physical restrictions as a result of compensable injury, he does not have any significant degree of transferrable job skills. Thus, considering Claimant's age, education, work

experience, physical impairment, and his lack of transferable skills, the Administrative Law Judge's wage-loss disability award seems abundantly fair and should be affirmed.

For the foregoing reasons, I dissent.

SHELBY W. TURNER, Commissioner