

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402928

STEVE POTTS, EMPLOYEE	CLAIMANT
FIRESTONE TUBE CO., EMPLOYER	RESPONDENT NO. 1
OLD REPUBLIC INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED DECEMBER 6, 2006

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

Claimant represented by the HONORABLE AARON MARTIN, Attorney
at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J.
DEMORY, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
vacated in part.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an
administrative law judge's opinion filed April 10, 2006.

The administrative law judge found, among other things, that the Second Injury Fund was liable for a 17% permanent disability to the claimant's wage-earning capacity. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the Second Injury Fund is liable for wage-loss disability in the amount of 17%. We vacate the administrative law judge's directive that each respondent hold sums in reserve for five years.

I. HISTORY

Steve Holden Potts, age 56, testified that he performed maintenance work with a master electrician and master mechanic for the employer Crompton Mills from 1966-72. After completing high school, Mr. Potts obtained a bachelor's degree in business administration with a minor in economics. The claimant testified that he had also taken vocational courses in computers, welding, and wiring. The claimant had received additional college training in chemistry and programming. The claimant testified that he worked as an assistant manager in a KFC store from 1972-80, and that he returned to Crompton Mills as a manager from 1980-82.

The claimant testified that he returned to KFC from 1982-87 before beginning work at a drive-through hamburger restaurant. The claimant testified that he began working at Bridgestone in October 1989.

The parties stipulated that the claimant sustained a neck injury on May 3, 1996. The claimant testified that he was injured while pulling a skid. In December 1996, the claimant underwent surgery at C6-7. Dr. Thomas M. Fletcher stated in May 1997, "I would estimate that his residual impairment following surgery is 10% to the body as a whole secondary to the cervical disc herniation that he sustained in the work injury of May, 1996." The parties stipulated that the respondents accepted and paid a 10% rating.

The claimant reported that he was hit in the head by a safety bar at work and jerked his neck in January 2000. The claimant testified, "I got it in the face with a big tube, about a 50-pound tube. It was 355 degrees, and it burned my forehead and burned the hide off the front of my nose and snapped my neck back."

The claimant underwent an anterior discectomy and anterior cervical fusion at C6-7 in March 2001. Dr. John L. Wilson noted in June 2001, "Permanent impairment is 7% to

the body as a whole as a result of his cervical disc and subsequent anterior cervical fusion." The parties stipulated that the claimant "sustained a prior neck injury which resulted in a 7% impairment to the body as a whole on June 27, 2001 and which Respondent No. 1 accepted and paid."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on February 27, 2004: "Employee states he raised a leaf up on a skid, it came back down and hit him in the head. Left side of the forehead area contusion that caused a small cut. Force of blow caused aggravation to old neck injury. Burning sensation down left arm."

The parties stipulated that Respondent No. 1 accepted a compensable injury on February 27, 2004.

The claimant testified that he did not work for the respondent-employer after March 2004, and that he was earning \$16 hourly when he left.

The claimant underwent a C5/6 anterior cervical discectomy with fusion in September 2004.

The claimant testified that he began receiving disability retirement benefits in September 2004.

Dr. Wilson stated in August 2005, "his impairment is 5% over and above what he has previously been awarded as a

result of the exploration of C5-6 and re-fusion with placement of graft.”

The parties stipulated that the claimant “has been assigned a 5% permanent anatomical impairment rating for his 2004 injury over and above his prior permanent anatomical impairment ratings, and the new rating has been accepted by Respondent No. 1.”

A pre-hearing order was filed on November 16, 2005. The claimant contended, among other things, that he had been rendered permanently and totally disabled as a result of his compensable injuries. The claimant alternatively contended that he was entitled to additional permanent partial disability benefits in the form of wage loss. The claimant contended that he was “now unable to earn wages equal to or greater than his average weekly wage at the time of his 2004 injury.”

Respondent No. 1 contended that the claimant had been provided all appropriate benefits for which he was entitled for the February 27, 2004 injury. Respondent No. 1 contended that it had paid the claimant’s medical expenses and temporary total disability compensation. Respondent No. 1 asserted that if the claimant was found to be entitled to

wage-loss disability or permanent total disability, then same was the responsibility of the Second Injury Fund.

A hearing was held on January 11, 2006. At that time, Respondent No. 2 contended that it did not have liability, and that the claimant could not prove entitlement to any degree of wage-loss disability. Respondent No. 2 contended that the claimant was drawing disability retirement from the respondent-employer, and that this benefit was subject to the offset provided for in Ark. Code Ann. §11-9-411.

Counsel for the Second Injury Fund questioned the claimant at hearing:

Q. You and I talked about vocational rehabilitation in your deposition; didn't we?

A. Yeah. I thought you asked me if I would have an objection to meeting or talking to anybody, and I said no....

Q. Now, the employer did not offer you any job placement after this injury, did they? They didn't offer to get a professional job finder to help you find a job; did they?

A. No. They wouldn't even let me come back to work....

Q. Well, would it be true as we're sitting here that as far as you know and remember, you have not asked for a program of vocational rehabilitation?

A. No, I haven't asked for one.

Q. Okay.

A. But if anything would help me go back to work, whatever it would be, I would be willing to try.

The administrative law judge found, among other things, that the claimant had sustained "a 17% permanent disability to his wage earning capacity, in excess of the permanent anatomical impairment accepted by Respondent No. 1." The administrative law judge found that Respondent No. 2, Second Injury Fund, was liable for the 17% permanent disability awarded. Respondent No. 2 appeals to the Full Commission.

II. ADJUDICATION

A. Wage Loss

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.

Ark. Code Ann. §11-9-102(4)(F)(ii)(a) provides that "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment."

Ark. Code Ann. §11-9-505(b) provides:

(3) The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

B. Second Injury Fund

Liability of the Second Injury Fund comes into question only 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. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant sustained wage-loss disability in the amount of 17%. The claimant, age 56, has undergone three neck surgeries and has received three separate anatomical impairment ratings. The

record does not indicate that the claimant is physically able to return to work for the respondent-employer. However, we note that the claimant has a college education and a diverse work history, including previous jobs in management. We find that a 17% wage-loss award is appropriate pursuant to the guidelines of Ark. Code Ann. §11-9-522(b). We also find that the compensable injuries were the major cause of the claimant's impairment and disability, pursuant to Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

Respondent No. 2, Second Injury Fund, contends that the claimant waived vocational rehabilitation and thus is not entitled to wage loss. This contention is entitled to no weight. There is no evidence before the Commission that such a program was offered to the claimant. Nor is there any evidence demonstrating that the claimant waived any program of rehabilitation or otherwise refused to participate in an offered program. The provisions of Ark. Code Ann. §11-9-505(b) therefore do not apply to the instant claim.

The Full Commission also affirms the administrative law judge's finding that the Second Injury Fund is liable for

the claimant's 17% wage-loss disability. The claimant suffered a compensable injury at his present place of employment in 2004. The compensable injury required surgery. Prior to that injury, the claimant had a permanent partial impairment as a result of prior compensable injuries. The evidence demonstrates that the claimant's 2004 injury combined with his preexisting impairment to produce the claimant's current disability, pursuant to *Mid-State Constr. Co., supra*.

C. Offset

Ark. Code Ann. §11-9-411 provides:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

(b) The claimant shall be required to disclose in a manner to be determined by the Workers' Compensation Commission the identity, address, or phone number of any person or entity which has paid benefits described in this section with any claim under this chapter.

(c)(1) Prior to any final award of approval of a joint petition, the claimant shall be required to

furnish the respondent with releases of all subrogation claims for the benefits described in this section.

(2) (A) In the event that the claimant is unable to produce releases required by this section, then the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

The administrative law judge found in the present matter:

11. Respondent No. 1 is directed to comply with the provisions of Ark. Code Ann. §11-9-411 with regard to the period of additional temporary total disability compensation awarded herein.

12. The Second Injury Fund is directed to comply with the provisions of Ark. Code Ann. §11-9-411 with regard to the 17% permanent disability awarded herein.

Respondent No. 1 does not appeal the administrative law judge's finding that the claimant proved he was entitled to additional temporary total disability compensation until May 24, 2005.

However, both respondents appeal the administrative law judge's language in his opinion, apart from the findings of fact, to wit: "Each respondent is also directed to hold in

reserve for a period of five years a sum equal to the potential subrogation claims regarding the claimant's pension plan payments subject to offset under Ark. Code Ann. §11-9-411." The Full Commission does not affirm this language. We note that the provisions of Ark. Code Ann. §11-9-411 are to be strictly construed. *Dooley v. Automated Conveyor Sys., Inc.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004). We are simply unable to determine from the record whether or not the claimant furnished the respondents with releases of all subrogation claims, pursuant to Ark. Code Ann. §11-9-411(c)(1). Nor is there any evidence before the Commission demonstrating the amount of any potential subrogation claims, pursuant to Ark. Code Ann. §11-9-411(c)(2)(A). Finally, we are unable to find any statutory language indicating that the provisions of Ark. Code Ann. §11-9-411(c)(2)(A) apply in any way to the Second Injury Fund.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the Second Injury Fund was liable for a 17% permanent disability to the claimant's wage-earning capacity. The Full Commission finds that each respondent is

entitled to the appropriate "offset" provisions of Ark. Code Ann. §11-9-411. We vacate the administrative law judge's extra-finding directive that each respondent hold sums in reserve for five years. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (2) (B) (ii) (Repl. 2002). For prevailing in part on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____ I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the Majority's findings on wage loss and Second Injury Fund liability, but dissent as to the portion of the decision

finding that the claimant did not show any potential subrogation claim, the amount of any potential subrogation claim, and the finding that Respondent No. 1 and Respondent No. 2 are not required to hold sums in reserve.

At the time of the hearing the parties stipulated that prior to the present injury being litigated, the claimant had previously sustained two prior neck injuries which resulted in impairment ratings paid for and accepted by Respondent No. 1. The parties also stipulated that the claimant sustained another injury in 2004, and that Respondent No. 1 accepted liability for the injury and the resultant impairment ratings.

The claimant's last injury, and the subject of the present litigation occurred on February 27, 2004. On September 11, 2004, the claimant underwent an anterior C5-6 discectomy and C5-6 fusion. As a result of the surgery, the claimant was assigned a 5% rating that was specified as being over and above his prior ratings. On April 8, 2005, the claimant underwent an FCE, which indicated he was able to work in a light work category. Dr. Foley, the claimant's surgeon, concurred in that evaluation and placed the claimant at MMI as of May 24, 2005.

At the time of the hearing, the claimant estimated that his last day of work was sometime in March 2004 and that he retired sometime around September 2004. The claimant said that his retirement was a disability retirement and occurred because of his injury. He indicated his retirement was provided at least in part by the respondents and that it was similar to disability insurance. He indicated that he would receive benefits pursuant to the policy until age 65, and then it would basically become a "normal" retirement. He described it as follows,

It's until age 65. Then at age 65, because I went out on disability - it's not a disability because it was work related; it's just a disability like if you had a car wreck of disability insurance.

The claimant said that he received around \$720 per week pursuant to the policy. When asked if the figure of \$728.32 would be accurate, he answered in the affirmative.

On appeal, Respondent No. 2 argues that they and Respondent No. 1 should be allowed a dollar-for dollar credit and that they and Respondent No. 2 should not be required to hold the amount of the credit in reserve for five years. Respondent No. 2 further argues that the

claimant waived his right to vocational rehabilitation benefits and that he has not shown his last injury was the major cause for his current disability. Respondent No. 1 did not file an appeal, but joined in all arguments raised by Respondent No. 2, with the notable exception of their argument that the Second Injury Fund did have liability for wage loss. The claimant also failed to file an appeal, but argued in his brief that neither respondent should be entitled to a credit, that the claimant did not waive vocational rehabilitation benefits, and that he was entitled to wage loss benefits. Finally, the claimant argued that in the event a credit was given, the respondents should still be required to set aside the funds in reserve in the event the group carrier asserted a subrogation interest.

The Majority now finds that they are unable to determine if the claimant provided the respondents with releases of all subrogation claims pursuant to Ark. Code Ann. §11-9-411 (c). They further find that there is no evidence to demonstrate the existence or amount of any potential subrogation claims pursuant to Ark. Code Ann. §411 (c) (2) (A). However, after reviewing the record, I find that these assertions are in error.

Arkansas Code Annotated §11-9-411 provides in pertinent part,

(c) (1) Prior to any final award or approval of a joint petition, the claimant shall be required to furnish the respondent with releases of all subrogation claims for the benefits described in this section.

(2) (A) In the event that the claimant is unable to produce releases required by this section, then the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

In my opinion, a review of the language of Ark. Code Ann. §11-9-411, indicates that the claimant's receipt of disability funds, was indeed subject to a potential subrogation claim. In fact, I note that on appeal, none of the parties argue that the claimant's receipt of benefits would not be subject to a subrogation claim. Instead, the parties seem to be focused on whether they would be required to hold the amount received by the claimant in reserve for five years. Certainly, if the parties are entitled to a

credit for the receipt of such benefits and the reason for such a credit is to prevent the claimant from a double recovery, it is only logical that the third party disability insurance company which had already paid those benefits would be entitled to be reimbursed. Furthermore, I note that in the past the Court of Appeals has seemingly supported this approach. In particular I note that in the case of Dooley v. Automated Conveyor Sys., Inc., 84 Ark. App. 412, 143 S.W.3d 585 (2004), the Court considered the application of Ark. Code Ann. §11-9-411. Though the Court was considering whether the respondents would be entitled to an offset, in affirming the Commission, they noted the following language of the Commission,

As we understand operation of the statute . . . a workers' compensation carrier will hold in reserve and ultimately reimburse a group carrier for those medical benefits paid for by the carrier. The workers' compensation carrier will also take a dollar-for-dollar offset (i.e., not pay the claimant for the medical provider) for benefits described in Section 411 (a), and the group carrier will provide a release of any potential subrogation claims once it has been reimbursed by the workers' compensation carrier for those medical benefits already paid for by the group carrier.

Id., citing Dooley v. Automated Conveyor Systems, Inc., Full Commission Opinion filed January 8, 2003 (F100282).

In my opinion, the aforementioned language clearly indicates that in the Court of Appeals has concluded that group policies as described by Ark. Code Ann. §11-9-411(a) are subject to dollar for dollar setoffs, but that the respondents are also required to put the amount of the subrogation in reserve. Finally, I note that in the past, this Commission has consistently interpreted the provisions of Ark. Code Ann. §11-9-411 to include both group health insurance policies or disability policies as being subject to subrogation claims. See, Dooley, supra; Thompson v. City of Bentonville, Full Commission Opinion filed September 8, 2005 (E901941, E911438, E911439); See also, Norman v. North Hills Service, Inc., Full Commission Opinion filed November 21, 2005 (F408828).

Likewise, I find the record clearly indicates that the claimant has been receiving approximately \$728.32 in disability benefits since September 2004. Furthermore, I find that it is curious the Majority would be unable to determine the amount of the subrogation claim since that

credit would be for the same amount of the potential subrogation claims.

_____I also disagree with the Majority's assertion that the provisions of Ark. Code Ann. §11-9-411 (c) (2) (A) do not apply to the Second Injury Fund. In my opinion, the language of Ark. Code Ann. §11-9-411 should be reviewed as a whole, rather than on a piecemeal basis or only by looking at each subsection in isolation. In my opinion, the purpose of the statute is to avoid awarding the claimant double benefits while allowing the third party group insurance carrier to recoup benefits that should have been paid by the workers' compensation carrier; not to allow the workers' compensation carrier or the Second Injury Fund to entirely avoid paying the benefits due the claimant. While the statute admittedly does not specifically include a provision naming the Second Injury Fund as a party that has to set aside funds for five years, in my opinion, it is evident, that if they are able to utilize a credit, they must fall under the auspices of the remaining provisions of Ark. Code Ann. §11-9-411. Furthermore, in my opinion, it is simply inconsistent and illogical to allow the Fund to take advantage of the provisions in order to allow them a credit

but then find that the language regarding subrogation somehow does not apply to them.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

SHELBY W. TURNER, Commissioner