

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E706234

FRANKLIN M. RIEDY,
EMPLOYEE

CLAIMANT

TOMLINSON ASPHALT,
EMPLOYER

RESPONDENT NO. 1

ZURICH AMERICAN INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JANUARY 23, 2006

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

Claimant represented by the HONORABLE CONRAD ODOM, Attorney
at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE LEE MULDROW,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an
administrative law judge's opinion filed February 10, 2005.
The administrative law judge found that the claimant was
entitled to permanent disability benefits in addition to an
18% anatomical impairment. The administrative law judge

found that the Second Injury Fund was liable for permanent total disability. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the claimant proved he was permanently and totally disabled. We reverse the administrative law judge's finding that the Second Injury Fund was liable for the claimant's permanent total disability. The Full Commission finds that the claimant's permanent total disability shall be the liability of Respondent No. 1.

I. HISTORY

Franklin Mason Riedy, age 56, testified that he left school during the sixth grade. The parties agreed to the respondents' stipulation that Mr. Riedy's subsequent work history included "essentially truck driving, construction and cutting wood, loader operator, dump truck operator, local truck driver, bulldozer operator and so forth, heavy equipment operator; that he has never, in the information we've obtained, handled a job that would be considered light[.]"

The claimant presented to Dr. Masoud Shahidi in September 1974:

This 25 year old man was admitted for evaluation of headache, dizziness, passing out spell and visual problem. The patient states that he has a throbbing headache that began from the left temporal and then spreads to the whole head. This headache began about 3 months ago after he hit the left side of his head on the iron bar after getting off the forklift. There was an iron bar across the top of the truck and he hit his head on that iron bar while he had his helmet on....

About 7 years ago, he was involved in a motorcycle accident and he received a fracture of the left temple, rupture of the left eardrum and he was comatose for 2 weeks....

Dr. Shahidi diagnosed "1. Headache with fainting spells, cause to be determined, most likely post cerebral concussion syndrome. 2. Cranial defect of the left temporal region."

The claimant underwent a "methyl methacrylate cranioplasty" in September 1974. The claimant's testimony indicated that he had not suffered from headaches following this surgery.

The claimant informed Dr. Leopold H. Garbutt in January 1983 "that several weeks ago when he was stooping and straightened up to get out from under a truck and while standing, twisted his left leg at the knee and felt a stabbing pain on the medial side of the left knee." Dr. Garbutt subsequently performed an arthroscopy of the

claimant's left knee, and the post-operative diagnosis was "Plica syndrome, anterior chamber synovitis, left knee."

Dr. Garbutt advised the claimant in April 1984 "that with a 40% permanent partial impairment to the left lower extremity, he should and could return to work both in welding or in other modes of work."

The claimant testified that he was a truck driver for the respondent-employer. "I drove a truck," the claimant testified, "a dump truck, and I moved equipment around: bulldozers and backhoes and track hoes or whatever equipment, plus hauled gravel and base, asphalt."

The parties stipulated that the claimant sustained a compensable injury to his lower back on May 7, 1997. The claimant testified that he hurt his back while helping to move a heavy machine.

The claimant began treating with a neurosurgeon, Dr. Vincent B. Runnels, in June 1997. Dr. Runnels noted on March 31, 1998 that the claimant was "considerably better," and that the claimant was driving for Clover Leaf Express. Dr. Runnels referred the claimant to Dr. D. Luke Knox for a second opinion in August 1998. In October 1998, Dr. Knox performed an L4-5 decompressive hemilaminotomy, discectomy,

and fusion. Dr. Knox removed surgical hardware on November 1, 1999.

The claimant underwent a Functional Assessment on November 22, 1999, and an assessment specialist reported to Dr. Knox, "Mr. Riedy expressed his readiness to return to work, as well as, his future concerns regarding his low back prognosis. The activities generating the greatest number of low back reports and behaviors involved prolonged sitting, standing, and lifting at level at or below the waist. This patient would appear to function best in an environment encouraging frequent, self-directed changes in position, and with lifting recommendations outlined in the overview pages of this report."

Dr. Knox assigned a permanent impairment rating in March 2000. Dr. Knox noted in August 2000 that the claimant was "quite motivated to return to work."

The record indicates that Dr. Knox performed additional surgery at L3-4 in October 2000.

Dr. Runnels stated on April 23, 2001, "I do think he is disabled for gainful employment unless he would be totally retrained for some sedentary occupation. He should be granted his Social Security and perhaps then he might

undergo some vocational rehabilitation to train for some lighter occupation. I have done a myelogram on him previously, showing spinal stenosis with an epidural cyst at 3-4, followed by surgery by Dr. Knox for 3-4 hemilaminotomies were done with removal of the synovial cyst. He has multilevel disc disease though and I doubt he is going to be able to be gainfully employed at any sort of strenuous occupation."

A pre-hearing order was filed on February 14, 2002. The claimant contended that he had been rendered permanently totally disabled either as a result of his compensable back injury, alone, or as a result of the combined effects of his compensable injury and his "pre-existing permanent head and knee injuries." The claimant alternatively contended that he had "experienced permanent disability greatly in excess of his permanent impairment."

Respondent No. 1 contended that the claimant's disability was "less than total; further, that this claim presents Second Injury Fund liability. This is predicated on the fact that claimant had a prior significant left knee injury which resulted in an assignment of 40% impairment to the left lower extremity. Also, that claimant was involved

in a motor vehicle accident in which he sustained a fractured skull. Claimant has a plate in his head. Residuals from both conditions contribute to the level of claimant's current disability."

Respondent No. 2 contended that the claimant could not prove he was permanently and totally disabled pursuant to Ark. Code Ann. §11-9-522 and 519. Respondent No. 2 contended that the claimant had waived rehabilitation and had refused to cooperate with a program of rehabilitation or job placement, which prohibited the claimant from receiving permanent partial disability in excess of the claimant's physical impairment, pursuant to Ark. Code Ann. §11-9-505. Respondent No. 2 contended, "The claimant's neuropsychological findings are not of a physical nature to constitute a pre-existing disability or impairment pursuant to Mid-State Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). Additionally, the neuropsychological findings were latent pursuant to Purolator Courier v. Chancey, 40 Ark. App. 1, 841 S.W.2d 159 (1992), and therefore not a basis for a combination to prove Second Injury Fund liability. Second Injury Fund v. James River Corp., 53 Ark. App. 204 (1996)." Respondent No. 2

contended, "With the claimant's four surgeries for the last May 20, 1997 injury, there is no combination of injuries greater than the last injury in and of itself."

The parties agreed to litigate the following issues: "1. The extent of permanent disability, including permanent total disability. 2. Whether the Second Injury Fund has any liability in this claim. 3. The date upon which the claimant's healing period ended for the last time. 4. Appropriate attorney's fees."

The claimant underwent a functional capacity evaluation on March 21, 2002: "The results of this evaluation indicate that Franklin Riedy was able to demonstrate a frequent lift of 16 pounds floor to knuckle, 16 pounds knuckle to shoulder, 17 pounds shoulder to overhead, and 12 pounds for the 100 foot carry. Based upon the Department of Labor Standards, this places him in the medium category of work for an 8 hour day."

Dr. Bettye R. Back-Morse performed a neuropsychological evaluation on April 8, 2002 and April 10, 2002 and concluded the following:

This is an abnormal neuropsychological profile. The patient's Halstead Impairment Index falls into the moderate range of impairment. His

Neuropsychological Deficit Scale score falls into the moderate range of impairment, as well.

His current, overall intellectual level falls in the low average range. Academic scores, however, suggest an individual of at least average pre-existing intelligence based on his academic skills, which are far above expectation for an individual with a 5th grade education.

Test patterns are consistent with damage to the left hemisphere, affecting verbal skills and sensory perception for the right body side. There is also evidence for contracoup damage to the right hemisphere, affecting visual memory and fine motor speed and coordination on the left body side. Visual-motor-perceptual skills are marginal.

Psychological testing is consistent with tension, anxiety, physical concerns and chronic pain.

There are no indications of malingering or exaggeration of symptoms.

Dr. Back-Morse's diagnostic impression was "1. Pre-existing head injury. 2. Chronic pain disorder."

Dr. Back-Morse informed Dale Thomas on April 30, 2002, "I would like to address your question in regard to Mr. Riedy's pre-existing head injury. Test patterns suggest that this is an old injury and it is my opinion that it is the result of his motorcycle accident at eighteen years of age."

On November 14, 2002, Dr. Knox returned the claimant to work "with a 15 pound weight restriction and to avoid significant stooping and lifting."

The claimant underwent another functional capacity evaluation on February 6, 2003:

Based upon the results of the FCE performed on February 6, 2003, it is recommended that Mr. Riedy is not able to return to his previous job as a truck driver with a medium physical demands level. It is felt he is not able to perform work to the required capacity of that job, due to numerous functional limitations demonstrated by the client during distraction based testing, methods-time-management testing, timed testing, and strength testing.

Based on the FCE results, it is felt that he would be able to perform work to the sedentary physical demands level, but based on his outward expressions of pain as well as his subjective reports of pain, it is uncertain if he would be able to perform work to the light physical demands level. As an example, refer back to the results of the Valpar 9 test, which is a method-time-management test in which he was able to complete the test, meeting or exceeding the industrial standard for that test, yet he held his back and showed numerous signs of pain during the test. In this case, his performance rating for the test did not match well with his subjective reports of pain, therefore, it is uncertain if he could return to work at the light physical demands level.

It should be noted that Mr. Riedy stated his pain was fairly high on the functional pain scale throughout testing.

On March 7, 2003, Dr. Knox checked a line beside the following sentence on a form provided by CorVel Corporation: "I agree with the results of the Functional Capacities Evaluation completed on 2/6/03. Franklin Riedy is able to work at the Sedentary level."

The claimant continued to follow up with Dr. Knox.

Dr. Knox reported on July 15, 2003, "He is now one year status post lumbar fusion. Apparently he had been rated from his previous surgery. From the standpoint of his new surgery, he would get 1% extra for level and 1% extra for the second operation, this being a total of 17% permanent partial disability to the body as a whole....His functional capacity evaluation can be reviewed and I would defer that to determine his FCE and pursuit of vo-tech retraining."

The parties stipulated that Respondent No. 1 had accepted a permanent physical impairment of 17% to the body as a whole.

The respondents' attorney informed Dr. Knox on October 30, 2003, "Respondents stand ready to provide claimant with assistance for retraining and/or rehabilitation. If you believe Mr. Riedy could participate in a rehabilitation program at present, please let us know what physical

limitations would be recommended." Dr. Knox replied on November 26, 2003, "I would recommend that he pursue a functional capacity evaluation, which could be arranged through our clinic if so desired. After his functional capacity evaluation, which would determine his physical limitations, he could pursue a retraining and/or rehabilitation program."

The claimant underwent another functional capacity evaluation on April 15, 2004:

Based upon the results of testing, the results would indicate that Mr. Riedy is not able to perform work to the required capacity of his pre-injury job (medium). Based upon the observable difficulties with testing involving sitting, standing, walking, low level, above shoulder, and any movement or activity requiring him to bend his back, he would not be able to perform work on a consistent basis. From constant observations of the client during distraction based testing, it would be difficult for this client to perform consistent work even to the sedentary physical demands level. He has no job skills other than driving a truck or heavy equipment and lacks education to attempt occupational rehabilitation which would suggest that he is unable to perform work in a competitive work environment with any consistency. The results of his evaluation were reviewed with Mr. Riedy at the conclusion of the evaluation.

Dr. David A. Davis performed an independent medical evaluation and informed the respondents' attorney on August 16, 2004:

Mr. Riedy indicates a desire to return to work. He is tired of feeling less than a whole person, as being useless. His depression might have been manifested by his drug overdose last week - he was vague on exactly what the goal was with the overdose.

Hopefully he could have vocational rehabilitation in a job which would require sedentary or light activity. It would also be necessary for him to be able to alternate sitting and standing. Often, the absence of a high school degree is a bar to vocation rehabilitation. In his case, he seems to demonstrate the skills expected from a high school graduate, so that his training would hopefully be successful. It does seem very important for him to be able to return to some work place capacity.

Respondents' Exhibits Two and Three contain "Labor Market Research" for northwest Arkansas carried out in September 2004. Respondents' Exhibit Two includes the Job Titles Driver Manager & CSR Load Planners, four Dispatcher positions, and Broker. Respondents' Exhibit Three details Job Titles of Van Driver, part-time, Lot Attendant, School Bus Driver, Security Guard, Newspaper Deliverer, and Pizza Delivery Driver.

A hearing was held on November 22, 2004. The claimant testified:

Q. What types of activities give you the most difficulty?

A. Bending, trying to pick something up off the ground, sitting in a straight- back chair, or standing for a long time.

Q. What about walking?

A. I don't walk far.

Q. How far do you walk before you have to stop and rest?

A. I walk down to the mailbox and then I get back and then I sit for a while....

Q. What about stairs?

A. No, I don't do stairs well....

Q. Can you return to your former work in your condition?

A. No.

Q. Can you return to any employment in your current condition?

A. Well, I'd sure like to, but I just don't know what.

Q. Is it your intent to go back to work?

A. Hopefully, someday, yeah. I've worked all my life. Yeah.

Q. What is it currently that's preventing you from doing that?

A. My back.

The administrative law judge found that the claimant had sustained an 18% physical impairment. The administrative law judge found that the Second Injury Fund was liable for permanent total disability benefits. The administrative law judge found that the claimant did not unjustifiably refuse rehabilitation or job placement assistance. Respondent No. 2, Second Injury Fund, appeals to the Full Commission.

II. ADJUDICATION

A. Anatomical Impairment/Wage Loss

The parties stipulated that Respondent No. 1 accepted a 17% permanent physical impairment rating. The administrative law judge determined that the claimant actually sustained an 18% anatomical rating, and Respondent No. 1 does not appeal that finding. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1). "Permanent total

disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Ark. Code Ann. §11-9-519(e) (1).

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.

In the present matter, the Full Commission finds that the claimant proved he was permanently totally disabled, and that the claimant did not waive vocational rehabilitation. The claimant is age 56, has essentially a fifth grade education, and has performed exclusively manual labor all his life. The claimant was a credible witness, and the record demonstrates that the claimant has been motivated to return to work. The medical reports and functional exams all indicate that the claimant (1) cannot work at all, or (2) that the claimant can perform only sedentary labor. The claimant testified that he met with Dale Thomas, the vocational counselor, only once. Mr. Thomas said they

actually met twice. But in any event, the claimant testified that he did not follow up on the "leads" provided by Mr. Thomas, because of the driving distances in some cases and because of the claimant's significant physical limitations following the compensable injuries and surgeries. The preponderance of evidence does not demonstrate that the claimant could earn remunerative wages while driving a bus or delivering pizzas with an automobile, just two of the potential low-paying jobs identified by Dale Thomas.

The Full Commission affirms the administrative law judge's finding that the claimant proved he was permanently totally disabled.

B. Second Injury Fund liability

The Second Injury Trust Fund is a special fund designed to insure that an employer employing a handicapped worker will not, in the event that the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his employment. Ark. Code Ann. §11-9-525(a)(1). 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. See, Ark. Code Ann. §11-9-525(b); Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988).

Ark. Code Ann. §11-9-525(a)(3) provides, "It is intended that latent conditions which are not known to the employee or employer not be considered previous disabilities or impairments which would give rise to a claim against the fund." The word "latent" applies to that which is present without showing itself. Sanderson & Porter v. Crow, 214 Ark. 416, 216 S.W.2d 796 (1949). Latent means hidden, concealed, or dormant. McDaniel v. Hilyard Drilling Co., 233 Ark. 142, 343 S.W.2d 416 (1961). An injury is latent until its substantial character becomes known or until the employee knows or should reasonably be expected to be aware of the full extent and nature of his injury. Purolator Courier v. Chancey, 40 Ark. App. 1, 841 S.W.2d 159 (1992), citing Arkansas Louisiana Gas Co. v. Grooms, 10 Ark. App.

92, 661 S.W.2d 433 (1983). A latent condition cannot qualify as a prior disability or impairment to trigger Second Injury Fund liability. Second Injury Fund v. James River Corp., 53 Ark. App. 204, 920 S.W.2d 869 (1996).

In the present matter, the preponderance of evidence does not show that a prior disability or impairment "combined" with the 1997 compensable injury to produce the claimant's current disability status. The record does clearly show that the claimant underwent a type of skull surgery after an injury in 1974. The claimant testified, however, that he did not suffer from headaches or other problems after that. The claimant then sustained a knee injury in 1983. Although the claimant testified that the knee injury did "slow him down" in later years, the record does not demonstrate that the claimant's knee impairment combined with the 1997 compensable injury to produce the claimant's current disability status. Nor was there any prior impairment to the claimant's back. The claimant testified that the reason he could not currently work was because of his back, not his prior knee injury or head injury. The claimant credibly testified under questioning by counsel for the Fund that he was not "handicapped" before

the 1997 compensable injury. The claimant testified that the knee injury slowed him down, but if not for the back injury, "I'd still be working."

The Full Commission recognizes the report of a neuropsychologist, Dr. Back-Morse, in April 2002. Dr. Back-Morse stated that there had been damage to the claimant's right hemisphere in 1974. Nevertheless, we can find no basis from the examination by Dr. Back-Morse that there had been a "combination" of prior impairment to the claimant's head and the 1997 back injury to invoke liability of the Second Injury Fund. Further, the claimant's testimony clearly supports a finding that the brain or skull injury was latent and did not affect the claimant at all after his 1974 surgery. A latent condition cannot trigger Second Injury Fund liability. James River Corp., *supra*.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he was permanently totally disabled. We affirm the administrative law judge's finding that the claimant did not waive vocational rehabilitation or job placement assistance. Because the preponderance of evidence does not demonstrate Second Injury Fund liability

pursuant to Ark. Code Ann. §11-9-525(b), the Full Commission finds that Respondent No. 1 shall be liable for the claimant's permanent total disability. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (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), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that Respondent No. 1 is liable for the claimant's permanent total disability, in addition to the claimant's 18% anatomical impairment. A carefully conducted de novo review of this claim in its entirety

reveals that the claimant's preexisting brain damage and knee impairment were not latent disabilities or impairments, and that these disabilities combined with the claimant's most recent compensable injury to create his current disability rating. This places liability for that portion of the claimant's total permanent disability above the 18% anatomical impairment rating for his back injury, squarely on the Second Injury Fund. Therefore, I would affirm and adopt the Administrative Law Judge's decision in its entirety.

The majority has made a thorough presentation of the law regarding Second Injury Fund liability, and the three hurdles that must be overcome in order to establish that liability. See, Ark. Code Ann. §11-9-525(b); See, also, Mid-Sate Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). Furthermore, the record in this claim clearly establishes that the claimant has satisfied the first two hurdles: he suffered a compensable injury at his present place of employment, and he had a permanent partial disability or impairment prior to that compensable injury. However, the majority errs in

finding that the third hurdle has not been cleared. First, the majority finds that the claimant's prior disabilities or impairments do not combine with the claimant's most recent compensable injury to produce the claimant's current disability rating. Second, the majority reasons that the claimant's previous disabilities were latent disabilities, which do not give rise to a claim against the Fund. However, the record demonstrates that the claimant sustained three severe injuries prior his most recent compensable injury, and that each of these injuries left the claimant with a significant amount of known disabilities or impairments. These disabilities or impairments have clearly combined with his most recent compensable injury to produce his current disability rating. Therefore, I find that the Second Injury Fund is liable in this claim for a portion of the claimant's permanent disability benefits.

The record reveals that a motorcycle accident in 1968 left the claimant with a fractured skull, ruptured left eardrum, and comatose for two weeks. Subsequently, in the summer of 1974, the claimant was struck in the left temporal region by a steel beam,

after which incident he began developing severe headaches, vision problems, episodes of dizziness, and syncopal events. The claimant was diagnosed with an epidural hematoma which was evacuated by way of left temporal craniectomy. Subsequently, a metal plate was surgically placed in the claimant's injured area by way of cranioplasty. A physical examination at the time of this procedure revealed possible "organic difficulty" relative to the claimant's temporal lobe injury. During her examination of the claimant in 2004, Dr. Back-Morse concluded that the claimant had, in fact, been left with cerebral dysfunction and organic brain damage in his left parietal and occipital regions due to his prior head trauma. The claimant's cumulative head injury had not been assessed with an impairment rating prior to his compensable back injury of May 20, 1997. However, the Administrative Law Judge, using the AMA Guides, 4th edition, correctly ascertained that the claimant's previous cumulative head injury constituted a permanent physical impairment rating of 14% to the body as a whole.

In addition to his head injuries, in mid-December of 1982, the claimant sustained a compensable injury to his left knee which ultimately resulted in a formal meniscectomy. The claimant was assigned with a permanent physical impairment rating of 40% to the body as a whole as a result of this injury.

The claimant contends, and the majority agrees, that these old injuries do not contribute to his current total disability. This contention is supposedly supported by the claimant's years of subsequent gainful employment after these prior injuries, as compared to his total inability to work after his most recent injury. This conclusion ignores, however, the results of comprehensive medical documentation, including the results of two Functional Capacity Evaluation studies. This medical evidence establishes that the claimant's prior disabilities or impairments clearly combine with his recent compensable impairment to create his current total disability. For example, but for the claimant's brain damage and the emotional and behavioral disabilities that accompany that condition, the claimant might be eligible for retraining in light to sedentary

type employment. However, as demonstrated during the distraction based testing portion of the claimant's FCE study conducted on April 15, 2004, it would be difficult for the claimant to perform consistent work even on a sedentary type basis because of the residual deficits caused by his brain damage. More specifically, according to Dr. Back-Morse's conclusions from her neuropsychological evaluation of the claimant conducted in April of 2004:

This is an abnormal neuropsychological profile. Test patterns are consistent with damage to the left hemisphere, affecting verbal skills and sensory perception for the right body. There is also evidence of contracoup damage to the right hemisphere, affecting visual memory and fine motor speed and coordination on the left body side. Visual-motor-perceptual skills are marginal.

Psychological testing is consistent with tension, anxiety, physical concerns and chronic pain.

Clearly, the claimant's above-described conditions and problems are not the result of a back injury. Moreover, these types of physical and psychological impairments have a direct and proportional

impact on the claimant's current employability. In testimony regarding his head trauma, the claimant admitted that he was in a coma for two weeks after his first head injury, that he almost died on several occasions from this injury, and that he experienced significant prolonged physical complaints as a result of this injury. Furthermore, at the time of his first head injury, the presence of cerebral dysfunction and organic brain disease was indicated through physical examination. These conditions were later confirmed by Dr. Back-Morse's more recent testing. Certainly, then, the claimant has been aware of the deficits caused by his head injuries since the time the first one occurred in 1968. In that regard, the claimant either knew or should reasonably have known of the existence of both the physical damage caused by his head injuries and the resulting cerebral dysfunction that has progressed since the time of his first head injury.

Until the Administrative Law Judge did so, the claimant was not previously assessed with a permanent impairment rating for his head injury. However, the claimant was assigned with a 40% permanent partial

impairment rating to his left lower extremity in April 1984 as a result of his knee injury. Albeit, the claimant was able to return to work after his knee injury, the claimant was most assuredly aware of the substantial degree of physical impairment resulting from his knee injury due to his persisting physical problems. For example, the claimant testified that he experienced significant difficulty with his left leg after his injury and surgical treatment of that injury, and that after having been off of work for a period of two to three years due to his knee injury, he "limped around" for seven to eight years more. The claimant admitted that he still experiences occasional problems with his left knee which limits his ability to twist and turn his body. Given the severity of the claimant's knee condition, his resulting 40% permanent physical impairment was by no means "latent" as that word is interpreted by case law. See, supra, Mid-State Construction; See, also Ark. Code Ann. §11-9-525(b). Certainly, the claimant's permanent residual knee and leg problems were reflected in the his FCE studies, which helped to illustrate that the claimant's current

physical limitations are not solely resultant from his compensable back injury. And, much like his knee injury, the claimant's cumulative head injury produced several permanent residual deficits. The obvious conclusion, therefore, is that the claimant was fully aware of his disabilities and physical impairments prior to his compensable back injury and that these disabilities and impairments were, therefore, not latent conditions.

Notwithstanding the claimant's prior disabilities, limited education, and limited employment skills, it is plausible that he worked well in his capacity as a truck driver in the years following his first two injuries. However, the record demonstrates that the degree of impairment caused by the claimant's prior injuries has now combined with his most recent compensable injury to produce his current disability rating. This is obvious given the claimant's inability to retrain due to the residual effects of his brain damage. In addition, a lack of full range of motion in the claimant's left knee was noted in the report of his FCE study conducted in April of 2004. This is consistent with the prediction of Dr. Garbutt, the orthopaedic

surgeon who repaired the claimant's torn meniscus in 1983, that the claimant would have permanent difficulty squatting. By his own testimony, the claimant's residual knee problems were well known to him throughout the years following his knee injury. Finally, the claimant apparently suffers from debilitating depression and anxiety which impedes his ability to return to work, and which clearly comports with the altered mental state and cerebral dysfunction caused by his head injuries.

The preponderance of the evidence supports a finding that the claimant's previous disabilities and impairments combine with his most recent compensable injury to produce his current disability rating. Furthermore, the preponderance of the evidence clearly demonstrates that the claimant knew or reasonably should have known about his prior disabilities and impairments. Therefore, the claimant's disabilities and physical impairments which resulted from his head and knee injuries are not latent, and the Second Injury Fund should be liable for that percentage of disability benefits to which the claimant is entitled above the 18% permanent physical impairment rating for his back. Based

upon the above and foregoing, I find that the decision of the Administrative Law Judge was correct, and should, therefore, be affirmed and adopted. Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner