

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310205

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| DOUG BOYETTE, EMPLOYEE | CLAIMANT |
| CONAGRA POULTRY COMPANY, EMPLOYER | RESPONDENT NO. 1 |
| GALLAGHER BASSETT SERVICES, INC., TPA | RESPONDENT NO. 1 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT NO. 2 |
| SECOND INJURY FUND | RESPONDENT NO. 3 |

OPINION FILED JANUARY 19, 2007

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, Death & Permanent Total Disability Trust Fund, waived its appearance.

Respondent No. 3, Second injury fund, represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Modified, in part, and reversed, in part.

OPINION AND ORDER

Respondent No. 2, the Second Injury Fund, appeals a decision of the Administrative Law Judge filed on June 9, 2006, finding that the claimant sustained a wage loss

disability of 56% in excess of his anatomical impairment rating, for which the Second Injury Fund is liable. In addition, the Administrative Law Judge found that neither the Second Injury Fund nor the remaining respondents are entitled to an offset against the claimant's Veteran's Administration benefits.

A carefully conducted de novo review of this claim in its entirety reveals that, although the claimant has failed to prove by a preponderance of the evidence that he was rendered permanently and totally disabled as a result of his compensable injury, he has proven that he sustained some degree of disability in excess of his permanent physical impairment rating. Therefore, the decision of the Administrative Law Judge is hereby modified to reflect that the claimant sustained a wage loss disability of 28% above his permanent physical impairment rating as a result of his compensable injury. In addition, the record demonstrates that the claimant failed to prove by a preponderance of the evidence that his pre-existing injury combined with his compensable injury to create a disability greater than his

compensable injury alone and of itself. Therefore, the decision of the Administrative Law Judge finding Second Injury Fund liability is hereby reversed. Moreover, the Administrative Law Judge's finding that the respondents and the Second Injury Fund are not entitled to an offset against the claimant's Veteran's Administration benefits is supported by the facts and law in this claim. Therefore, the decision of the Administrative Law Judge to deny an offset against the claimant's Veteran's Administration benefits should be affirmed. The issues of permanent total disability benefits and additional temporary total disability benefits have not been appealed. Therefore, the decision of the Administrative Law Judge with regard to permanent and total disability benefits and additional temporary total disability benefits should also be affirmed. Finally, the respondents are entitled to a credit for temporary total disability benefits paid during the claimant's times of additional temporary disability.

The claimant sustained an admittedly compensable injury to his back and shoulder resulting from a work

related fall on September 9, 2003. Respondent No.1 accepted the compensability of the claimant's injury and paid benefits accordingly. These benefits included medical treatment under the general direction of Dr. Greg Smart. The claimant was ultimately referred for specialty treatment for his back to Dr. Scott Schlesinger, and for his shoulder to Dr. David Collins.

Upon verifying through diagnostic testing that the claimant had sustained a herniated disc at L5-S1, on October 30, 2003, Dr. Schlesinger performed decompression surgery to repair that herniation. On December 15, 2003, Dr. Schlesinger released the claimant from his care with a 7% permanent physical impairment rating, and he released him to return to regular work activities effective January 6, 2004. The record establishes that the claimant attempted to return to work, but was physically unable to continue due to his back discomfort. Therefore, when the claimant returned to Dr. Schlesinger on January 28, 2004, the doctor took him off of work again through February 28, 2004. In addition, Dr. Schlesinger reported that the claimant had reached

maximum medical improvement for his back, and he revised the claimant's permanent physical impairment rating from 7% to 8% to the body as a whole.

In the meantime, diagnostic studies performed under the direction of Dr. Collins confirmed that the claimant had injured his right AC joint as a result of the incident of September 9, 2003. Therefore, in early December 2003, Dr. Collins advised the claimant that his condition would probably require surgery. Because the claimant consistently declined surgical intervention for his shoulder condition, on February 18, 2004, Dr. Collins released the claimant from his care with a 6% permanent physical impairment rating. Dr. Collins noted that the claimant's shoulder rating would not change with surgical intervention. Moreover, Dr. Collins indicated that the claimant could "pursue activities without restriction".

After his release by Dr. Collins, the claimant continued under the care of Dr. Smart with regard to his back complaints. Dr. Smart ultimately opined that the

claimant could not return to his "regular duties of truck driving".

On August 31, 2004, the claimant returned to Dr. Collins with a recurrence of his shoulder symptoms. Although a subsequent arthrogram showed no evidence of a full thickness tear, Dr. Collins again advised the claimant that he was a candidate for a distal clavicle excision due to a partial tear. On October 7, 2004, Dr. Collins performed a partial claviclectomy of the claimant's right shoulder. On December 10, 2004, Dr. Collins reported that the claimant had reached maximum medical improvement for his shoulder, and he released him to return to work with permanent lifting restrictions. Dr. Collins maintained that the claimant had sustained 6% permanent physical impairment to the body as a whole pursuant to his shoulder injury.

The record reveals that the claimant had a number of preexisting conditions for which he received Veteran's Administration disability benefits prior to his compensable injury. A medical report from Dr. Edward L. Domingues dated August 16, 1971, reflects that the claimant had been

hospitalized at that time for severe right sciatica. In that report, Dr. Domingues states:

He has intermittent back pain off and on for several years since injuring his back while in the service in Viet Nam (sic). ... He was thought to have a herniated nucleus pulposus on the right at the L5, S-1 area.

The claimant testified that this injury stemmed from a combat-related incident that occurred in Vietnam in 1968. The claimant verified that after recovering from this incident, he finished his tour of duty and was honorably discharged from the military. The claimant admitted having subsequent problems with his back for which he received periodic medical attention. In addition to his back problem, the claimant was diagnosed with a respiratory condition (possible COPD) in the early 1990's, and with post traumatic stress syndrome in approximately 1996. Both of these conditions have been attributed to the claimant's military service. Since his compensable injury, the claimant has been diagnosed with diabetes, which is also attributed to his military activities.

The record reveals that the claimant's preexisting service-related conditions did not affect his ability to perform work activities prior to his compensable injury. To illustrate, the claimant sustained his original back injury in 1968 when a vehicle in which he was riding was attacked by enemy forces. The claimant received treatment for that injury in Alabama, then returned to Vietnam to finish his tour of duty. After being honorably discharged from the military, the claimant worked as a mechanic at a car dealership, then briefly as a door-to-door insurance salesman. Thereafter, the claimant drove an asphalt truck for approximately two years before ultimately finding employment with the respondent employer. The claimant explained that although the respondent employer has changed hands several times during his 32 year tenure there, his primary duty - truck driving - has remained essentially the same since his hire. The claimant testified that his preexisting conditions did not hinder his employment activities with the respondent employer. In support of this testimony, the claimant stated that he has received a DOT

card every year since he began his employment with the respondent employer, up until the time of his compensable injury. The claimant explained that he has had to pass a yearly physical examination in order to receive his DOT card.

The claimant maintains that he has been unable to work since his compensable injury due to residual symptoms from his compensable injury. But for his compensable injury, the claimant asserts that he would still be driving a truck for the respondent employer.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that she sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998).

The claimant has proven by objective medical

evidence that he sustained permanent physical impairment as a result of his compensable injury. As previously mentioned, the claimant sustained a 14% permanent physical impairment as a result of the physical damage that he sustained to his back and shoulder on September 9, 2003. Moreover, the respondent carrier has paid benefits according to this rating. Further, although the claimant has failed to prove by a preponderance of the evidence that he is permanently and totally incapacitated from earning a livelihood as a result of his compensable injury, he has proven by a preponderance of the evidence that his capacity to earn wages has been diminished as a result of his compensable injury. Therefore, the claimant is entitled to wage-loss disability benefits. Finally, the claimant has proven that he is entitled to wage-loss disability benefits over the Second Injury Fund's contention that he is precluded from those benefits pursuant to Ark. Code Ann. §11-9-505.

First, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App.

232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education, and work experience. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the workers' age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers' future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Emerson Electric v. Gaston, *supra*.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002).

Although the claimant testified that he is limited by his current physical condition, he testified that he was not physically restricted by any prior disability. Nor does

the record contain evidence that the claimant was given permanent restrictions by a physician due to his prior back injury. In addition, although there is medical evidence contained within the record to substantiate that the claimant sustained a prior back injury, there is no such proof that the claimant's prior back injury was assigned a permanent impairment rating by a physician. The claimant sustained 8% permanent physical impairment as a result of his current, compensable back injury. The claimant sustained 6% permanent physical impairment as a result of his compensable shoulder injury. The claimant's only current physical restrictions from either his old injury or his current compensable injury are lifting restrictions imposed by Dr. Collins from his shoulder impairment. By his own testimony, the claimant worked without hindrance or restrictions prior to his compensable injury. Therefore, although ratable, his prior back injury apparently did not contribute to his current alleged diminished capacity to work. Because the claimant suffered a decrease in earning capacity only since his compensable injury, we find that he

has failed to prove that his current degree of anatomical impairment is of such magnitude to create wage-loss of 56% as awarded by the Administrative Law Judge.

Second, the claimant testified that he suffers from other, service-related, conditions that are deemed by the Veteran's Administration to be disabling. As noted in the record; however, the Veteran's Administration uses a different method of assigning disability ratings than we use to assign anatomical impairment ratings for workers' compensation injuries. For example, the claimant suffers from post traumatic stress disorder, for which, according to the record, he has been assigned 70% disability by the Veteran's Administration. In addition, the Veteran's Administration has assigned the claimant with 40% disability due to his back, and 20% disability for his diabetes, which was diagnosed after his compensable injury. Therefore, according to the Veteran's Administration, the claimant is currently more than 100% disabled as a result of his combined conditions. However, as previously discussed, for workers' compensation purposes, the claimant has sustained

only a 14% permanent physical impairment as a result of his combined back and shoulder conditions. The claimant testified that he was willing and able to work prior to his compensable injury, even with the level of disability that he was assigned by the Veteran's Administration. Because the claimant contends and the record establishes that his current inability to work is due to his compensable injury, he has failed to prove that he sustained a wage-loss of 56%. This amount of wage-loss is particularly excessive in view of the fact that, notwithstanding Dr. Smart's opinion that the claimant should not return to truck driving, none of the claimant's treating physicians have deemed him unable to work, and only Dr. Collins has restricted him from returning to work in some capacity. The claimant is in his late fifties, has his GED, is a military veteran, and has supervising, dispatching, and office experience. Therefore, the claimant is still employable at this time, and he has transferable job skills. Finally, the claimant currently receives from the Veteran's Administration and retirement income, monthly benefits near the equivalent of what he

earned at the time of his compensable injury. The claimant admitted in testimony that although he would be willing to return to work, he has little incentive to return to a job paying less than what he earned at the time of his compensable injury. Therefore, the claimant shows a lack of motivation in returning to work, and by his own admission, has done nothing in the way of looking for acceptable employment since he took early retirement. Based on the above and foregoing, we find that the claimant has proven by a preponderance of the evidence that he sustained a wage loss disability of 28% above and beyond his anatomical impairment rating.

With regard to Second Injury Fund liability, the preponderance of the evidence shows that the Second Injury Fund is not liable for wage-loss benefits above and beyond the claimant's anatomical impairment. The underlying purpose of the Second Injury Fund statute is to limit the employer's liability to the amount of disability or impairment suffered by the employee during his employment with that employer, and to thereby encourage hiring of the handicapped. Mid-

State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988); See, also, Ark. Code Ann. §11-9-525. When it is determined that through the combination of a preexisting condition and a current compensable injury the claimant has sustained a disability greater than would have resulted from either of them alone, the statute provides that the claimant shall be fully compensated for his current disability. Weaver v. Tyson Foods, 31 Ark. App. 147, 790 S.W.2d 442 (1990); See, also, Ark. Code Ann. §11-9-525. The employee is thus fully protected in that the Second Injury Fund pays the worker the difference between the employer's liability and the balance of his disability or impairment which results from all disabilities or impairments combined. Mid-State, supra. But the statute does not provide that the Second Injury Fund shall compensate the claimant for his preexisting condition, for which there are several obvious reasons. Id. First, if the preexisting condition was the result of a compensable injury, the claimant has presumably already been fully compensated for it. Id. But if the preexisting condition was from a nonwork-related injury, or

a congenital defect or disease process, it is not covered by workers' compensation law and neither the employer nor the Second Injury Fund is liable. Id. To hold otherwise would make workers' compensation general disability insurance. Id. Further, this would tend to increase premiums to be paid by insurance carriers and self-insured employers, and discourage the hiring of handicapped workers. Id.

The guidelines for Second Injury Fund liability, codified at Ark. Code Ann. §11-9-525(3)&(4), state that the Second Injury Fund may be subjected to liability if a claimant suffers from a permanent impairment, whether or not that impairment is the result of a compensable injury. Second Injury Fund v. Furman, 60 Ark. App. 237, 961 S.W.2d 787 (1998). Moreover, a preexisting impairment can either be work related or nonwork-related and need not include wage loss. Id.

The liability of the Second Injury Fund comes into question after three hurdles have been overcome. Weaver v. Tyson Foods, 31 Ark. App. 147, 790 S.W.2d 442 (1990); citing, Mid-State Construction Co. v. Second Injury Fund,

295 Ark. 1, 746 S.W.2d 539 (1988); see, also, Chamberlain Group v. Rios, 45 Ark. App. 144, 871 S.W.2d 595 (1994).

First, the employee must have suffered a compensable injury at his present place of employment. Mid-State Construction, supra; Weaver, supra; Chamberlain, supra. Second, prior to that injury, the employee must have had a permanent partial disability or impairment. Mid-State, supra; Weaver, supra; Chamberlain, supra. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. Mid-State Construction, supra; Weaver, supra; Chamberlain, supra. In addressing Second Injury Fund liability, the determination of whether an employee suffered a preexisting impairment in addition to any disability which resulted from a work-related injury is a factual one and to be made by the Commission. Chamberlain Group v. Rios, supra. However, before the Second Injury Fund can be liable to pay for an injury, the employee's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause of the

impairment. See Mid-State, supra. As the court in Mid-State explained, “[i]t is the substantial nature of the impairment which is emphasized...” Id.

In the present claim, it is undisputed that the claimant suffered a compensable injury while employed with the respondent. Thus, the first hurdle set forth in Mid-State, supra, has been overcome. The claimant has overcome the second hurdle by proving that he had a previous injury which was ratable under the AMA Guides. Since the record contains no evidence that the claimant was assigned a rating for his prior back injury, we must estimate the amount of impairment that the claimant may have sustained as a result of that injury. Using Table 75 of the AMA Guides to the Evaluation of Permanent Impairment, 4th edition, the claimant would have sustained 5% permanent physical impairment as a result of a lumbar herniation, un-operated on, with residuals. Based on the medical records pertaining to that injury, it is obvious that the claimant sustained a back injury at L5-S1 in the late 1960's, and due to his documented periodic medical treatment, it is obvious that

the claimant had residual symptoms as a result of that prior back injury. Therefore, the claimant's prior anatomical impairment would be 5% to the body as a whole for his back. See Mid-State, supra. Finally, the preponderance of the evidence fails to show that the claimant's prior disability combined with his recent compensable injury to produce his current level of disability. This is supported by the undisputed fact that although the claimant received periodic medical treatment for his back condition, he was able to maintain employment and work without hindrance from the time of his first back injury until the time of his recent compensable injury. Further, although the medical records demonstrate that the claimant's current compensable back injury was at the same level, L5-S1, as his first back injury, it is abundantly clear that the claimant's previous back injury in no way restricted or hindered the claimant in his ability to perform his employment. The claimant's present compensable injury alone and of itself is the basis for the decrease in the claimant's wage earning capacity. Therefore, we find that the claimant has failed to overcome

the three hurdles set forth in Mid-State, supra, to show that the Second Injury Fund has liability for his current wage-loss. Accordingly, we find that the decision of the Administrative Law Judge assessing the Second Injury Fund liability must be reversed.

As for respondents' entitlement to a credit, Ark. Code Ann. §11-9-411(a) provides as follows:

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.

The respondent Second Injury Fund contends that it is entitled to an offset for the disability benefits paid to the claimant by the Veteran's Administration, and that by denying this offset, the claimant will receive what amounts to a double-recovery. This issue has been addressed by the

Commission and the courts in prior decisions. For example, in Henson v. General Electric, Full Commission Opinion filed August 31, 2006 (F106883), the Commission reversed the decision of the Administrative Law Judge finding that the respondent was not entitled to a credit pursuant to Ark. Code Ann. §11-9-411 for the claimant's long-term disability and disability retirement benefits. In reaching its conclusion, the Commission stated as follows:

If we did not allow this reimbursement to take place, the claimant would essentially be paid twice for his wage loss, which is not the intent of the Act.

However, later in its opinion, the Commission noted that long-term disability and disability retirement benefits are the types of benefits which subsection 411 is intended to address. The Commission further noted that disability retirement is not the same thing as regular retirement. More specifically, the Commission stated:

An employee becomes eligible for a disability retirement by virtue of injury, not by meeting the minimum number of years for a normal retirement.

In the case of Dollarway School District v. Lovelace, ___ Ark. App. ___, ___ S.W.3d ___ (February 23, 2005), the Court upheld the Commission's decision to deny an offset to be taken against life insurance proceeds. In support of its decision the Court of Appeals stated as follows:

Our statutes are to be strictly construed and the plain language of this section [referring to subsection 411] includes no mention of life insurance, death or dependency benefits. See Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Similarly, in Norman v. North Hills Service, Inc., Full Commission Opinion filed November 21, 2005 (F408828), the Commission found that since payments made to the claimant were "not made by an insurer", an offset could not be taken.

In view of the above decisions, the Veteran's Administration benefits do not fall within the laundry list of benefits considered in subsection 411, for which a credit or offset can be claimed. Although the Commission indicated in Henson, supra, that any benefits designed to compensate

an employee for a disability caused by an injury fall under the benefits intended by subsection 411, the claimant makes a compelling argument that his Veteran's Administration benefits are paid by reason of his injuries sustained while in the service of the United States, and not in contemplation of a work-related injury for which other disability funds are designed to address. See Socha v. Northwest Airlines, Full Commission Opinion filed April 7, 2006 (F500085). Finally, the claimant had received the benefits in question for many years prior to his compensable injury. Based on the above and foregoing, we find that the respondents are not entitled to a credit pursuant to Ark. Code Ann. §11-9-411, against the Veteran's Administration disability benefits the claimant has received since the time of his compensable injury.

Finally, the Second Injury Fund's argument that Ark. Code Ann. §11-9-505 precludes the claimant's award of wage loss benefits is without merit because the claimant did not refuse to participate in a program of rehabilitation. The record demonstrates that such a program has not been

offered to the claimant by any entity other than the Veteran's administration. Moreover, although an employee may request such a program, he is not required by our statute to elect to do so. See Ark. Code Ann. §11-9-505(4). Therefore, the claimant has not, in this instance, waived his rights to vocational benefits, and is not precluded by subsection 505 from receiving benefits.

Based on the above and foregoing, we find that the Administrative Law Judge's Opinion should be modified to reflect that the claimant is entitled to 28% wage-loss disability benefits, and must be reversed with regard to Second Injury Fund liability.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part and dissents, in part.

CONCURRING AND DISSENTING OPINION

_____I concur with the Majority's opinion on all issues in this claim except for the level of Claimant's wage loss disability benefits.

_____I respectfully dissent without opinion with regards to the modification of the level of the Claimant's wage loss benefits.

PHILIP A. HOOD, Commissioner