

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409140; F509580; F611070

MELVIN SAMS, EMPLOYEE	CLAIMANT
CRABTREE RV CENTER, INC., EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

**ORDER FILED JULY 23, 2007**

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

Claimant represented by HONORABLE MATTHEW KETCHAM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

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

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

ORDER

Presently before the Commission is claimant's Motion to Supplement the Record. After consideration of claimant's motion, respondents' responses thereto and all other matters properly before the Commission, we find that the claimant's motion must be, and hereby is, granted as modified.

At the hearing held on December 14, 2006, no evidence was introduced of a physician assessing the claimant with a physical impairment rating. The parties agreed to leave the record open to obtain the deposition of Dr. Gary Moffitt. During opening statements, both respondents contended that the claimant has not been rendered an impairment rating. When offered an opportunity to respond to these contentions, counsel for claimant only requested the opportunity to speak to counsel for respondents off the record.

In his deposition Dr. Gary Moffitt testified that the claimant's condition was permanent. When asked what rating he would assign the claimant, Dr. Moffitt declined to assess an impairment rating off the top of his head. When asked how long it would take him to review the criteria and render a rating, Dr. Moffitt said he could do it within a week or two. Subsequent to his deposition, both counsel for claimant and counsel for respondent no. 1 wrote to Dr. Moffitt inquiring into his assessment of the claimant's permanent impairment. As both inquiries offered slightly different facts for rendering a rating, Dr. Moffitt's responses to each letter provided differing ratings for the

claimant. When counsel for claimant sought to have these two letters assessing different ratings introduced into the record, counsel for respondent no. 1 objected. In a telephone hearing held March 9, 2007, the Administrative Law Judge ruled that the letters containing Dr. Moffitt's ratings would not be admitted into evidence finding that there was never an understanding between the parties whether the impairment ratings sought after the deposition would be admitted into evidence. In her opinion filed March 12, 2007, the Administrative Law Judge found, based upon the A.M.A. Guide to the Evaluation of Permanent Impairment, 4<sup>th</sup> edition, that the claimant sustained a 7% whole body impairment from his 1998 surgery and an additional 2% impairment resulting from his compensable injury.

Counsel for claimant contends in his Motion to Supplement the Record that the letters from Dr. Moffitt form the basis for his cross-appeal. In her response to said motion, counsel for respondent no. 1 averred:

Dr. Moffitt did not give Claimant an impairment rating when his deposition was taken. While Dr. Moffitt indicated that Claimant might be entitled to a rating and while the parties wrote to him to determine what rating might be warranted and what he might base a

rating on, no discussion was had among the parties as to what would occur after any rating might be issued by Dr. Moffitt. No agreement was made to submit any rating reports; no agreement was made to obtain any necessary clarifying reports from Dr. Moffitt or to take his supplement deposition, and no agreement was made to somehow address before the judge whether or not a rating was given pursuant to AMA Guides, 4<sup>th</sup> Edition.

In addition to these factual questions, counsel for respondent no. 1 also argued the legal points that (1) A.C.A. § 11-9-705(c) requires each party to introduce all evidence at the hearing; (2) Commission Rule 25 requires all legal and factual issues to be developed at the hearing and all claimant requested was for Dr. Moffitt's evidentiary deposition to be made a part of the record, which it was; (3) the evidence sought to be admitted did not comply with the Prehearing Order; and, (4) as the Administrative Law Judge found the claimant entitled to an impairment rating despite the omission of any medical evidence assessing a rating the admission of the requested evidence is unnecessary.

Having considered all the points made by the parties with regard to the claimant's motion, we find that

Sams - F409140  
F509580 & F611070

-5-

the claimant should be allowed to profer said evidence in order to make his argument on appeal as to whether the Administrative Law Judge properly excluded the evidence. The claimant is hereby instructed to argue both the evidentiary issue and substantive issues on appeal in his brief. Having noted that both respondent no. 1 and the Second Injury Fund have already filed their briefs on appeal, these parties are hereby granted an additional 15 days after the claimant's brief is filed to respond.

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

KAREN H. McKINNEY, Commissioner

---

PHILIP A. HOOD, Commissioner