

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409778

RONALD STANDLEY, EMPLOYEE	CLAIMANT
HUGG & HALL EQUIPMENT, EMPLOYER	RESPONDENT NO. 1
SAFECO INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
PRUDENTIAL FINANCIAL	DISABILITY CARRIER

OPINION FILED JANUARY 23, 2007

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 GUY ALTON
WADE, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed in part as
modified; reversed in part.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an
administrative law judge's opinion filed May 26, 2006. The
administrative law judge found that the claimant proved he
sustained wage-loss disability in the amount of 60% and that

Respondent No. 2 was liable for the claimant's wage-loss disability. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion in part as modified and we reverse in part. The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%, but that Respondent No. 2. is not liable.

I. HISTORY

Ronald Clint Standley, age 50, testified that he left school after the tenth grade. Mr. Standley agreed at hearing that he was "fairly good" at reading and writing. The claimant described his work history as involving general labor, including construction. The claimant testified that he had occasionally suffered from right shoulder problems as a result of a motor vehicle accident.

The claimant testified that he injured his knee on two occasions in the 1980's, and that he underwent knee surgery. The claimant agreed on cross-examination that cartilage was removed from his knee. Following surgery, the claimant testified, "I couldn't stand on this leg (pointing on right knee) very long....It pops, swells. If I'm on it too long it swells up. I have to elevate it and get off of it and I

have to really watch it. I had to take it easy on weekends to let it rest up to where I can work all next week."

The attorney for Respondent No. 1 cross-examined the claimant:

Q. Now, after your knee injury did your knee ever get to the point where you didn't have to think about it whenever you were working at these different construction companies?

A. I had to think about it every day. I had to watch where I put that leg....

Q. Now, it would continue to swell; is that right?

A. Yes, sir.

Q. Your knee would?

A. Yes, sir....

Q. Now, did your knee ever quit giving you pain or problems?

A. No.

The claimant testified that he had to stop working in construction because of his knee, and the claimant agreed at hearing that he ultimately received a commercial driver's license. "I went to truck driving and I was still doing the construction type," the claimant testified. "I was still hauling red dirt on the construction jobs because, you know,

that was what I've always loved doing and that's what I know."

The record indicates that the claimant began working for Hugg & Hall in about May 1998. The claimant testified that he was a truck driver.

The parties stipulated that the claimant sustained a compensable injury to his neck and back on September 2, 2004. The claimant testified that while loading a forklift, "I felt this burning sensation in my back and it just kept getting worse and worse and by the time I got - I went ahead and chained down, and by the time I got to the terminal it was hard for me to stand up straight."

A physician reported the following on September 2, 2004:

Gradual onset of back pain today while unloading a forklift from his semi trailer. Drives a semi and does a lot of climbing up and down. Pain radiates into top of both legs. Has numbness in his feet. Pain has become very severe and now can barely walk.

2 years ago hurt back on job, saw physician but never had any x-rays or MRI to his knowledge. Gradually recovered but has had mild recurrent low back pain and stiffness ever since. Rarely will take an aspirin but nothing else. Has to sleep at night on his side with knees bent.

It was also noted that the claimant had undergone "Right knee surgery - laparoscopic." The claimant was diagnosed as having lumbar back pain and bilateral leg pain.

An MRI of the claimant's lumbar spine was taken on September 9, 2004, with the following impression:

"Multilevel degenerative changes, most prominently, at L4-5 and L5-S1, there are moderate degrees of bilateral neural foraminal narrowing in conjunction with annular disc bulges and facet arthropathic change. Moderate disc space narrowing is seen at L5-S1."

Dr. James B. Blankenship noted on September 22, 2004, "He has had some back problems ever since a work injury two years ago, but this stabilized on its own without any significant treatment and he has tolerated his degree of back pain since then. He had been loading a forklift on to a truck and then driving back to his shop, he noticed a rather marked increase in his back pain. He continued working that day, but had significant back pain and has not worked since then."

Another lumbar MRI was taken on November 9, 2004, with the following impression: "1. Multilevel degenerative changes with multilevel changes of endplate edema noted. 2.

Mild to moderate lateral recess stenosis at L4/5 with lateral disc protrusions bilaterally. 3. Milder lateral recess stenosis and neuroforaminal stenosis at L5/S1."

The claimant's employment with Hugg & Hall was terminated effective January 7, 2005.

The following impression resulted from an MRI of the claimant's cervical spine, taken on January 24, 2005: "1. Cervical canal stenosis, C4-5, C5-6, and C6-7, as described. 2. Disc desiccation at all cervical levels. 3. Spondylosis and generalized bulging annulus, C3-4, C4-5, C5-6, and C6-7. 4. Multilevel neural foraminal narrowing, as described."

Dr. Blankenship noted on May 3, 2005, "The patient states currently his neck, as well as his lower back pain are giving him significant difficulty."

In June 2005, Dr. Blankenship performed "corpectomy and reconstruction from C4 down through C7 with anterior plating."

Dr. Blankenship noted on August 25, 2005, "He has expressed an interest in trying to get back to work and I have praised him for that. I told him, unfortunately, I obviously can't release him to go back to work without

restrictions and I certainly do not feel like the job he was originally doing is a job that he is going to be able to do. What I would like to do is to get him back to some type of limited activity for a while, working four hours a day for a couple of weeks and then back to eight hour work days. He has a permanent weight lifting restriction placed on him of 25 lb. He knows how to lift when he needs to and he should do no prolonged stooping or bending."

The record contains the following recommendations from a Functional Capacity Evaluation Summary Report dated November 4, 2005:

Based on the results of the Functional Capacity Evaluation performed on 11/4/05 it is recommended that Mr. Standley cannot perform work to the required capacity of his pre-injury job. He was unable to lift to the medium physical demands level that his job was classified as and he was unable to sit for the required amount of time to drive a truck. He would be able to perform work to the sedentary physical demands level with lifting up to 10 pounds on an occasional basis (0-33% of the day). He would be restricted from lifting above shoulder but would be able to perform work above shoulder on an occasional basis. He would be able to sit on a frequent basis (34-66% of the day) with the freedom to stand as needed once or twice an hour. It is felt that Mr. Standley would benefit from vocational rehabilitation to find a new occupation for the client that does not require lifting more than 10 pounds and that does not require the patient to stay in a seated position for extended periods of time.

Counsel for the Second Injury Fund questioned the claimant with regard to the Functional Capacity Evaluation:

Q. They said you could bend or stoop for as long as 26 minutes. They tested you and you went that long. Do you remember that?

A. Well, yeah. I mean, as long as I didn't - I couldn't squat down on this floor for no 26 minutes on this knee (pointing on right knee), no. As long as I had this knee (pointing on left knee) out, yeah, I could - this other leg could stay down that long.

The parties stipulated that the claimant's healing period ended on November 10, 2005.

Dr. Blankenship stated on November 23, 2005:

1. I do feel like Mr. Standley has reached Maximum Medical Improvement as of 11/10/05.
2. He has sustained a partial impairment. This is solely related to his cervical injury. His lower back pain actually predates his neck pain. It is my medical opinion, based on a reasonable degree of medical certainty that the gentleman's cervical spine problems and need for surgery was directly related to his work related injury. I also feel like his lower back pain is related to his work, but certainly is superimposed on rather significant degenerative disc disease. Without an acute disc herniation, the patient really would not qualify for any impairment based on the IV Edition AMA Guidelines....

It is my medical opinion that the patient qualifies for a partial permanent impairment of 10% to the body as a whole....He does have pre-existing degenerative changes, but I feel like the 10% encompasses his work related injury. Once again, this is for his cervical spine. His lower

back condition currently would not qualify for a rating based on the current Worker's Compensation guidelines....

The parties stipulated that Respondent No. 1 had accepted an impairment rating of 10% to the body as a whole.

A pre-hearing order was filed on February 1, 2006. The claimant contended that he was "unable to return to work making the same or similar wages," so that he was entitled to permanent partial disability "in excess of the rating."

Respondent No. 1 contended that the claimant was "not entitled to any benefits in excess of the impairment rating. Alternatively, if the claimant is determined to have sustained a wage loss disability, it shall be the responsibility of the Second Injury Fund."

Respondent No. 2 contended that it would "state its contentions following discovery."

The pre-hearing order listed the following issues for litigation: "1. Claimant's entitlement to permanent benefits in excess of the 10% rating. 2. Second Injury Fund liability. 3. Attorney fee."

A hearing was held on April 19, 2006. Counsel for Respondent No. 1 cross-examined the claimant:

Q. Now, since the injury in September of '04 you have not made any effort to look for work, have you, sir?

A. No.

Q. You've not applied for any jobs?

A. No, sir....I just called Hugg & Hall and talked with them....

Q. Now, does your knee continue to bother you today?

A. Yes, sir.

Q. Now, are you able to do any kind of squatting or bending, -

A. No.

Q. - stooping, anything like that?

A. As long as I don't bend this knee (pointing on right knee). You know, I can bend - I can get down on this knee (pointing on left knee) and keep this one out (pointing to right knee). I cannot squat down....

Q. Now, is it your opinion that because of your right knee and your right shoulder problems and your current back complaint and condition that you're not able to work?

A. Yes.

Q. Is that what you're telling Judge Stewart today?

A. Yes, sir.

The administrative law judge found, in pertinent part:

2. Claimant has met his burden of proving by a preponderance of the evidence that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole.

3. The Second Injury Fund is liable for payment of benefits attributable to claimant's loss in wage earning capacity.

Respondent No. 2 appeals to the Full Commission.

II. ADJUDICATION

A. Wage Loss

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).

The administrative law judge found in the present matter, "Claimant has met his burden of proving ... that he has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole." The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%.

The claimant, who the Full Commission finds was a credible witness, has barely a 10th grade education but he can read and write. The claimant's work history is almost entirely general labor and truck driving. The claimant had problems in his shoulder, back, and right knee before the compensable injury. It does not appear that the claimant returned to work for the respondents after the September 2004 compensable injury to his neck and back. The claimant's employment was terminated in January 2005. It is also improbable that the claimant will ever be able to return to manual labor or extensive truck driving. The Functional Capacity Evaluation of November 2005 set forth permanent work restrictions. The claimant also received a 10% anatomical impairment to his neck.

However, the claimant testified that he had not tried to seek any sort of employment following his termination from the respondent-employer. The claimant's lack of motivation to seek work impedes our assessment of his wage-loss disability. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000). The Full Commission finds that the claimant proved he sustained wage-loss disability in the amount of 40%.

B. Second Injury Fund

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. See, Ark. Code Ann. §11-9-525(a) *et seq.* 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).

The administrative law judge found in the present matter, "The Second Injury Fund is liable for payment of benefits attributable to claimant's loss in wage earning capacity." The Full Commission does not affirm this finding. The claimant testified that he injured his knee on two occasions in the 1980's, and that he underwent cartilage

removal from his right knee. The claimant testified that his knee continually gave him problems after that time. The claimant testified that, because of prior problems with his right knee, he was forced to stop working manual construction labor, obtaining a commercial driver's license to become a truck driver.

Following the September 2004 compensable injury, it was noted in passing that the claimant had undergone laparoscopic knee surgery. Nevertheless, there is no evidence before the Commission demonstrating that the instant claimant had a preexisting rateable condition pursuant to the Guides to the Evaluation of Permanent Impairment, Fourth Edition. The claimant began working for the respondent-employer in May 1998. The record contains an Examination To Determine Physical Condition Of Drivers conducted in May 1998. The claimant did not indicate in that Examination that he had sustained a prior impairment to the knee or shoulder.

Nor does the record demonstrate that there was a prior disability or impairment which combined with the recent compensable injury to produce the current disability status. The claimant testified that he was unable to fully

participate in the Functional Capacity Evaluation because of his impaired right knee. However, there was no indication in the Functional Capacity Evaluation, administered in November 2005, which indicated that the claimant's knee was a hindrance to his activities. Nor did Dr. Blankenship indicate that a prior impairment combined with the compensable injury to produce the claimant's current disability status. The Full Commission therefore finds that the Second Injury Fund is not liable for the claimant's 40% wage-loss disability.

Based on our *de novo* review of the entire record, the Full Commission affirms in part as modified the opinion of the administrative law judge. We find that the claimant proved he sustained wage-loss disability in the amount of 40% to the body as a whole. The Full Commission reverses the administrative law judge's finding that Respondent No. 2, Second Injury Fund, is liable for the claimant's wage-loss disability. We find that the claimant's wage-loss disability shall be the liability of Respondent No. 1. Pursuant to Ark. Code Ann. §11-9-411(a), Respondent No. 1 is entitled to a credit for disability benefits the claimant has previously received pursuant to the disability policy

about which the claimant testified. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the Majority opinion, which reduces the claimant's wage loss entitlement to 40%, finds the Second Injury Fund has no liability, and awards Respondent No. 1 a credit. After a de novo review of the record, I find that the Second Injury Fund bears liability and that neither respondent is entitled to a credit.

I first find that because the claimant's previous knee and shoulder disabilities resulted in a permanent impairment which has combined with his current disability and resulted in a greater disability status, the Second Injury Fund should be found liable. In Mid-State Construction Co. v Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988), the Arkansas Supreme Court set forth the test for determining Second Injury Fund liability. The Court opined,

It is clear that liability for the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury in his present place of employment. Second, prior to that injury the employee must have had permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. (Original emphasis.)

There is no dispute that the claimant has satisfied the first element necessary to establish Second Injury Fund Liability as shown by the fact that the parties stipulated that the claimant's September 2004 injury was compensable.

I also find that the claimant has shown that he had a pre-existing permanent partial disability or impairment. Specifically, the claimant suffered from a loss of cartilage in his knee that limited his ability to walk for extended periods of time or from walking on particular surfaces. He also suffered from an inability to lift due to the repeated dislocation of his shoulder.

Pursuant to Arkansas Workers' Compensation Law a pre-existing impairment or disability can be either work-related or non-work related. Second Injury Trust Fund v. POM, Inc., 316 Ark. 796, 875 S.W. 2d 832 (1994).

Additionally, impairment does not necessarily mean that a claimant has suffered a wage loss. Second Injury Trust Fund v. White Consolidated, 317 Ark. 26, 875 S.W. 2d 834 (1994).

In this instance the claimant has sustained prior injuries to his right shoulder and knee. The injury to the knee resulted in a surgery in which the claimant's cartilage was removed. While the claimant was unable to specify whether the doctor placed restrictions on him after the surgery, there is little doubt that such a surgery would be ratable pursuant to the AMA Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Additionally, the

claimant credibly testified that he had difficulty walking on certain surfaces due to his knee, and that he had even had to quit a job due to his inability to work in areas with red clay, dirt, and mud because of his knee swelling. Additionally, the claimant testified that he still has difficulty walking long distances and has to be careful to avoid re-injury to his knee.

Additionally, the claimant testified that he has difficulty lifting items due to his shoulder. While the Majority argues that the claimant had no permanent impairment to his shoulder, I note that the claimant's FCE report specifically indicated he was not to perform above shoulder lifting. In my opinion, this corroborates the claimant's assertions.

Finally, I find that the claimant's past knee and shoulder injuries combined with his recent compensable injury to produce his current disability status. The claimant testified that his knee condition causes him difficulty in walking, squatting, and bending. When considered in conjunction with the limitations placed on him as a result of the FCE, I find that the claimant has shown that his knee condition combined with his current

compensable injury to produce the current disability status. Furthermore, the claimant is unable to lift above his head due to his shoulder, thereby increasing his disability. Accordingly, I find the Second Injury Fund should bear liability.

I further find that the Majority errs in awarding a credit to Respondent No. 1. In my opinion, the claimant's policy was not a "group" policy as described by Ark. Code Ann. §11-9-411. Furthermore, I find that to allow a credit when the claimant's policy already deducts the amount of compensation received, is to unjustly penalize the claimant.

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 in connection with any claim under this chapter.

(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.

During the claimant's employment, he obtained a disability policy. The terms of the policy indicate that the employee provide the premiums and that they will be deducted from their checks. Since the injury, the claimant has been drawing long term disability benefits pursuant to that policy. Each month he receives \$2,125.75, but then the

carrier, Prudential, deducts \$1,963.00 pursuant to the claimant's receipt of workers' compensation benefits and the terms of the policy.

In my opinion, the claimant's long-term disability policy was not a "group policy" pursuant to the provisions of Ark. Code Ann. §11-9-411. In my opinion, the provisions of Ark. Code Ann. §11-9-411 apply to respondents who are providing disability benefits under a disability plan that is paid, at least in part by the respondents, and where at the same time the respondents are required to pay the claimant benefits under the Arkansas Workers' Compensation Act.

In contrast, in the present instance, the terms of the policy specifically provide that the premiums for the policy are to be paid for by the employee. The policy specifically states at page 19, "Your coverage is paid for by you. Your Employer will inform you of the amount of your contribution when you enroll." In my opinion, this language is indicative that the claimant's policy is not a "group" policy as described by the provisions of Ark. Code Ann. §411.

In short, I find the purpose of Ark. Code Ann. §411 is to prevent the claimant from receiving double recovery. Accordingly, I find that since the terms of the insurance policy specifically indicate that the entire amount of workers' compensation benefits received by the claimant are to be deducted, the Majority errs by granting a credit in the amount of \$162.75 as actually received by the claimant.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner