

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404830

TERRY GLADISH, EMPLOYEE	CLAIMANT
TENNECO AUTOMOTIVE, INC., EMPLOYER	RESPONDENT NO. 1
ACE AMERICAN INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED FEBRUARY 20, 2009**

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

Claimant represented by HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by HONORABLE MARK MAYFIELD, Attorney at Law, Jonesboro, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, as modified.

OPINION AND ORDER

The Second Injury Fund appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to a 65% loss in wage earning capacity for which it is liable over and above his 12% permanent anatomical impairment. After conducting a de novo review of the record, we find that the claimant has proven by a preponderance of the

evidence that he is entitled to some wage loss disability benefits. We further find that the Second Injury Fund has liability for those benefits. However, we find that the claimant has only proven that he is entitled to a 27% loss in wage earning capacity in addition to his permanent anatomical impairment. Accordingly, we hereby modify the decision of the Administrative Law Judge.

The claimant became employed by the respondent employer in March of 1979. In 1981, the claimant injured one of his kneecaps but no surgery was performed. In 1989 or 1990 the claimant sustained a work-related back injury and underwent surgery in 1991 or 1992. The claimant does not remember receiving a permanent anatomical impairment rating for this surgery and he returned to work with no permanent physical restrictions. In January of 2002, the claimant began experiencing back problems related to another back injury and received conservative treatment. He wore a back brace for a period of time. On April 13, 2004, the claimant was pushing an extremely heavy machine die when he sustained a work-related injury to his back. The claimant underwent back surgeries by Dr. Tonymon on April 21, 2005, and

October 8, 2005. The claimant returned to work within his physical restrictions but, according to the claimant, he could not do the walking that was required of him. The claimant was ultimately terminated by the respondent employer and has failed to seek any employment since. The claimant is currently receiving Social Security Disability benefits in the amount of \$1300 per month.

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 he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504

(1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). 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); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may

also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. 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. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker's failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). 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).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be

employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii) (Supp. 2005) 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) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In our opinion, the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 65% loss in wage earning capacity in addition to his permanent anatomical impairment rating. The claimant has undergone a Functional Capacity Evaluation which showed that he was capable of performing full time work at the medium

level. Nevertheless, the claimant pursued and is currently receiving Social Security Disability Benefits of more than \$1300 per month. He was given a job within his physical restrictions after his last work related injury. Even though the claimant was not restricted on his ability to walk as a result of his injury, he could not do the walking required for his job. After leaving the respondent employer the claimant did not ask for any kind of retraining program where he could be qualified for medium or light work; nor has he sought to further his education. Although the claimant provided testimony and a hand-written list of contacts, the claimant did not ask for the services of a professional vocational expert to help him find work. In our opinion, the claimant's sincerity in finding work is suspect at best and this equates to a lack of motivation in finding work.

Therefore, based upon our de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to a 65% loss in wage earning capacity in addition to his permanent anatomical impairment rating. However, we find that the

claimant has sustained a 27% loss in wage earning capacity. Accordingly, we would modify the decision of the Administrative Law Judge.

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.

In addition, "where there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of the Second Injury Fund's liability." POM, Inc. v. Taylor, 325 Ark. 334, 337, 925 S.W.2d 790, 791 (1996). Further, an employee's ability to return to the same

work following a prior injury is simply not determinative of the Second Injury Fund's liability. 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.

It is intended that latent conditions, which are not known to the employee or employer, not be considered previous disabilities or impairments that would give rise to a claim against the Second Injury Fund. Ark. Code Ann. §11-9-525.

The liability of the Second Injury Fund comes into question after three hurdles have been overcome. Weaver, supra; citing, Mid-State, supra; 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, 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, 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, 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.

Once Second Injury Fund liability has been established, the four steps to be used in calculating the liability of the Second Injury Fund are: (A) determine the last anatomical impairment which resulted from the last injury; (B) determine the disability attributable to all injuries or conditions existing at the time the last injury was sustained; (C) determine the degree or percentage of the combined disability or impairment; and (D) determine the balance which shall be paid by the Second Injury Fund (determined by adding A and B and subtracting the total from C). Weaver, supra; see also, Ark. Code Ann. §11-9-525. If the employee is entitled to receive compensation on the basis of combined disabilities or impairments, the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment which would have resulted from the last injury had there been no preexisting disability or impairment. Id.; citing, Ark. Code Ann. §11-9-525.

With regard to the Second Injury Fund liability, the Administrative Law Judge found that the claimant suffered a compensable injury on April 13, 2004, which

resulted in a 12% permanent physical impairment. The Administrative Law Judge further found that the claimant had suffered from not one, but two previous injuries which in and of themselves produced physical impairment whether or not such were assigned by the claimant's then treating physicians. Finally, the Administrative Law Judge found that a preponderance of the evidence reveals that the claimant's current disability status is the product of a combination of the most recent compensable injury with the pre-existing impairment of the 1990 injury and the 1991 back surgery. Both Dr. Lovell and Dr. Tonyman offered testimony to this effect. Accordingly, we affirm this finding. Therefore, we find that the Second Injury Fund is liable for the claimant's 27% wage loss disability.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

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

**CONCURRING AND DISSENTING OPINION**

I agree with the majority opinion finding that the Second Injury Fund has liability for wage-loss disability in this case. I must respectfully dissent from the majority's finding that the claimant sustained only a 27% wage-loss disability.

### **HISTORY**

The facts of this case are not in dispute. The claimant, now 58 years old, worked for Respondent #1 for approximately 27 years. While he did perform some supervisory duties, his job always required manual labor. He has a seventh grade education with a GED.

The claimant had a prior work-related back injury and surgery while working for Respondent #1 in 1989 or 1990. In January of 2002, the claimant suffered a second work-related back injury for which he received conservative treatment. After both of these injuries, the claimant returned to work for Respondent No. 1 and was able to perform his job duties.

The injury which is the subject of this claim occurred on April 13, 2004. On that date, the claimant sustained a compensable low back injury resulting in a herniated nucleus pulposus at L5-S1. On April 21, 2005, he underwent fusion surgery for the treatment of his injury by Kenneth Tonymon, a neurosurgeon. He was given a 12% anatomical impairment rating, with physical restrictions based primarily on his comfort level. He is able to sit for only twenty to thirty minutes after which he must lay down,

get up and walk, or take pain pills because of pain in his back and legs. He has problems with housework, vacuuming, and washing dishes and must spend several hours a day laying down on a couch for relief of back and leg pain. He has difficulty sleeping at night and must take medication in order to do so.

In addition to his physical limitations, the pain medication taken by the claimant creates significant vocational obstacles. Because of pain, he takes from two to four Oxycodone tablets per day, a potent narcotic pain medication. This medication affects his concentration and mental clarity.

Two functional capacities evaluations were performed. The first indicated that the claimant was capable of light work and the second one suggested that he could perform medium work.

The claimant attempted to return to work for Respondent No. 1 for a period of 7 or 8 days. At first, the claimant was able to perform his job duties but the employer kept adding additional duties to the point where he was no longer able to continue. Of particular difficulty, was the

walking and standing on concrete which was required of the job. He was sent home by the employer and never invited to return to work.

After his unsuccessful work attempt with Respondent No. 1, the claimant made numerous efforts at returning to work with other employers. The record contains evidence that the claimant contacted more than 100 prospective employers in an attempt to find work. In addition, he sought assistance from a temporary employment service, the state unemployment agency, and a vocational rehabilitation expert. None of these efforts produced a job within the claimant's limitations.

The claimant applied for and received social security disability benefits. However, he continued to search for work after the receipt of these benefits.

#### **ANALYSIS**

Pursuant to Ark. Code Ann. §11-9-522(b)(1) the Commission has the authority to increase a claimant's disability rating when a claimant has been assigned an anatomical impairment rating to the body as a whole. See Lee V. Alcoa Extrusion, Inc., 89 Ark. App. 228, 201 S.W.3d 449

(2005). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Id. In determining wage-loss disability, the Commission may take into consideration such factors as the claimant's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity. Ark. Code Ann. §11-9-522(b)(1). Such other matters include 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), 54 Ark. App. 130, 923 S.W.2d 886 (1996).

The Court of Appeals decided a case, analogous to this one, in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 141 S.W.3d 916 (2004). In Whitlatch, the claimant appealed the Commission's 50% wage-loss disability award contending entitlement to permanent total disability. The claimant in Whitlatch was a forty-four year old manual laborer with an eleventh grade education who had sustained a back injury, undergone one surgery, and received an

anatomical impairment rating of 9% to the body as a whole.

The Court noted the following limitations:

As a result of his severe pain, appellant is not able to sleep at night. During the day, he tries to lay down and rest. Due to his lack of sleep, he reports that he stays, "irritable, jittery, and angry." According to appellant, he suffers side effects from the medications, which makes him "feel groggy, down, and not there all the time." Appellant stated that he spends his days getting "up and down" to get comfortable. He testified that the most comfortable position for him is lying on his left side with his left leg pulled up towards his body with his right leg straightened. He said that during the day he watches television, reads, and lies on his bed playing with his dog, a small toy fox terrier. Between the working hours of 8 a.m. and 5 p.m., he estimates that he spends four to five hours lying down and trying to cope with his pain. As a result of his pain, he is no longer able to take care of his household responsibilities, and a neighbor helps with his housework. He is unable to vacuum, cook, or wash dishes.

In Whitlatch, the claimant contended on appeal that the Commission's decision should be reversed and an award of permanent total disability entered. The Court agreed, reversed the Commission's decision, and awarded permanent

total disability benefits based on the claimant's limited education, manual-labor employment skills, severe pain in his back and legs, coupled with the side effects of necessary prescription pain medication.

Like the claimant in Whitlatch, Mr. Gladish suffers from severe pain in his back and legs, and requires frequent periods of rest and many opportunities to lay down during the normal work day. He suffers from side effects brought on by the use of narcotic medication as did Mr. Whitlatch. His daily activities are similarly limited and his inability to perform household duties is comparable. Therefore, the restrictions imposed upon the claimant in this case are virtually indistinguishable from those of the claimant in Whitlatch.

However, it should be noted that the claimant in this case has undergone multiple back surgeries while the claimant in Whitlatch had only one. In addition, the claimant herein has a 12% anatomical impairment, which is significantly greater than the impairment suffered by Mr. Whitlatch. The claimant is fifty-eight years old while Mr. Whitlatch was only forty-four. The claimant in

Whitlatch had an eleventh grade education while the claimant herein finished only the seventh grade. And finally, the claimant in this case made a significant effort at seeking employment while Mr. Whitlatch made no effort at all. All things considered, this case presents an even stronger factual basis for an award of permanent total disability than Whitlatch.

In finding that the claimant sustained only a 27% loss in wage earning capacity, the majority concluded that the claimant was not motivated to return to work. The uncontradicted evidence of record speaks loudly to the contrary. The claimant was a 27 year employee. The claimant attempted to return to work for Respondent No. 1 until he was sent home by the employer because he was unable handle the physical requirements of the job. Thereafter, he contacted over 100 employers in an attempt to become employed. He sought assistance from a temporary employment service, the unemployment agency, and a vocational rehabilitation expert. And even after he received Social Security benefits, he continued to look for work. Under these circumstances, it was error to conclude that the

evidence established that the claimant was not motivated to return to work.

In conclusion, wage-loss determinations are to be primarily based on age, education, and past work experience. The claimant is 58 years old, has a seventh grade education with a GED, and has past work experience in heavy labor. The severity of the claimant's medical condition is also a factor to be considered. The claimant has undergone multiple back surgeries and suffers from medically documented pain and limitations in his ability to perform basic functions of employment. He is required to take narcotic pain medication which affects his ability to work. And on the question of motivation, the claimant was a 27 year employee of Respondent No. 1. He made valiant efforts at return to work, even after he was approved for Social Security. Under these facts, a finding of permanent total disability would have been appropriate.

The Administrative Law Judge awarded only a 65% wage-loss disability. This was a conservative award. However, the majority's reduction of that award to 27% goes

way beyond conservatism and borders on absurdity. Reasonable minds could not have come to this conclusion.

While I agree that the Second Injury Fund has liability in this case, I must dissent from the majority's meager 27% wage-loss award.

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PHILIP A. HOOD, Commissioner