

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009154

TOMMY LINDSEY, EMPLOYEE	CLAIMANT
SMI JOIST CO., EMPLOYER	RESPONDENT NO. 1
HIGHLANDS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED DECEMBER 4, 2009

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

Claimant represented by the HONORABLE TIM A. WOMACK,  
Attorney at Law, Camden, Arkansas.

Respondents No. 1 represented by the HONORABLE KENDRA  
WEBB, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by the HONORABLE CHRISTY  
KING, Attorney at Law, Little Rock, Arkansas. (Waived  
appearance at the hearing.)

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondent No. 1 appeals an opinion and order of  
the Administrative Law Judge filed June 9, 2009. In

said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Commission has jurisdiction of this claim.
2. The claimant sustained a compensable injury to his right knee on February 6, 1997, at which time the employee/ employer/carrier relationship existed.
3. As a result of that injury, he was given a 9% permanent impairment rating which, along with all other related medical and indemnity benefits, was paid.
4. During the course of treatment for the knee, the claimant sustained a related lower back injury, was treated and subsequently released on September 21, 2006, with a 5% whole person impairment rating.
5. The 5% impairment rating for the back injury has been paid.
6. Knee treatment continued until September 25, 2006, which resulted in a total knee replacement, subsequent knee revision, and a 20% impairment rating to the whole body, for all of which appropriate benefits have been paid.
7. Dr. Crowell assigned the claimant a 14% permanent anatomical impairment rating on November 13, 2008.
8. At the time of the injury on February 6, 1997, the claimant was earning wages of \$274.00 per week, entitling him to weekly compensation rates of \$183.00 for temporary total disability and \$154.00 for permanent partial disability.
9. When the claimant ceased working in 2003, he earned \$9.70 per hour.

10. Pursuant to Arkansas Code Annotated Section 11-9-518(a), Respondent No. 1 properly calculated the claimant's compensation rates based on his average weekly wage of \$388.00 per week when he sustained his compensable injury on February 6, 1997.
11. The preponderance of the evidence establishes that the claimant's healing period ended on September 22, 2006. The claimant has therefore failed to establish that he is entitled to any period of temporary disability compensation beyond that date.
12. The claimant has failed to establish by a preponderance of the evidence that he is entitled to compensation for the 14% impairment rating assigned by Dr. Crowell on November 13, 2008. Specifically, the claimant has failed to establish by a preponderance of the evidence that his compensable injuries are the major cause of the 14% impairment assigned by Dr. Crowell.
13. The claimant has established by a preponderance of the evidence each of the requirements necessary to establish that he is entitled to benefits for permanent and total disability as a result of his compensable knee injury and compensable low back injury beginning when his healing period ended on September 23, 2006. Respondent No. 1 and the Death and Permanent Total Disability Trust Fund, not the Second Injury Fund, are liable for the claimant's permanent and total disability.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically,

we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the June 9, 2009 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee

in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he was permanently and totally disabled and that the Second Injury Fund did not have liability for those benefits. In my opinion, it is clear that the Second Injury Fund has liability for any benefits to which the claimant is entitled.

Arkansas Code Annotated § 11-9-525 provides the following:

11-9-525. Compensation for disability - Second injuries.

(3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a

subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment that would have resulted from the last injury had there been no preexisting disability or impairment.

(4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an administrative law judge or the Workers' Compensation Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the commission, and the degree or percentage of disability or impairment that existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the fund provided for in § 11-9-301.

(5) If the previous disability or impairment, whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself. However, if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in §§ 11-9-501 - 11-9-506 for permanent total disability, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under §§ 11-9-501 - 11-9-506 out of the fund.

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, "[it is the substantial nature of the impairment which is emphasized..." Id.

It is clear from Ark. Code Ann. § 11-9-525 that the last injury is the injury the Commission is statutorily mandated to look at in making a determination of whether or not the Second Injury Fund has liability. It is that last injury that combines with the claimant's other impairments that result in Second Injury Fund liability. When the last injury

combines with previous injuries with the same employer, the Second Injury Fund is liable for wage loss benefits. Nelson v. Timberline, Inc., 332 Ark. 165, 964 S.W.2d 357 (1998).

In the case presently before us, the claimant had two injuries; one to his knee and one to his back. The claimant's last injury was to his back. Although there was a failure on the part of the respondent employer to file the proper forms with the Commission reporting the back injury, this does not relieve the Second Injury Fund of liability.

There is absolutely no dispute that the claimant had a back injury. At the time of the back injury, the claimant was already receiving medical benefits for his compensable knee injury. The respondents simply treated the two injuries under one claim number. The respondent did not file a new claim, therefore, a new claim number was not generated with the Commission. The claimant testified that he sustained a specific incident injury to his back while he was working after his knee injury. The respondents accepted the back as a compensable consequence of the claimant's knee injury and lumped the two injuries together under

one claim. Nevertheless, the claimant's back injury was a new injury, unrelated to the claimant's knee injury. It is clear from the provisions of Ark. Code Ann. § 11-9-525 that the last injury must be the injury considered when assessing Second Injury Fund liability. It is also patently obvious from the facts of this case presently before us that the claimant's last injury was his back and not his knee. Therefore, it is my opinion that when the back injury is combined with the knee injury, the Second Injury Fund has liability for all benefits over and above the impairment ratings paid to the claimant in this case. I cannot disagree with the fact that the claimant is permanently and totally disabled based upon the facts. However, to require the respondent to pay those benefits is an impermissible application of the law.

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KAREN H. MCKINNEY, COMMISSIONER