

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704587

ROBERT WHITE, EMPLOYEE	CLAIMANT
ARKANSAS STATE HIGHWAY & TRANSPORTATION DEPARTMENT, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIV., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MAY 4, 2009

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

Claimant represented by HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE WILLIAM L. WHARTON, 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 CHRISTY KING, Attorney at Law, Little Rock, Arkansas, and waived participation in the hearing herein.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 23, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all other relevant times, including April 18, 2007.
3. Respondents #1 have accepted the claim and paid claimant a 1% impairment rating, temporary total disability, and medical benefits.
4. Claimant's compensation rates are \$450.00 and \$338.00.
5. Claimant reached maximum medical improvement as of July 20, 2007.
6. The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled.
7. The claimant has failed to prove by a preponderance of the evidence that he suffered any wage-loss disability in excess of his 1% anatomical impairment rating.

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 of fact

made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After a de novo review of the record, I must respectfully dissent from the majority opinion. I find that the claimant proved that he is permanently and totally disabled, and that the Second Injury Fund has no liability in this claim. The claimant was employed by respondent employer for twenty-nine years when he sustained a second injury to his low back on April 18, 2007.

PERMANENT DISABILITY BENEFITS

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. 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). 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).

The Commission is charged with the duty of determining disability. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). In determining the extent of permanent disability, the Commission may consider, in addition to the evidence of permanent anatomical impairment, claimant's general health, age, education, work experience, attitude, interest in rehabilitation, degree of pain, and any other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. Sec. 11-9-522(b)(1); Glass, supra; Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Arkansas Wood Products v. Atchley, 21 Ark. App. 138, 729 S.W.2d 428 (1987).

For an award of permanent benefits, the compensable injury must be the major cause of the disability or impairment. If the injury combines with a pre-existing disease or condition, or the aging process, to cause or

prolong the disability, permanent benefits are available only if the compensable injury is the major cause of the permanent disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(F)(ii). Major cause is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. Sec. 11-9-102(14). Dr. Schlesinger opined that the work incident in April 2007 caused the claimant's current condition, satisfying this requirement.

The respondents accepted and paid a one percent rating to the body as a whole; however, Dr. Schlesinger stated that the claimant was entitled to a seven percent permanent rating if his first back injury was not a workers' compensation injury. The medical records and testimony show that the claimant had a non-work-related back injury in 1991, and therefore the claimant should have received the seven percent impairment rating, according to the AMA Guides to Permanent Impairment, (4th Ed. 1993) Edition, Table 75. I find that, at a bare minimum, the claimant has proved his entitlement to a permanent anatomical impairment rating of seven percent and the concomitant permanent partial disability benefit.

I also find that the claimant has suffered wage loss over and above the amount of his permanent anatomical impairment rating. The claimant's testimony revealed that he was 54 years of age at the time of the hearing. He had a high school education. He performed manual labor all of his life, and since 1988, he worked as a motor grader operator, a physically heavy job. Once he suffered the April 2007 injury, he was unable to return to that work due to back pain. The only way he was able to manage his pain was with a combination of pain medication and rest. He required a pain pill every morning and took one or two every day. Approximately three times a week, he required three pills in a day. He was able to sleep in a bed for five or six hours at a time, then he would have to move to a recliner try to sleep more. Sometimes he had to sleep in his recliner. He was comfortable sitting in a recliner but not in a chair or in a car. He could not sit or stand for long periods of time. The medication he takes for pain caused drowsiness, dizziness, and interfered with his ability to think clearly and to drive. The claimant was unable to pursue his hobbies and household duties, such as mechanical repair, fishing, riding a Jeep in the woods, and yard work. He was limited in

his ability to travel with his family and unable to participate in outings with them. The claimant stated unequivocally that he could not work, and that he wanted to return to work for financial and personal reasons. There was no evidence of a suitable job for the claimant.

Dr. Schlesinger stated that he felt the claimant was motivated to work but would be unable to return to the type of work he used to perform. Dr. Bates encouraged the claimant to file for disability. The claimant explained that he did not look for work with the respondent employer because he knew, as a long term employee, there was no job within his abilities.

The claimant performed at a Medium work level on the Functional Capacity Evaluation ("FCE"), but he was medicated at the time, and that effort caused him significant pain and forced him to rest for two days. He could not do that activity every day. The evaluator noted his consistent complaints of lower back pain and burning. While a functional capacity evaluation is an often helpful expert opinion, it is not conclusive evidence of a claimant's capacity to work. Second Injury Fund v. Exxon Tiger Mart, 70 Ark. App. 101, 15 S.W.3d 345 (2000). I find

that the FCE is not adequate evidence of the claimant's ability to perform employment.

I find that the claimant is permanently and totally disabled. Dr. Schlesinger indicated that the claimant could not return to the kind of work he used to perform, which is the only kind of work - heavy labor - he ever performed. Dr. Bates encouraged him to apply for disability, not to return to work. During the FCE, the claimant reported pain consistently, and afterwards, he was confined to his recliner for at least two days in pain. He credibly testified that he could not sustain that activity regularly. He required daily narcotic medication to control the pain which interfered with his balance and thinking, and which made him drowsy. His pain and his medication restricted his driving, sitting and standing as well. It is difficult to imagine gainful employment for someone with the limitations, and there is no evidence of any jobs for which the claimant would be qualified. Dr. Schlesinger recognized his motivation to work, and the claimant testified that if he could, he would be working. It would be unduly harsh to find that the claimant was unmotivated to work, where his condition rendered any attempt to re-enter the workforce

futile. To paraphrase the Court in Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 406, 141 S.W.3d 916 (2004), if one considers the claimant's limited education, heavy labor employment skills, constant and regularly severe pain in his lumbar spine, coupled with the side effects of his necessary prescription narcotic pain medication, in addition to his age and the opinions of his treating physicians, the claimant is clearly permanently and totally incapacitated from earning wages.

SECOND INJURY FUND LIABILITY

The majority did not need to address Second Injury Fund liability, as its findings rendered the issue moot. As I have found that the claimant is entitled to permanent and total disability benefits, the issue must be addressed. The test for Second Injury Fund liability is three-pronged:

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.

Douglas Tobacco Prods. Co. v. Gerrald, 68 Ark. App. 304, 8 S.W.3d 39 (1999), citing Mid-State Constr. Co. v. Second

Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). The claimant suffered a compensable injury resulting in an accepted impairment rating of 1%, although I have found that the impairment rating should have actually been 7%.

The question before me is whether the claimant's non-work-related injury in 1990 combined with the April 2007 compensable injury to produce the current disability. The claimant's 1990 injury was at L5-S1, a different level of his spine than the 2007 injury at L4-L5. He reported a different kind of pain with each injury. His complaints surrounding the first injury were completely resolved through surgery, and he returned to full duty. Dr. Schlesinger stated that the April 2007 twisting incident was the cause of the claimant's current condition, with no reference to any other injury or medical condition. I find that the claimant's 2007 injury did not combine with his 1990 injury, and that the Second Injury Fund does not have liability for the claimant's permanent benefits.

CONCLUSION

I find that, based upon the medical records and testimony, the claimant has proven that he is permanently and totally disabled. I further find that the claimant should have been assigned a seven percent impairment rating and paid permanent partial disability benefits at that rate. Lastly, I find that the Second Injury Fund does not have liability in this claim. This claim was controverted, and the claimant's attorney is entitled to fees on the indemnity benefits awarded, as well as for his work on appeal. For the aforementioned reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner