ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
OLLY NEAL, Judge

DIVISION III

CA06-308

OCTOBER 4, 2006

TOMLINSON ASPHALT CO., INC.
ZURICH AMERICAN INSURANCE CO.
APPELLANTS

AN APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION

v.

[E706234]

FRANKLIN M. RIEDY
SECOND INJURY FUND
APPELLEES

AFFIRMED

Tomlinson Asphalt Company and Zurich American Insurance Company appeal from the January 23, 2006, opinion of the Workers' Compensation Commission (Commission) which affirmed in part and reversed in part an opinion of the administrative law judge (ALJ). The Commission held that appellee Franklin M. Riedy was permanently and totally disabled and that the Second Injury Fund was not liable for appellee's permanent total disability. Appellants argue that the Commission's decision that the facts of the case do not support a finding of Second Injury Fund

liability is erroneous and is not supported by substantial evidence.[1] We affirm.

Appellee suffered a compensable back injury in 1997, and as a result, he underwent four surgeries. Dr. Luke Knox performed the following surgeries on appellee: a lumbar fusion of L4-5 on October 6, 1998; due to difficulties, he removed the fusion hardware on November 1, 1999; on December 29, 2000, he performed a L3-4 discectomy; and finally on July 26, 2002, he performed a L3-4, L5-S1 fusion. Evidence suggests that this is not the end of appellee's surgeries.

Appellee testified that he had a fifth-grade education; that he had always worked physically demanding jobs; and that his back was preventing him from going back to work. He also stated, "The pain is just in my lower back. It's always there." According to appellee, since the injury, he has difficulty sitting in straight-back chairs, standing for long periods of time, bending, and lifting. Appellee stated that prior to his May 20, 1997, injury, he did not consider himself to be handicapped. He also stated, "If it weren't for the back injury and these four surgeries that I have had, I would still be working."

Appellee had suffered other injuries prior to his back injury. In 1967, he sustained a head injury due to a motorcycle accident. He underwent a methyl methacrilate cranioplasty of his left temporal skull defect on September 27,1974, following complaints of dizziness, headaches, and fainting spells. Appellee's pre- and post-surgery diagnosis was skull defect, left temporal region. Appellee testified that, after the metal plate in his head was replaced with a plastic plate, he never experienced another headache. An August 2004 medical report by Dr. David A. Davis also

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[1]The notice of appeal included the issue of whether the appellee was permanently and totally disabled. Since filing the notice, the parties have stipulated that appellee was permanently and totally disabled. Therefore, the only point on appeal relates to the Commission's finding that there was no Second Injury Fund liability in this case.

indicated that appellee had no headaches, no unsteadiness or dizziness, and no loss of coordination. However, a neuropsychological evaluation performed by Dr. Betty R. Back-Morse in April 2002 indicated that appellee had a pre-existing head injury and chronic pain disorder. Dr. Back-Morse stated that appellee's scattered test scores were "consistent with brain injury." In Dr. Back-Morse's letter to Vocation Consultant Dale Thomas, dated April 30, 2002, she stated, "Test patterns suggest that this is an old injury and it is my opinion that it is the result of his motorcycle accident at eighteen years of age." She told appellee's attorney the same thing in July 2002. Appellee testified, "To the extent that Dr. Morse has made all these diagnoses and opinions about my condition that she connect back to my motorcycle accident, I didn't have any knowledge of that prior to my back injury."

Appellee injured his left knee in 1982 while working for Harley Brothers. On February 1, 1983, Dr. Leopold H. Garbutt performed surgery on appellee's knee. In a letter dated April 23, 1984, Dr. Garbutt stated that "with a 40% permanent partial impairment to the left lower extremity, [appellee] should and could return to work both in welding or in other modes of work." There was nothing else in the record concerning appellee's receipt of treatment for this knee injury. Appellee stated that he was off work for a couple of years following his knee injury; that he limped around on his knee for about seven or eight years; that he has problems with his knee when it is damp and cold; that he gets around on his knee all right; that he could run on his knee before his back injury; that he does not complain to anyone about his knee; that he has not received treatment or taken medication for his knee since 1984; that he could pretty much do what he wanted to do despite the knee injury; and that his employers never had to change or modify his job duties because of his knee injury. According to appellee, "Before I hurt my back, young men would have trouble keeping up with me. . . . I could work circles around any one of them back then."

Upon hearing all the evidence, the ALJ found that appellee was permanently and totally disabled and that the Second Injury Fund was liable for appellee's permanent total disability. Appellants appealed the ALJ's decision to the Commission. The Commission affirmed the ALJ's finding that appellee was permanently and totally disabled, however, it reversed the ALJ's finding that the Second Injury Fund was liable. It is from the Commission's order that appellants Tomlinson Asphalt Company, Incorporated, and Zurich American Insurance Company bring this appeal.

On appeal, appellants do not contest that appellee is permanently and totally disabled. Instead, appellants argue that appellee's knee and head injuries are impairments that give rise to the Second Injury Fund liability because (1) appellee's pre-existing knee injury combined with his back injury to produce his current disability status, and (2) appellee's pre-existing head injury combined with his back injury to produce his current disability status.

We review cases in the light most favorable to the Commission and affirm the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty*, *supra*. It is the Commission's function to determine witness credibility and the weight to be afforded to any testimony. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003). The Commission must weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Id.* The Commission's resolution of the medical evidence has the force and effect of a jury verdict.

*Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

For the Second Injury Fund to be liable under workers' compensation law, the employee must have suffered a compensable injury at his present place of employment, prior to that injury the employee must have had a permanent partial disability or impairment, and the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Rice v. Georgia-Pacific Corp*., 72 Ark. App. 148, 35 S.W.3d 328 (2000). The Second Injury Fund is obligated to provide compensation for any disability greater than the disability resulting from the earlier injury and the anatomical impairment caused by the second injury. *Id*. (citing Ark. Code Ann. § 11-9-525 (Repl. 1996)). It is intended that latent conditions unknown to the employee or employer not be considered previous disabilities or impairments giving rise to a claim against the fund. Ark. Code Ann. § 11-9-525 (a) (3) (Repl. 2002). An injury is latent until its substantial character becomes known or until the employee knows or should reasonably be expected to be aware of the full extent and nature of his/her injury. *Purolator Courier v. Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992).

The Commission found that appellee was permanently and totally disabled. According to the Commission, appellee only had a fifth grade education and had performed manual labor throughout his life. The Commission found appellee to be a credible witness and believed him when he testified that he had not followed up on any employment leads provided by Mr. Thomas "because of the driving distances in some cases and because of [his] significant physical limitations following the compensable injuries and surgeries."

However, the Commission determined that appellee's injury did not give rise to Second Injury Fund liability. The Commission wrote:

> In the present matter, the preponderance of evidence does not show that a prior disability or impairment "combined" with the 1997 compensable injury to produce the claimant's current disability status. The record does clearly show that the claimant underwent a type of skull surgery after an injury in 1974. The claimant testified, however, that he did not suffer from headaches or other problems after that. The claimant then sustained a knee injury in 1983 (sic). Although the claimant testified that the knee injury did "slow him down" in later years, the record does not demonstrate that the claimant's knee impairment combined with the 1997 compensable injury to produce the claimant's current disability status. Nor was there any prior impairment to the claimant's back. The claimant testified that the reason he could not currently work was because of his back, not his prior knee injury or head injury. The claimant credibly testified under questioning by counsel for the Fund that he was not "handicapped" before the 1997 compensable injury. The claimant testified that the knee injury slowed him down, but if not for the back injury, "I'd still be working."
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> The Full Commission recognizes the report of a neuropsychologist, Dr. Back-Morse, in April 2002. Dr. Back-Morse stated that there had been damage to the claimant's right hemisphere in 1974. Nevertheless, we can find no basis from the examination by Dr. Back-Morse that there had been a "combination" of prior impairment to claimant's head and the 1997 back injury to invoke liability of the Second Injury Fund. Further, the claimant's testimony clearly supports a finding that the brain or skull injury was latent and did not affect the claimant at all after his 1974 surgery. A latent condition can not trigger Second Injury Fund liability. (citation omitted.)
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> Because the preponderance of the evidence does not demonstrate Second Injury Fund liability pursuant to Ark. Code Ann. § 11-9-525 (b), the Full Commission finds that [Tomlinson Asphalt Co. and Zurich American Ins. Co.] shall be liable for the claimant's permanent total disability.

Appellants argue that appellee's pre-existing knee and head injuries combined with his 1997 back injury to produce his current disability status. The Commission disagreed. According to the Commission, the preponderance of evidence did not show that a prior disability or impairment "combined" with the 1997 compensable injury to produce the appellee's current disability status. Appellee testified that he did not suffer from headaches or other problems after his 1974 skull surgery. Furthermore, although appellee testified that his prior knee injury slowed him down, he nevertheless testified that the reason he could not currently work was because of his back. He even stated that, prior to his back injury, he could work circles around his younger co-workers.

Substantial evidence was available for the Commission to conclude that appellee's pre-existing knee and head injuries did not combine with his back injury to produce his current disability status. Therefore, reasonable minds could reach the Commission's conclusion, and we affirm.

Affirmed.

PITTMAN, C.J., and BIRD, J., agree.