

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F200619

RICHARD COSNER, Employee

CLAIMANT

C&J FORMS & LABELS, INC. Employer

RESPONDENT NO. 1

LIBERTY MUTUAL GROUP, Carrier

RESPONDENT NO. 1

SECOND INJURY TRUST FUND

RESPONDENT NO. 2

DEATH & PERMANENT TOTAL DISABILITY TRUST FUND

RESPONDENT NO. 3

OPINION/ORDER FILED AUGUST 5, 2025

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS, in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

Respondent No. 2 represented by ROBIN W. MICKEL, Attorney, Little Rock, Arkansas.

Respondent No. 3 represented by CHRISTY L. KING, Attorney, Little Rock, Arkansas.

OPINION/ORDER

Respondent No. 2 and Respondent No. 3 have jointly moved to dismiss this matter and their motion states:

1. That the claimant's date of injury was December 19, 2001.
2. That the Second Injury Fund was joined as a party to this claim on December 28, 2007.
3. That the Death and Permanent Total Disability Trust Fund was joined as a party to this claim on June 11, 2019.
4. That the Second Injury Fund sent written Interrogatories and Requests for Production of Documents to legal counsel for both the claimant and the respondent employer/insurance carrier on June 11, 2008. A second request for a response to the Second Injury

Fund's Interrogatories and Requests for Production of Documents to legal counsel for both the claimant and the respondent employer/insurance carrier was sent on May 27, 2015. That to a date current, neither claimant nor respondent no. 1 have answered the discovery requests of the Second Injury Fund. That, per the holding in *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988), any claim against the Second Injury Fund should be dismissed for failure of the parties to answer the Second Injury Fund's discovery requests.

5. That on May 13, 2024, and again on May 31, 2024, a request was sent for production of medical reports since December 13, 2016, for both the Second Injury Fund and the Death and Permanent Total Disability Trust Fund. That to a date current, neither claimant nor respondent no. 1 have answered this request.

6. That the claimant was born on June 17, 1947.

7. That claimant was hired by respondent no. 1 in 1985.

8. That the claimant was an employee of respondent no. 1 and still actively working as of April 17, 2020, and may still be an employee of respondent no. 1 to a date current.

9. That "The primary purpose of the worker's compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force;..." A.C.A. §11-9-101(b)

10. That according to the Social Security Administration the full retirement age for the claimant is 66. *Social Security Administration, Knowing Your Full Retirement Age*, www.ssa.gov/prepare/plan-retirement. As of 202, the claimant was 72 years old, which is approximately 6 years past his full retirement age.

11. That "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wage in same or other employment. A.C.A. §11-9-519(e)(1)

12. That “Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter.” A.C.A. §11-9-713(3)

13. That *Black’s Law Dictionary*, 5th Ed. states that the term “standing” is a concept utilized to determine if a party is sufficiently affected by the litigation and is shown where the party has a legally protectable and tangible interest at state in that litigation. Claimant does not have a “legally protectable and tangible interest” in dismissal of the *wage loss disability/permanent and total disability* issue because he will never meet the requirements for those benefits. The question of “standing” is a threshold issue and should be addressed first. *Bomar v. Moser*, 369 Ark. 123, 251 S.W.3d (2007).

14. That the primary purpose of the Arkansas Workers’ Compensation Act has been met in this claim. The claimant has either received or continues to receive all benefits to which he is entitled, including temporary and permanent benefits, reasonable and necessary medical treatment, and he was returned to work. As of 2020, the claimant has worked for respondent no. 1 for 35 years and well past his full retirement age of 66 years old. The claimant has worked for at least 19 years after his compensable injury and therefore cannot prove an inability, because of his compensable injury, to earn a meaningful wage. If the claimant has stopped working, it is clearly based on his years of service and age.

15. That “The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.” A.C.A. §11-9-519(e)(2). As noted above, in order for the claimant to have standing he must have a “legally protectable and tangible interest” in the dismissal of the wage loss/permanent and total disability issue. Based upon the information available to the Funds, the claimant cannot prove either wage loss or permanent and total disability. At the time of the claimant’s compensable injury in December of 2001, according to the AR-2 filed by respondent no. 1, his average weekly wage was \$646.65. In 2010 while still employed by respondent no. 1, the claimant had another injury and was earning \$1,567.57 as an average weekly wage according to the AR-2 filed by respondent no. 1. Neither Fund has joined to this subsequent claim. Based on

this information alone it is clear that the claimant did not suffer a decrease in his earnings because of his compensable injury. It has also been shown that the claimant continued to work for respondent no. 1 at least until 2020. The claimant has no standing to bring a claim for wage loss/permanent and total disability based on his continued employment until well passed his full retirement age and lack of decrease in wage earnings.

16. That the claimant requested a hearing on October 23, 2023. The claimant informed the Commission on November 20, 2023, that there was no longer a need for a hearing and the file was returned to Little Rock.

17. That to the best of the Fund's knowledge and belief, the Claimant has not made a bona fide request for a hearing on the issue of wage loss/permanent and total disability since the file was returned to Little Rock on November 20, 2023. Therefore, Respondent No. 2, Second Injury Fund, and Respondent No. 3, the Death and Permanent Total Disability Trust Fund are requesting a dismissal of the wage loss/permanent and total disability claim in this case per Rule 099.13 and A.C.A. §11-9-702.

Both A.C.A. §11-9-702(a)(4) and Rule 099.13 allow the Commission at its discretion to dismiss a claim for want of prosecution and/or for lack of filing a bona fide request for a hearing. Respondent No. 2, the Second Injury Trust Fund, and Respondent No. 3, the Death & Permanent Total Disability Trust Fund, hereafter described as the "Funds" rely upon A.C.A. §11-9-702(a)(4) and Rule 099.13 as a basis for their Motion to Dismiss.

The claimant in this matter is a 78-year-old male who sustained an admittedly compensable injury to his right knee on December 19, 2001. It was later determined by the Commission that the claimant sustained bilateral shoulder injuries as a compensable consequence of his compensable right knee injury. Throughout the claimant's compensable injuries, he has continued to work for Respondent No. 1. The claimant has had medical treatment for both his right knee and bilateral shoulders over the course of several years. The most recent

medical treatment the Commission is aware of is an operation on the claimant's left shoulder performed by Dr. Justin Rabinowitz on April 14, 2025. I note that this is less than a month before the current hearing in this matter and several months after the Funds filed their November 22, 2024, Motion to Dismiss. It is clear that the claimant is still actively receiving medical treatment for his compensable injuries.

Upon review of the evidence submitted in this matter, I find no evidence that the claimant has ever failed to advance or prosecute his workers' compensation claim. In fact, while the claimant's original injury might have been 24 years ago, it appears the claimant has continued to move his case forward with litigation and medical treatment. The Funds, in Paragraphs 4 and 5 of their Joint Motion to Dismiss, make allegations that the claimant has failed to comply with discovery. At the hearing, the attorney for Respondent No. 3, the Death & Permanent Total Disability Trust Fund, had the following interaction with this administrative law judge:

MS. KING: Judge, I don't know how this ever got interpreted as a discovery issue. There was never a discovery issue. I didn't request discovery. I made a statement of fact that interrogatories were sent out and weren't responded to. A response was sent out and wasn't responded to showing that although The Funds are a part to this claim, we have not been kept up with how this claim has been going. It is obvious from the claim that we had requested updated medical in 2023 and that was never dealt with. I was just making a statement of fact. Nowhere in my motion do I ask for those medical reports.

THE COURT: Sorry to interrupt, but you are not basing your Motion to Dismiss on any discovery matter?

MS. KING: No. It was just a statement of fact and the fact that there is case law out there that says if the parties don't respond to discovery, that they don't have a right to defend against it.

THE COURT: Okay.

Clearly the alleged discovery violation is not the basis for the Funds motion to have this matter dismissed. The balance of the points made in the Funds' Motion to Dismiss deal with the merits of the claimant's case for wage loss disability and permanent total disability. While the Funds have titled this motion "Motion to Dismiss", it appears that the motion is, in reality, a motion for summary judgement regarding the issues of wage loss disability and permanent total disability. This type of action is not permissible under the Arkansas Workers' Compensation Act. The claimant is moving forward with the prosecution of his case, including recently receiving medical treatment. I find no basis for dismissal of this claim under A.C.A. §11-9-702 or Rule 099.13. As such, the Funds' Motion to Dismiss is denied.

IT IS SO ORDERED.

HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE