

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307285

MORRIS K. JOLLY, EMPLOYEE

CLAIMANT

**COOPER TIRE & RUBBER COMPANY,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

**CENTRAL ADJUSTMENT COMPANY, INC.,
TPA**

RESPONDENT NO. 1

SECOND INJURY TRUST FUND

RESPONDENT NO. 2

OPINION FILED AUGUST 12, 2025

Hearing before Administrative Law Judge Chandra L. Black on May 14, 2025, in Little Rock, Pulaski County, Arkansas.

Claimant represented by the Honorable Paul Miller, Attorney at Law, Texarkana, Arkansas. Mr. Miller's appeared for the hearing telephonically.

Respondents No. 1 represented by the Honorable Karen H. McKinney, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the Honorable Christy L. King, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 14, 2025, the above-captioned case was heard in Little Rock, Arkansas. Thus, the sole purpose for the hearing was for a determination of whether Respondent No. 2, the Second Injury Trust Fund (also referred to interchangeably as the "Second Injury Fund," the "Trust Fund" or the "Fund"), should be dismissed as a party to this claim.

No testimony was taken.

The record consists of the transcript of the May 14, 2025, hearing, and the documents held therein. Specifically, admitted into evidence in this case were the following: Commission's Exhibit No.1 consisting of twenty-nine pages; and Respondents No. 1 introduced into evidence a

Medical Exhibit consisting of five pages, it was thus marked accordingly. Both exhibits were made as part of the record without objection.

Procedural History

This case has a peculiar factual background. A timeline of the procedural history of this claim has been narrated below:

The Claimant sustained a compensable injury on January 23, 2003. Respondents No. 1 began making payment of these benefits to and on behalf of the Claimant. Subsequently, a dispute arose over wage-loss disability. As a result, the issue of wage loss disability was litigated by the parties via a full hearing. Following this hearing, On October 8, 2009, an Administrative Law Judge issued an opinion and found: “The Claimant’s pre-existing impairment in his lumbar spine combined with his most recent lumbar injury to produce his current disability status.” At that time, the Claimant was awarded 40% in wage loss disability benefits. The Second Injury Fund was found to be liable for payment of these benefits. There was no appeal taken from this decision. Therefore, the Trust Fund began making payments to the Claimant for these benefits.

On April 12, 2010, the Second Injury Trust Fund made its final payment to the Claimant on the award for the 40% wage loss disability benefits. The Fund filed a Form AR-4 with the Commission showing that it had made full payment on these benefits.

Since this time, the Claimant’s attorney has filed on behalf of the Claimant the following additional claims. Specifically, on September 13, 2015, the Claimant filed a Form AR-C requesting additional benefits and an attorney’s fee. On April 6, 2016, the Claimant filed another Form AR-C, asking for medical benefits and an attorney’s fee. The Claimant filed another Form AR-C on February 5, 2019, asking for additional permanent partial disability, additional medical treatment, and attorney fees. Also, the box for Other is checked, and out beside this box is typed written, “wage loss.”

Of significance, in 2007, Ark. Code Ann. §11-9-525 was amended prohibiting any claim from being made against the Second Injury Fund, if not filed prior to January 1, 2008. In the present matter, the Second Injury Fund was properly joined and made a party to this claim prior to the closure of the Trust Fund.

Subsequently, on May 15, 2023, the Second Injury Fund filed a motion to be dismissed as a party from this claim. I entered an order on August 21, 2023, denying the Second Injury Fund's motion for it be dismissed as a party in this case.

The Second Injury Trust Fund has filed a second motion for it to be dismissed from any additional wage-loss liability in this claim. Specifically, on or about November 18, 2024, the Fund filed with the Commission a **SECOND INJURY FUND'S AMENDED MOTION TO DISMISS**. For its motion, the Second Injury Fund states:

1. The Claimant sustained a compensable injury on January 21, 2003.
2. Administrative Law Judge Mark Churchwell entered an Opinion on October 8, 2009, and awarded the Claimant 40% in wage loss disability benefits. He found that the 40% wage loss was to be assessed against the Second Injury Fund. This opinion was not appealed.
3. Respondent No. 2, Second Injury Fund, filed a Form AR-4 on August 22, 2011, informing the Commission the 40% wage loss award had been paid, with the date of the last payment of benefits being April 12, 2010 (Exhibit A).
4. Subsequently, on September 13, 2015, counsel for the Claimant submitted for filing a Form AR-C requesting only medical benefits and an attorney fee (Exhibit B). Counsel for Claimant filed another Form AR-C on April 6, 2016, again seeking only medical benefits and an attorney fee (Exhibit C).
5. On February 5, 2019, counsel for the Claimant filed another Form AR-C. This AR-C contained requests for additional permanent partial disability, additional medical treatment,

attorney fees, and under Other is written Wage Loss (Exhibit D).

6. By email dated March 13, 2019, counsels for the Claimant and Respondents No. 1 agreed to hold in abeyance any further activity in this case for a period of thirty (30) days (Exhibit E). On April 29, 2019, Administrative Law Judge Black informed the parties that she was returning this case to General Files until those parties inform her that they are ready to try further (Exhibit F).

7. The Second Injury Fund, on May 15, 2023, brought its motion for dismissal of the claim against it on three grounds. First, per **Rule 099.13** of the Rules of the Arkansas Workers' Compensation Commission, any party may apply for a dismissal for failure to prosecute and the Commission may enter an order dismissing the claim after reasonable notice to the other parties.

Second, per **A.C.A. § 11-9-702**, the claim may be dismissed if there is no *bona fide* request for a hearing within six (6) months of the filing of the claim.

Third, **A.C.A. § 11-9-713(a)(1) and (2)** requires that any request to review a compensation order, award, or decision must be brought within six (6) months of termination of the compensation period fixed in the original compensation order or award where the ground for the review request is a change in physical condition.

8. After a telephone conference with the parties, the law judge entered an Order on August 21, 2023. (Exhibit G). In that Order, the law judge found that the Claimant took a neutral position as to the Second Injury Fund's motion and that only the Employer objected to the motion on the sole ground that there was a "...remote prospect of future liability of the Fund.". The law judge based her denial on the further point that, if the Second Injury Fund were to be dismissed, there would be no way the Second Injury Fund could be rejoined as a party to the claim. She found further that there was no evidence that the Second Injury Fund would suffer any undue burden by remaining a party to the claim. The law judge found that, because the Claimant was still receiving

medical treatment, the Second Injury Fund had failed to show a want of prosecution in the claim pursuant to Commission Rule 099.13 and ACA § 11-9-702. The Order was silent as to the Second Injury Fund's contention that the statute of limitations in ACA § 11-9-713 served to bar any further wage loss claim in this case. Finally, the law judge cited the Commission's holding in *Henderson v. New Hampshire Insurance Co.*, G402688 (Opinion filed 9-14-2018) in support of her findings and conclusions.

9. The Second Injury Fund contends that sufficient time has passed since the entry of that Order to allow consideration of a second motion to dismiss. Each motion to dismiss stands on its own merits and the Second Injury Fund is not bound by previous dismissals. Past case histories reveal that employers have filed new motions to dismiss despite previous denials and the Second Injury Fund is entitled to the same consideration.

10. The Second Injury Fund was found responsible for wage loss disability of 40% in this case per the October 8, 2009, law judge Opinion, and that holding is *res judicata* and "the law of the case". Respondents No. 1 will never have liability for the *wage loss disability portion* of this claim. Due to that immunity from responsibility for wage loss disability, which is the only subject of the Second Injury Fund's motion, Respondents No. 1 do not have **standing** to participate in this present motion to dismiss. *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 stake in that litigation. Respondents No. 1 do not have a "legally protectable and tangible interest" in dismissal of the *wage loss disability* issue because it will never have exposure for that benefit. The question of "standing" is a threshold issue and should be addressed first. *Bomar v. Moser*, 369 Ark 123, 251 S.W.3d 234 (2007). Respondents No. 1 should be disallowed from participating in the sole issue presently before the Commission because it lacks **standing**.

11. The Second Injury Fund states that, because it and Respondents No. 1 have exclusively separate and identifiably different types of benefits for which each is responsible, neither of the two cases cited by Respondents No. 1 in paragraph 14 of its response to the Second Injury Fund's previous motion apply to this case. Both the *Reynolds Metal Co.* case and the *Southern Wooden Box Co.* case were not cases involving the Second Injury Fund and did not address the issue presently before the Commission. This is also true with regard to *Henderson v. New Hampshire Insurance Co.* which was cited in the law judge's denial of the Second Injury Fund's May 15, 2023, Motion to Dismiss. While receipt of *medical* benefits might toll the statute of limitations for a future assignment of **anatomical impairment** payable by Respondents No. 1, the Second Injury Fund is not legally responsible for either one of those types of benefits. The Second Injury Fund's sole responsibility is for *wage loss disability*. The wage loss award made by the law judge in the October 8, 2009, opinion was completely paid out on **April 12, 2010**. The argument that the receipt of continued medical benefits from Respondents No. 1, which the Second Injury Fund has never owed **by statute and will never owe**, ought to be able to toll the Second Injury Fund's liability is faulty. ACA § 11-9-713, as it applies solely to the Second Injury Fund, is not in conflict with subsection 702. That's why the Second Injury Fund restricted its motion to the only benefit it is legally required to pay in this case. That issue restriction removes all conflict between §702 and §713 as it applies the facts of this case.

12. The argument by Respondents No. 1 that the Second Injury Fund's motion to dismiss ought to be denied on the ground that the Second Injury Fund could not be joined again later is not a **legal** basis for denial. ACA § 11-9-704(c)(4) requires that the law judges and Commission weigh the evidence impartially and not give the benefit of the doubt to any party. Furthermore, the appellate courts have noted that the Commission is required to apply the principle of fairness to all parties. *Int'l Paper Co. v. Plunkett*, 4 Ark App 314, 630 S.W.2d 552 (1982). Under the facts of

the instant case, the Second Injury Fund completed its payout of the 40% award on **April 12, 2010**. The Claimant did not file a claim for additional *wage loss disability* benefits until **February 5, 2019**, almost *nine (9) years* later. As of a date current (November 2024), more than an additional four and ½ years have passed since the latest wage loss claim and still **no hearing has been requested**. An additional claim for wage loss involves only the Claimant and the Second Injury Fund as parties, and “fairness” requires that the wage loss claim against the Second Injury Fund be dismissed. A holding in this case that the Second Injury Fund “might” have **future** (not present) exposure is total **speculation** and cannot be used as the basis for a denial of the Second Injury Fund’s present motion to dismiss. Findings based on conjecture and speculation, even if plausible, cannot take the place of proof. *Dena Constr. Co. v. Herndon*, 264 Ark 791, 575 S.W.2d 155 (1979).

13. As Respondents No. 1 stated in its response to the previous motion, ACA § 11-9-525(e)(1) disallows the bringing of a claim against the Second Injury Fund on or after January 1, 2008. That provision is a mandate from the legislature to “close” the Second Injury Fund. It is not the intent of the legislature for the Second Injury Fund to be “held captive” for over fourteen (14) years, or more, because of a claimant who “sits on his rights”. With the passage of time, the medical reports grow more voluminous. Treating physicians may either retire or expire. The ability of the Second Injury Fund to defend against a claim for additional wage loss does become more **burdensome**. The passage of a vast period of time has produced a very real **burden** on the Second Injury Fund and its ability to defend against a speculative future request for another *wage loss disability hearing*. Further, it produces a continuing and growing **prejudice** against the Second Injury Fund with such passage of time.

14. The procedural defenses advanced by the Second Injury Fund have been in place ever since the Claimant filed his claim for “additional” wage loss disability benefits on **February 5,**

2019. Pursuant to A.C.A. §11-9-702(c) a claim for additional compensation must specifically state that it is a claim for additional compensation. The Claimant only wrote in “wage loss” in the section marked “other” in the AR-C filed in 2019. If the claim is truly one for “additional” wage loss, the previous final order of the law judge entered on **October 8, 2009**, bars the claim per the principle of *res judicata*. In the alternative, if it was brought as a claim for a “change in physical condition” (there has been no such allegation in this case to a date current), then subsection 713 would bar it because the wage loss claim was not brought within six (6) months following the date the Second Injury Fund paid out its wage loss obligation on **April 12, 2010**. The Claimant and the Second Injury Fund are the only two (2) parties involved in this issue.

15. To the best of the Second Injury Fund’s knowledge and belief, the Claimant has not made a *bona fide* request for a hearing on the issue of wage loss since Judge Black denied the Second Injury Fund’s Motion to Dismiss on August 21, 2023. Therefore, Respondent No. 2, Second Injury Fund, is again requesting a dismissal of the wage loss claim in this case per **Rule 099.13** and **A.C.A. § 11-9-702** and **A.C.A. § 11-9-713**.

16. To the best of the Second Injury Fund’s knowledge and belief, there has been no claim for additional wage loss disability benefits due to a change of physical condition filed within six (6) months of the termination of the compensation period fixed in the original compensation order of Judge Churchwell on October 8, 2009. Therefore, the February 5, 2019, Form AR-C requesting additional permanent partial disability (wage loss) benefits should be dismissed for failing to be brought within the period of time authorized by statute.

WHEREFORE, the Second Injury Fund respectfully requests that the Commission schedules (sic) a hearing to determine whether Respondents No. 1 have **standing** to participate in this present motion to dismiss the wage loss disability portion of the **February 5, 2019**, claim on the ground that they are not sufficiently affected by the present litigation and have no legally

protectable and tangible interest in the sole issue to be decided at this time. Further, the Second Injury Fund respectfully requests that the Commission schedules a hearing to dismiss the wage loss disability portion of the claim against it for the reasons stated hereinabove.

The Claimant and Respondents No. 1 have both objected to the Second Injury Fund being dismissed as a party to this action. Both parties have submitted a response to said motion, each response has also been given consideration herein.

Here, the Claimant has continued to receive ongoing reasonably necessary medical treatment for his compensable injury of January 2003. This medical care is being paid for by Respondents No. 1.

Discussion

The Claimant is now 62 years of age. He sustained a compensable injury on January 21, 2003, while working for Respondents No. 1/Copper Tire. The Claimant was electrocuted in the course and scope of his employment, while trying to pull an indoor pump out of floor. A medical report of the Claimant's most recent office visit of January 7, 2025, was made a part the record. At that time, the Claimant was evaluated by his treating physician, Dr. Aaron Calodney, for his compensable back injury. The Claimant's chief complaint was chronic pain. Per these notes, the Claimant requested to restart the process for him to be considered for implantation of a spinal cord stimulator/SCS device. Per these notes, the Claimant reported that in 2023, he was in the process of getting a trial stimulator approved when there was a change in insurance companies with his workers' compensation carrier. The Claimant asked Dr. Calodney to restart this process, which was done.

Currently, the Claimant is being considered as a potential candidate for the possible implementation of a medical device in his back. The implementation of this treatment modality into the Claimant's back will likely result in a change in his condition. While it is the Claimant's

hope that the procedure changes his condition for the better, there remains the possibility that the medical procedure could change his position for the worse and could rise to further litigation of the issue of additional wage loss.

Regarding the Fund's present motion, it has made arguments about my earlier order of August 21, 2023. That order was not appealed. Of note, for an order to be appealable, it must be final. *TEC V. Falkner*, 38 Ark. App. 13, 827 S.W. 2d 661 (1992). The Fund has also failed to produce any probative evidence to show that Respondents No. 1 lack standing to participate in this motion to dismiss it from the wage loss disability part in this claim. For that reason, Respondents No. 1 were allowed to participate in this present motion.

Moreover, the Trust Fund has asked that it be dismissed from this claim per Ark. Code Ann. §11-9-702; and Commission Rule 099.13 (now codified at 11 C.A.R. § 25-110(d)). Clearly, since the start of this claim in 2003, the Claimant has been continuously seeking and receiving reasonably necessary medical treatment for his compensable injury of January 23, 2003, as proven by the above referenced most recent medical report of record authored by Dr. Calodney in January 2025. Hence, this is a very active case. Therefore, I find that the Fund has failed to produce any probative evidence whatsoever proving that the Claimant has failed to prosecute his claim at any time.

Concerning the Fund's assertion that implies the Claimant is barred from receiving any additional wage-loss disability benefits above the 40% wage loss awarded in 2009, I am unaware of any law, rule, or statutory provision that caps wage-loss disability at 40% in workers' compensation claims. As such, the Fund's argument for dismissal under Ark. Code Ann. §11-9-713 is moot.

The Second Injury Trust Fund has maintained that the passage of time has produced a very real burden on the Fund and its ability to defend against a claim for additional wage loss. I am

unable to find any probative evidence demonstrating that the Trust Fund has been any more prejudiced by the passage of time than the Claimant or Respondents No. 1. As such, I am unable to conclude that any significant probative evidence has been offered by the Second Injury Fund to prove it has been unfairly prejudiced in this regard.

Hence, when considering the totality of the Trust Fund's present motion, I am convinced that in essence, what the Fund is asking for is a motion for summary judgment regarding the issue of wage-loss disability liability against it. It is well-settled under workers' compensation law that summary judgments are not applicable in Arkansas workers' compensation cases.

Accordingly, I find no basis for dismissal of Respondent No. 2/the Second Injury Trust Fund from this claim. As such, the Fund's second motion is denied, *without prejudice*.

Findings of Fact and Conclusions of Law

I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The Second Injury Trust Fund filed with the Commission a second motion to be dismissed from this claim, thereby relieving it of any future wage-loss liability. A hearing was held on the motion.
3. Reasonable notice of the hearing was given to all proper parties.
4. The Second Injury Fund's second motion to be dismissed from this action is denied based on all of the above reasons, *without prejudice*.

ORDER

In accordance with the Findings of Fact and Conclusions of Law set forth above, the Second Injury Trust Fund's second motion to be dismissed from this claim for additional liability for wage-loss disability against it is hereby respectfully denied, *without prejudice*.

IT IS SO ORDERED.

CHANDRA L. BLACK
Administrative Law Judge