

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F200578

**LEGOLIA ATKINSON,
EMPLOYEE**

CLAIMANT

**ABM INDUSTRIES, INC., D/B/A
ABM JANITORIAL SERVICES,
EMPLOYER**

RESPONDENT

**AMERICAN CASUALTY INS. CO.
OF READING, PENNSYLVANIA,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 22, 2003

Hearing conducted May 27, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. J. Gary Davis, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the extent of permanent disability sustained by the claimant as a result of his admittedly compensable low back injury.

The claimant contended that his compensable injury rendered him permanently and totally disabled. He further contended that Ark. Code Ann. §11-9-522(f), limiting permanent disability benefits by reference to age, is discriminatory and unconstitutional according to such cases as Golden v. Westark Community College, 333 Ark. 41 (1998). An attorney's fee for controversion was requested. Other possible issues were reserved.

The respondents contended that the claimant is not permanently totally disabled and that his compensable injury is not the major cause of any wage loss disability, within the meaning of Ark.

Code Ann. §11-9-104(4)(F)(ii). Alternatively, they contended that, due to the claimant's age, the limitations of Ark. Code Ann. §11-9-522(f), should apply to the claim.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury January 2, 2002; his average weekly wage at that time was \$306.00; and, as a result of this injury, he has sustained permanent impairment in the amount of 7% to the body as a whole; and that the healing period ended January 16, 2003.

3. The preponderance of the evidence shows that as a result of his compensable injury the claimant has sustained permanent partial disability in a total amount equal to 70% to the body as a whole and consisting of his anatomical impairment of 7% to the body as a whole together with wage loss disability in the additional amount of 63% to the body as a whole.

4. The claimant lacks standing to challenge the constitutionality of Ark. Code Ann. §11-9-522(f) which applies only in the case of permanent total disability.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

The claimant, now 77 years of age, injured his low back during his employment as a laborer for the employer's janitorial service, when he fell some 6½ feet from the top of a dumpster, landing on his back. He was seen at the emergency room where, after x-rays of his cervical and lumbar spine, his condition was diagnosed as cervical and lumbar strain.

He was next seen by his family doctor, Dr. Harold Betton, who kept him off work until February 1, 2002. The report of an MRI scan performed January 8, 2002, at Dr. Betton's request indicated that the claimant had moderate bilateral foraminal narrowing for the L5 nerve roots related to discogenic and arthritic changes as well as mild disk bulge at L4-5, other minor findings, and facet arthropathy at L4-5 and L5-S1. Dr. Betton recommended physical therapy. On February 4, 2002, Dr. Betton saw the claimant and noted that he continued to have back pain and was unable to work and had an appointment with the orthopedist, Dr. Blankenship.

However, at the direction of the respondents, the claimant was seen on February 5, 2002, by Dr. Earl Peeples who diagnosed his condition as lumbar strain with minimal changes on MRI. He further stated that the report of the MRI indicated age-related changes of the disks, including bulging and desiccation, as well as arthritic changes around the facets without stenosis and minimal to moderate bilateral foraminal narrowing at the L5 nerve roots. He recommended some physical therapy and muscle relaxants and stated that, if the claimant improved, he could be considered for more intensive therapy, but a clear cut lesion causing neurological deficit or compression was not seen at present. A note dated February 19, 2002, indicated that the claimant was not making good progress with physical therapy and would be seen in Dr. Peeples' office again. On February 26, 2002, Dr. Peeples saw the claimant and wrote that he had back and leg pain and weakness with

failure to improve and should have a bone scan and nerve conduction/EMG testing to see if there is any explanation for his complaints of weakness and his failure to improve. He stated that the claimant continued to have radiation of pain into his legs along with a feeling of weakness. The report of the bone scan dated March 4, 2002, indicated minimal osteoarthritis of the right side of the low cervical region and no lumbar degenerative disease or osteoarthritis evident. The report also noted that the spine otherwise appeared normal. Arthritic changes in the shoulders, knees, and left wrist were noted.

When the claimant was seen by Dr. Alonzo Burba, his complaints included low back pain, leg numbness along with weakness, and some burning, as well as trouble walking at times and losing his balance a lot. Dr. Burba's note dated March 19, 2002, indicates that the claimant's EMG reveals lower amplitude in all the motor nerves, but the right posterior tibial nerve has a conduction block with a markedly prolonged distal latency. He stated that this looks like an underlying axonal polyneuropathy. He explained that most axonal polyneuropathies are metabolic in nature, but can also be nutritional, paraneoplastic, toxic and infectious in nature. He recommended a complete polyneuropathy work-up and stated that the claimant "did have a few polys around the L5 dorsal root in the back" and that this probably represented mild chronic denervation reinnervation, but no acute denervation was seen.

The claimant continued his treatment with Dr. Peebles and on October 30, 2002, was evaluated by Dr. Wayne L. Bruffett. Dr. Bruffett diagnosed the claimant's condition as lumbar strain and noted that Dr. Burba's EMG study apparently revealed a polyneuropathy. He commented that the claimant had had an excellent non-surgical care thus far, but recommended that he see Dr. Barry

Baskin. He also recommended a functional capacity evaluation and stated that it would help the claimant find some other type of employment.

On November 11, 2002, Dr. Baskin saw the claimant and wrote that he had degenerative disk disease of the lumbar spine and possibly an overlying chronic lumbar strain/sprain type injury related to his fall. He also stated that the claimant had a mild polyneuropathy, most likely unrelated to the fall. He also stated that the claimant's current symptoms are due to his work-related injury given the history that he was not having doctor visits in the proceeding ten years prior to the fall. He also stated that it was of importance that the claimant was working daily and not having any back problem prior to his injury.

Dr. Baskin recommended medication and stated that he might benefit from some pool therapy, three times per week. On December 10, 2002, Dr. Baskin stated that the claimant will have a rating by the AMA Guidelines and based on the L4-5 disk bulge and lumbar pain and stiffness. He stated that the claimant's symptoms and his inability to work were the direct result of his fall, stated within a reasonable degree of medical certainty. On January 16, 2003, he wrote that using the AMA Guidelines, 4th Edition, page 113, table 75, the claimant will have a 7% rating to the whole body based on his lumbar spine problems. The claimant was also treated by chiropractor Dr. Richard L. Riley during December, 2002, until January, 2003. The respondents do not challenge the claimant's 7% impairment rating, which is consistent with the AMA Guidelines noted by Dr. Baskin.

In assessing permanent disability claims, the Commission is to consider, in addition to the percentage of the employee's permanent anatomical impairment, such factors as his age, education, work experience, and other matters reasonably expected to affect his future earning capacity. Ark. Code Ann. §11-9-522(b)(1); Glass v. Edens, 233 Ark. 786 (1961).

Here, the claimant is 77 years of age, has a sixth or seventh grade education, served in the United States Army from 1945 through 1947, and has worked as a laborer going back to the time that he left school to help out his grandfather, the one who raised him. He testified that because of his back problems he cannot lift or bend as before and that his job involved lifting heavy bags of trash and bending over. He stated that his leg problems do not prevent him from working, although the medical record indicates that he has had pain and weakness in his legs. Dr. Baskin specifically noted that the claimant's current symptoms are due to his work-related injury, given the history of no doctor visits in the preceding ten years prior to the fall, although the claimant was working daily and not having back problems before that incident. Moreover, none of his physicians have suggested that the claimant was not sincere, or that he now return to the kind of labor he was doing at the time of the injury. At most, they proposed that he try only lighter employment. Thus, the preponderance of the evidence shows that the claimant's compensable injury was the major cause of his wage loss disability. The polyneuropathy which pre-existed his fall did not interfere with his ability to work prior to the injury and should not now be considered a significant cause of his wage loss disability, contrary to the opinion of Dr. Peebles who tended to view all the claimant's pathology as age related and pre-existing. However, when all matters affecting wage loss are considered, the claimant has sustained permanent disability as set forth above.

As to the constitutionality of Ark. Code Ann. §11-9-522(f), the claimant has cited Golden v. Westark Community College, 333 Ark. 41 (1998), which held that this provision in its previous form violated the Equal Protection Clause of the United States Constitution because the justification for the age-based classification was not rationally related to a legitimate government purpose. The stricken provision was added to the code by Section 24 of Act 796 of 1993 and stated:

- (1) Any permanent partial disability benefits payable to an injured worker age sixty-five (65) or older shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker received or is eligible to receive from a publicly or privately funded retirement or pension plan but not reduced by the employee's contribution to a privately funded retirement or pension plan.
- (2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

Section 3 of Act 251 of 1997 amended the provision to provide for a 50% reduction, rather than a dollar-for-dollar reduction. In its Golden opinion, the Supreme Court specifically noted that it could not accept the position that workers' compensation benefits received by one who is age 65 or older fall into the category of a "retirement supplement." They further noted that there was no logical premise for the legislative conclusion that social security retirement benefits and workers' compensation benefits are duplicative and should offset one another.

Thereafter, Section 1 of Act 1168 of 1999 re-enacted paragraph (2) above and replaced the constitutionally defective first paragraph with the following language:

- (1) Permanent total disability benefits shall be paid during the period of such permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.

Thus, curiously, the target of the effort to prohibit workers' compensation from becoming a retirement supplement has become those employees who have suffered the greatest permanent disability as a result of their work, while the less disabled would draw benefits without limitation. Because the claimant has not been found to be permanently totally disabled, he does not fall into the targeted class and lacks standing to challenge that provision. Nevertheless, since he may be found

to be permanently totally disabled on appeal, and thereby acquire standing, it is appropriate to address the issue further.

The re-enactment of the second paragraph, indicating the same intent to avoid becoming “a retirement supplement”, gives context to the new language, showing that it is another attempt to accomplish the basic objective of the provision stricken by the Court in Golden. Since, any distinction between the old and new provisions is fundamentally a distinction without a real difference for purposes of constitutional review, the current provision is also constitutionally suspect pursuant to Golden.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant’s attorney is entitled to the maximum statutory attorney’s fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant’s portion of the controverted attorney’s fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant’s attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge