

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F105152

ERNEST DALE LOHMAN, Employee	CLAIMANT
SSI, INC., Employer	RESPONDENT
VILLANOVA INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED AUGUST 5, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA ROSS CRINER, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 12, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 6, 2003, and a pre-hearing order was filed on October 7, 2003. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed between the parties at all relevant times.
3. The claimant suffered compensable injuries on April 16, 2001.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$256.00 for total disability benefits and \$192.00 for permanent partial disability benefits.
5. Respondent has accepted and is paying permanent partial disability benefits based on a 15% rating.

At the time of the hearing the parties also agreed to stipulate that respondent was requested to provide claimant with a psychological evaluation and/or treatment but did not do so.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Extent of claimant's permanent disability benefits.
2. Attorney fee.

At the time of the hearing claimant indicated that he was not requesting payment for Dr. Walz's evaluation.

The claimant contends that he is entitled to permanent disability greatly in excess of his 15% impairment rating. The claimant contends that his attorney is entitled to an appropriate attorney's fee on all benefits paid or payable in this case because the claim has been controverted in its entirety. The claimant contends that the fact that the respondents voluntarily reinstated temporary total disability benefits on January 7, 2003 and continued to pay those benefits until June of 2003 does not relieve the respondent of liability for a controverted attorney's fee with regard to those benefits because payment of those benefits arose out of a claim that has been controverted in its entirety.

The respondents contend that it has paid all appropriate benefits to which claimant is entitled. With respect to claimant's request for permanent disability benefits attributable to wage loss, respondents contend that claimant did not cooperate with job placement assistance; therefore, claimant is not entitled to permanent benefits over and above the 15% anatomical rating.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 6, 2003, and contained in a pre-hearing order filed October 7, 2003, are hereby accepted as fact.

2. The parties' stipulation that respondent was requested to provide claimant with a psychological evaluation and/or treatment but did not do so is also hereby accepted as fact.

3. Claimant is entitled to permanent disability benefits in an amount equal to 60% to the body as a whole as a result of wage loss from his compensable injury.

4. Respondent has controverted claimant's entitlement to all compensation benefits and claimant's attorney is entitled to a fee on all compensation benefits, including those previously paid.

FACTUAL BACKGROUND

The claimant is a 39-year-old man who performed construction work for the respondent. Claimant suffered a compensable injury on April 16, 2001 when he fell approximately 20 feet from the ground. This fall resulted in multiple injuries including a cervical spine fracture, rib fractures, and a fracture of the right upper extremity. Following his fall claimant was taken to the hospital and surgery was performed by Dr. Arthur Johnson on April 17, 2001. The surgery consisted of a cervical discectomy and fusion at the C5-6, C6-7, and C7-T1 levels. It also included removal of a portion of the vertebral body at C7, decompression of the spinal canal, the implantation of a plating system, and placement of a halo fixation device. Less than one month later on May 8, 2001, claimant underwent a second surgical procedure involving a fusion in the claimant's cervical thoracic spine.

Following the second surgical procedure claimant underwent some physical therapy

and was eventually released by Dr. Johnson with a permanent physical impairment rating in an amount equal to 15% to the body as a whole which was assigned on September 18, 2001.

Despite claimant's release by Dr. Johnson, he continued to have significant discomfort and pain. Claimant was sent to Dr. Bradley Short for additional evaluation on June 6, 2002. At that time Dr. Short reviewed the claimant's medical history and his multiple traumas. Dr. Short opined that claimant would not be able to return to work as a roofer and he scheduled a functional capacities evaluation which revealed that claimant was capable of performing work in the light category. Dr. Short prescribed narcotic medication for treatment of claimant's pain. Dr. Short's medical reports indicate that claimant reported increased functioning and improvement of his pain with increases of medication. As a result, Dr. Short increased the dosage of claimant's medication and continued to prescribe medication over a period of time. Dr. Short's medical reports indicate that he was concerned that claimant was having difficulty controlling his medication and Dr. Short indicated that claimant should undergo a psychological evaluation by Dr. Bier. There is no indication that claimant ever underwent this evaluation. The medical reports from Dr. Short indicate that he continued to prescribe medication for the claimant. After Dr. Short's medical report of December 26, 2002, there is no additional report from Dr. Short until May 29, 2003. In his report of that date Dr. Short noted that the claimant had presented to the emergency room over the weekend of May 16, May 17, and May 18. Dr. Short noted that the emergency room physicians had diagnosed claimant as suffering from opiate withdrawal as a result of misuse of pain medication. Dr. Short indicated that he had elected not to continue treating claimant because of his misuse of medications and would not refill any of the claimant's medication.

After claimant's treatment from Dr. Short he came under the care and treatment of Dr. George Howell. The first medical report from Dr. Howell is dated June 27, 2003. As

a result of claimant's complaints of pain Dr. Howell prescribed claimant additional medications including narcotic medication. Dr. Howell's medical reports contain observations consistent with Dr. Short's observations. Those observations include statements that claimant was able to engage in more activities while on pain medication and that the medication was helping control claimant's pain. In fact, Dr. Howell's medical report of September 4, 2003 indicates that claimant informed him that he occasionally needed extra Oxycontin. As a result, Dr. Howell prescribed additional medications for the claimant. In his note of October 2, 2003, Dr. Howell noted that the medications have allowed claimant to increase his physical activity.

At the same time claimant was receiving treatment from Dr. Howell, claimant was also being evaluated and treated by Dr. Brackman. In a report dated October 30, 2003, Dr. Brackman indicated that claimant's anxiety/depression was not being treated at that time. As a result, Dr. Brackman prescribed claimant medication for his depression. In his office notes of January 23, 2004, Dr. Brackman increased claimant's depression medication and ordered an MRI scan of the claimant's low back and neck. Apparently, this MRI scan has not been performed.

At respondent's request claimant also underwent an evaluation by Dr. Reza Shahim in Little Rock. Dr. Shahim completed form AR-3 indicating that claimant had a permanent physical impairment rating in an amount equal to 15% to the body as a whole. In addition, Dr. Shahim indicated that claimant could return to work lifting no more than 40 pounds.

For social security purposes, claimant was sent to Dr. Patricia Walz for a psychological evaluation. Dr. Walz performed numerous tests on the claimant which indicated he functioned in the extremely low to borderline intelligence range. Dr. Walz noted that testing revealed that while claimant read at a high school level, his spelling was the equivalent of a fourth grade level and his math a third grade level. Dr. Walz went on to indicate that claimant would need assistance with finances if he were to be awarded

benefits. She also indicated that while claimant would not qualify for a diagnosis of mild mental retardation, he was not functioning as well as he was prior to his injury because of chronic pain and depression. Dr. Walz noted that the depression was severe enough to interfere with claimant's concentration and attention. She also noted that his irritability could interfere with relationships with peers, supervisors, and the public. Dr. Walz diagnosed the claimant as suffering from major depression and borderline intellectual functioning.

In an effort to return the claimant to work following his compensable injury, the claimant underwent rehabilitation evaluations by three rehabilitation specialists hired by the respondent. These specialists were Dale Thomas, Tanya Owen, and Terry Owens. While Dale Thomas' report indicates that claimant was cooperative with rehabilitation and job placement efforts, the reports of Owen and Owens indicate that claimant was not cooperative. In fact, Terry Owens testified at the hearing that claimant did not appear for scheduled appointments at the Adult Education Center, did not attend approved physical therapy sessions, did not attend appointments with her, and did not follow through with attempting to find work at employers given to him by Owens.

ADJUDICATION

The initial issue for consideration involves respondent's contention that claimant is barred from receiving permanent disability benefits over and above the 15% anatomical rating due to a lack of cooperation with job placement assistance. The law governing the lack of cooperation is codified at A.C.A. §11-9-505(b)(3). That subsection states as follows:

The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation

or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

The question in this case becomes first whether claimant refused to participate in or cooperate with respondent's offer of job placement assistance, and if so, whether claimant had reasonable cause. Based upon my review of the reports from Tanya Owen and the reports and testimony of Terry Owens, I believe that claimant failed to cooperate with job placement assistance. The report from Tanya Owen dated August 6, 2002, indicates that claimant was reluctant to avail himself of her job placement services due in part to a pending social security claim. In addition, the rehabilitation reports of Terry Owens as well as her testimony indicate that claimant was less than cooperative by failing to contact respective employers, by failing to attend adult education appointments, and by failing to follow through with physical therapy.

If this was the only evidence presented one could conclude that claimant is barred from receiving additional benefits because he did not cooperate with job placement assistance. However, after my review of the remaining evidence I find that claimant's lack of cooperation was excusable.

The first rehabilitation specialist who worked with the claimant was Dale Thomas. Mr. Thomas authored a letter dated March 28, 2002 which clearly indicates that claimant was cooperating with job placement efforts.

Mr. Lohman has started an active job search using the physical abilities that he reports to have. He is placing applications for employment for a variety of positions that are currently open in the Van Buren/Fort Smith, Arkansas area based on job leads that I am providing. He is also registered with the Employment Security Department (state unemployment office). They have sent him on one interview.

I am encouraged by Mr. Lohman's motivation to seek employment.

The question arises as to what transpired to change the claimant from a motivated cooperative individual described in Thomas' report of March 28, 2002 to the individual described by Owen and Owens. I believe that the answer to this question is found in the medical reports of Drs. Short, Howell, Brackman, and Walz. As previously noted, the claimant began treatment with Dr. Short on June 6, 2002. Dr. Short's medical treatment consisted primarily of narcotic pain prescriptions. When claimant reported a decrease in pain and an increase in his activity level, claimant was given additional medication. However, even at the time of Dr. Short's initial evaluation on June 6, 2002, Dr. Short noted that the claimant appeared to be "profoundly depressed." By September 10, 2002 Dr. Short although continuing to prescribe medication recommended that the claimant undergo an evaluation by Dr. Bier, a psychologist. As previously noted, there is no indication that claimant ever underwent that evaluation. Thus, at the time claimant began working with Tanya Owen he was receiving increasing doses of narcotic medication and had been noted to be "profoundly depressed" by Dr. Short. Likewise, when claimant was undergoing job placement assistance from Terry Owens in October 2002, claimant was receiving medication for depression from Dr. Brackman. Claimant was also at that same time again receiving narcotic medication from Dr. Howell.

The claimant's need for evaluation of depression was confirmed by Dr. Walz in April 2003. Following a battery of tests, Dr. Walz in her report of April 23, 2003 indicated that claimant was suffering from major depression and borderline intellectual functioning. Dr. Walz noted that claimant's depression was severe enough to interfere with his ability to function on the job and that it could interfere with his concentration and attention and that his irritability could interfere with relationships with peers, supervisors, and the public.

I also note that Terry Owens testified that an individual suffering from depression would have a decreased incentive or motivation.

Given all of this evidence, I find that claimant did not intentionally fail to cooperate

with the respondent's efforts at job placement assistance. Instead, I find that as a result of claimant's injury and his psychological condition the claimant was unable to cooperate. As of April 28, 2002, Dale Thomas, the rehabilitation specialist, indicated that claimant was cooperative and motivated. In fact, claimant had taken steps to apply for employment. However, shortly after that time the claimant was placed on narcotic medication, the use of which he was unable to control. In addition, claimant's physicians noted that he appeared to be depressed and this diagnosis was confirmed by Dr. Walz following testing in April 2003. Dr. Walz noted that depression and irritability could interfere with claimant's ability to function including concentration and that it could interfere with relationships with peers, supervisors, and the public. Thus, while claimant was less than cooperative with job placement assistance provided by Tanya Owen and Terry Owens, I find that due to the claimant's narcotic medication regimen as well as his depression that the lack of cooperation was not intentional; therefore, I find that claimant is not barred from receiving benefits pursuant to A.C.A. §11-9-505(b)(3).

In making this finding I am aware that claimant has not requested compensation benefits for treatment of his psychological condition and I am not finding that claimant's depression is a compensable consequence of his work-related injury. However, the evidence does establish that claimant suffers from depression. Regardless of the cause of this depression, the fact that claimant suffered from depression which interfered with his ability to cooperate with job placement assistance is what is important.

Having found that claimant is not barred from receiving benefits for a loss in wage earning capacity pursuant to A.C.A. §11-9-505(b)(3), the question becomes the extent of claimant's loss in wage earning capacity. In considering the claimant's loss, A.C.A. §11-9-522(b)(1) states that in addition to the impairment rating, the Commission may take into account various factors including the claimant's age, education, work experience, and other matters reasonably expected to affect their future earning capacity.

Here, the claimant is a 35-year-old man. Testing performed by Dr. Walz indicates that claimant functions in the borderline intellectual range. Although claimant is capable of reading at a high school level, his spelling is the equivalent of a fourth grade level and he performs math at the third grade level.

As previously noted, claimant was released by Dr. Johnson with a permanent physical impairment rating in an amount equal to 15% to the body as a whole. In a report dated April 26, 2002, Dr. Johnson indicated that claimant was in need of no further surgery and that claimant could be discharged to return to work without restrictions as long as he exercised discretion in lifting and performing jobs that could cause additional injury to his cervical spine. I do not find a discharge for the claimant to return to work without restrictions to be credible given the functional capacities evaluation indicating that claimant had the ability to perform work in the light category of work with the occasional lifting of up to 25 pounds. The evaluation was considered valid.

In considering the extent of claimant's loss in wage earning capacity, I have also reviewed a videotape which was taken by a private investigator of the claimant in September 2002. First, I note that this videotape is almost two years old. Furthermore, I do acknowledge that the claimant who is on the tape is not the same individual who was present at the hearing. On the videotape claimant appears to be capable of engaging in various physical activities without any apparent difficulty. On the other hand, at the hearing the claimant was unable to sit in a chair by himself and hold his head straight. Instead, it was necessary for the claimant to place the chair close to the wall and rest his head against the wall for support. In response to questioning surrounding his ability to engage in these activities in September 2002, claimant noted that at that period of time he was taking a great deal of narcotic medication and as a result was capable of performing increased activities. Claimant's testimony is supported by the medical records from both Dr. Short and Dr. Howell stating that the increased narcotic medication allowed claimant

to engage in additional physical activities. Once claimant was taken off the narcotic medication, he was unable to continue with those physical activities.

Prior to his construction work for respondent, claimant drove a propane truck in California for nine to ten years and he also worked as a mechanic.

Claimant testified that his current physical condition includes pain in his neck which radiates down his spine; difficulty sleeping; and difficulty driving a vehicle.

After considering all the relevant wage loss factors presented in this case, I find that claimant has suffered a loss in wage earning capacity in an amount equal to 60% to the body as a whole. As a result of his compensable injury the claimant has been assigned a permanent physical impairment rating in an amount equal to 15% to the body as a whole. A functional capacities evaluation indicates that claimant is capable of performing work in the light-duty category which requires the occasional lifting of up to 25 pounds. On the other hand, Dr. Walz's testing indicates that claimant functions in the borderline intellectual category. While claimant is capable of reading, he can only spell at a fourth grade level and perform math at a third grade level. Thus, while claimant has physically been limited in the number of jobs he is capable of performing, claimant's intellectual functioning also limits his ability to perform lighter jobs. Accordingly, for the forgoing reasons, I find that claimant is entitled to permanent partial disability benefits in an amount equal to 60 percent to the body as a whole as a result of a loss in wage earning capacity.

In assessing claimant's wage loss I have not taken into consideration the diagnosis of depression. While I believe this diagnosis is important in determining whether claimant cooperated with job placement assistance, I do not believe it can be considered in assessing wage loss absent a finding that it existed prior to his injury [an employer takes a claimant as it finds him] or that the depression was a compensable consequence of the work-related injury.

The final issue for consideration involves claimant's attorney's request for an

attorney fee. Obviously, the respondent has controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 60% to the body as a whole attributable to claimant's loss in wage earning capacity. However, claimant's attorney contends that by initially controverting this claim and accepting compensability only after a hearing was scheduled that respondent controverted claimant's entitlement to all compensation benefits. In *Tilley v. Aeroquip Corporation*, Full Commission Opinion filed August 5, 1999 (E412583), the Full Commission addressed the issue of controversion. In that particular case, the respondent also asserted that claimant did not suffer a compensable injury. Following a hearing an administrative law judge found that claimant had suffered a compensable injury and awarded compensation benefits. That decision was subsequently affirmed and adopted by the Full Commission. Later, the claimant was assigned a permanent physical impairment rating in an amount equal to 7% to the body as a whole which was accepted and paid by the respondent. Although respondent accepted liability for the 7% impairment rating, claimant's attorney contended that because respondent initially controverted the claim respondent was liable for an attorney fee on all compensation benefits. An administrative law judge found that claimant's attorney was not entitled to a fee on the 7% impairment rating and that decision was appealed to the Full Commission. Relying upon the decision in *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998), the Commission held that respondent was liable for an attorney fee on any future benefits which might accrue after litigation caused by respondent controverting a claim in its entirety and requiring a claimant to engage an attorney to litigate claimant's entitlement to future benefits.

In this particular case, respondent initially controverted claimant's entitlement to compensation benefits contending that claimant did not suffer a compensable injury. As a result, a pre-hearing conference was conducted on July 17, 2001 and a pre-hearing order filed July 18, 2001 indicated that a hearing was to be conducted on the issue of

compensability on October 8, 2001. Prior to the hearing the respondent accepted compensability of claimant's injury and paid compensation benefits. However, because respondent initially controverted claimant's entitlement to compensation benefits, it was necessary for the claimant to hire an attorney to represent him and file a claim which resulted in the setting of a hearing on compensability. Respondent's subsequent acceptance of compensability does not change the fact that it initially controverted this claim in its entirety. Accordingly, based upon the decision in *Tilley*, I find that claimant's attorney is entitled to a fee on all compensation benefits payable to the claimant. Since the claimant's injury occurred prior to July 1, 2001, this includes medical benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that as a result of his compensable injury he is entitled to permanent partial disability benefits in an amount equal to 60% to the body as a whole for a loss in wage earning capacity. Respondent has controverted claimant's entitlement to these benefits. In addition, respondent is also liable for an attorney fee on all compensation benefits payable as a result of claimant's compensable injury.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by the claimant and one-half to be paid by the respondents. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE