

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F206514

SHANNON SCOTT, Employee	CLAIMANT
C.V. FAMILY FOODS, Employer	RESPONDENT #1
CRAWFORD & COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED AUGUST 6, 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.

Respondent #1 represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 19, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 23, 2004, and an amended pre-hearing order was filed on that same date. 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 opinion filed January 9, 2004 is final and res judicata.
2. Respondent #1 has now accepted and is paying permanent partial disability benefits based on a 7% impairment rating.
3. The Second Injury Fund has accepted liability for wage loss and is paying permanent partial disability benefits in an amount equal to 20% to the body as a whole.

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

1. Claimant's entitlement to permanent partial disability benefits for wage loss in excess of 20% to the body as a whole.
2. Attorney fee, including impairment and 20% accepted by Second Injury Fund.

The claimant contends she has sustained a 7% permanent impairment to the body as a whole as a result of her April 30, 2002 accident and that she has received a 10% permanent impairment rating due to a fusion that occurred in 1999. Claimant contends she is entitled to permanent disability benefits for wage loss greatly in excess of the 20% accepted by the Second Injury Fund. The claimant contends that the respondent carrier and the Second Injury Fund have controverted all permanent disability benefits and that her attorney is entitled to an appropriate attorney's fee.

Respondent #1 contends the claimant has already been provided all benefits to which she is entitled.

Respondent #2 contends that claimant is not entitled to permanent partial disability for wage loss in excess of the 20% previously accepted.

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 witness and to observe her 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 June 23, 2004, and contained in an amended pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits for wage loss in excess of the 20% to the body as a whole previously accepted by the Second Injury Fund.

3. Claimant's attorney is not entitled to a fee on permanent partial disability benefits paid by respondent #1 based upon a 7% rating or the 20% accepted by the Second Injury Fund.

FACTUAL BACKGROUND

The claimant is a 33-year-old lady who went to work for respondent #1 as a produce manager. As a produce manager the claimant was responsible for ordering produce, stocking produce, preparing monthly profit/loss statements, and inventory control. The claimant suffered an admittedly compensable injury to her cervical spine on April 30, 2004 when she was pulling a pallet filled with produce with a pallet jack and felt something pop in her cervical spine area. After some initial treatment from a general practitioner, the claimant came under the care of Dr. Capocelli, a neurosurgeon. Previously, in 1999, Dr. Capocelli had performed a cervical spine fusion on the claimant. Dr. Capocelli has not performed surgery on claimant following her most recent injury.

Following a cervical myelogram Dr. Capocelli in a report dated October 1, 2003 noted that the myelogram revealed post-surgical changes at the C4-6 level with small disc bulges at the C3-4 and C6-7 levels. Dr. Capocelli's treatment has primarily consisted of physical therapy.

At respondent #1's request claimant was also evaluated by Dr. Saer, a neurosurgeon, on April 1, 2003. Dr. Saer diagnosed claimant's condition as a cervical strain/sprain and recommended a six-week course of aggressive physical therapy. Dr. Saer also opined that claimant would most likely not need surgery.

Respondent #1 accepted claimant's injury as compensable and paid some compensation benefits. However, there came a point at which respondent #1 no longer paid claimant temporary total disability benefits. As a result, claimant filed a claim requesting additional temporary total disability benefits beginning June 3, 2003 and continuing through a date yet to be determined. She also requested payment of mileage expenses and a controverted attorney fee. That claim was the subject of a hearing conducted on October 13, 2003. Subsequent to that hearing the parties also submitted the deposition of Dr. Capocelli which was taken on November 19, 2003. As a result, an

opinion was issued by myself dated January 9, 2004 finding that claimant was entitled to additional temporary total disability benefits beginning June 3, 2003 and continuing through September 18, 2003. I also found that respondent #1 was liable for all unpaid mileage expenses associated with claimant's compensable injury. That opinion was not appealed and the parties have stipulated that it is final and res judicata.

Following that decision claimant has filed a claim requesting payment of permanent partial disability benefits as a result of her compensable injury. Respondent #1 has accepted and paid permanent partial disability benefits based upon a 7% impairment rating. In addition, the Second Injury Fund has acknowledged its liability for wage loss and has accepted and is paying permanent partial disability benefits in an amount equal to 20% to the body as a whole. Claimant now contends that she is entitled to benefits for a loss in wage earning capacity in excess of 20% to the body as a whole as a result of her compensable injury.

ADJUDICATION

As previously noted, respondent #1 has accepted and paid permanent partial disability benefits in an amount equal to 7% based upon an impairment rating assigned by Dr. Capocelli for claimant's cervical spine injury. In addition, the Second Injury Fund has accepted liability for permanent partial disability benefits attributable to wage loss in an amount equal to 20% to the body as a whole. Claimant contends that her loss in wage earning capacity exceeds 20%.

Pursuant to A.C.A. §11-9-522(b)(1) when considering claims for permanent partial disability benefits in excess of a claimant's permanent physical impairment the Commission may take into account several factors. These include the percentage of permanent physical impairment as well as the employee's age, education, work experience, and all other matters reasonably expected to affect their future earning capacity.

After my review of the relevant wage loss factors I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits in excess of the 20% previously accepted by the Second Injury Fund.

As previously noted, claimant had a prior injury to her cervical spine in 1999. As a result of that injury she underwent a cervical fusion which was performed by Dr. Capocelli. Apparently, Dr. Capocelli did not assign the claimant a permanent physical impairment rating at that time. However, Dr. Capocelli did address at his deposition claimant's impairment relating to the 1999 injury. Dr. Capocelli testified that as a result of the 1999 cervical spine fusion claimant would have suffered a permanent physical impairment in an amount equal to 8 to 10 percent to the body as a whole. With respect to claimant's most recent injury, Dr. Capocelli opined that claimant has suffered a permanent physical impairment in an amount equal to 7% to the body as a whole. Thus, according to Dr. Capocelli's testimony, the claimant has a permanent physical impairment as a result of both compensable injuries which ranges from 15% to 17% to the body as a whole.

Also at the time of his deposition Dr. Capocelli stated that claimant would have some permanent restrictions with regard to her ability to return to work. Dr. Capocelli stated that claimant could perform sedentary or light work with no lifting of more than 10 to 20 pounds on an intermittent basis, no squatting, bending, or frequent position changes through the day. Approximately four days after his deposition Dr. Capocelli completed a form indicating that claimant could return to work with restrictions of sedentary work, no lifting more than 10 pounds, no bending, twisting, or pulling.

With respect to her current physical problems, claimant testified that she suffers from complete numbness in the last two digits of her left hand. She also testified that she has tingling, numbness, and pain in the other three digits and weakness in her left arm. It should be noted that claimant is left-hand dominant.

Claimant is 33 years old, graduated from high school, and has 41 hours of college

credit. Prior to working for respondent #1 as a produce manager the claimant most recently worked as managing editor of *Naturpathic Magazine*. Claimant testified that she was responsible for performing graphic design, stories, ad layout, sending the magazine to the printer and to subscribers. Claimant testified that as managing editor she was required to lift boxes of magazines weighing 45 to 65 pounds. Claimant was paid \$7.00 per hour and was given a rental allowance. Claimant performed this job as managing editor from July 2000 through January 2002.

Prior to her job as managing editor of *Naturpathic Magazine* the claimant was self employed in computer repair. Claimant troubleshooted software and replaced hardware in computers. Claimant testified that she ceased that employment because it was not a steady income. Prior to her self employment the claimant worked at Jiffy Print performing graphic design. In addition, she had also previously worked at Kinko's in both Fort Smith and Tulsa performing graphic design work. Before performing graphic design work claimant worked as a cook in a restaurant.

Claimant testified that she would be unable to return to her jobs as a graphic designer due to the speed at which data would need to be inputted into a computer. Claimant testified that problems with her hand prohibit her from typing at a rapid rate.

Following her employment with respondent #1, claimant worked approximately four days for West Telecommunication Services, a phone sales company. Claimant underwent approximately three days of training and one day of work. Claimant testified that she has applied for jobs at the Employment Security Division and with *The Thrifty Nickel*.

The claimant is enrolled to return to school at the University of Arkansas - Fort Smith in August studying computer aided drafting and design. Claimant testified that computer aided drafting and design does not require as much data input as graphic design. She believes that she can perform this type of work and is scheduled to graduate in May of 2006.

After consideration of the relevant wage loss factors, I find that claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits for wage loss in excess of the 20% previously accepted by the Second Injury Fund. While claimant has had significant physical limitations placed upon her ability to return to work, the evidence indicates that claimant has job skills which would allow her to become employed in sedentary or light duty type work in accordance with her doctor's restrictions. While claimant's job as a produce manager for respondent #1 obviously required physical work in the form of stocking produce, claimant also had skills involving the ordering of the produce, preparing monthly profit/loss statements, and inventory control. In addition, as managing editor of the *Naturpathic Magazine*, claimant had skills which would translate to other types of employment. In addition to the graphic design claimant was also responsible for stories and ad layout. In addition, claimant has been self employed in computer repair performing not only physical work involving replacing hardware but also performing troubleshooting of software. Finally, claimant testified that she is currently enrolled at the University of Arkansas - Fort Smith where she will be studying computer aided drafting and design. Claimant testified that she believes she can perform this type of work because it does not require as much data input as graphic design. In addition to these skills which would allow claimant to become employed in jobs not requiring physical activity, I also note that claimant is a relatively young 33-year-old high school graduate and that she already has 41 hours of college credit. Given all of these factors, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a loss in wage earning capacity in excess of the 20% previously accepted by the Second Injury Fund. Instead, I find that claimant's loss of earning capacity equals 20% to the body as a whole.

The final issue for consideration involves attorney fees. Claimant's attorney first contends that he is entitled to an attorney fee on the 7% impairment rating accepted and

paid by respondent #1. I find no evidence that respondent controverted claimant's entitlement to permanent partial disability benefits in the amount of 7% based upon the impairment rating assigned by Dr. Capocelli. As previously noted, a prior hearing was conducted in this claim on October 13, 2003. At that time claimant was contending that she was entitled to temporary total disability benefits through a date yet to be determined. Following Dr. Capocelli's deposition an opinion was filed on January 9, 2004 finding that claimant was entitled to additional temporary total disability benefits from June 3, 2003 and continuing through September 18, 2003. That opinion was not appealed and claimant subsequently requested a hearing on her entitlement to permanent partial disability benefits. At the time of the pre-hearing conference which was conducted on May 3, 2004 the parties stipulated that respondent #1 had accepted and was paying permanent partial disability benefits based upon a 7% impairment rating. Given that the January 9, 2004 opinion did not become final until some time in February 2004 and that by May 3, 2004 respondent #1 had already accepted and begun paying permanent partial disability benefits based upon a 7% impairment rating, I find insufficient evidence that respondent #1 controverted claimant's entitlement to permanent partial disability benefits in an amount equal to 7% to the body as a whole. Therefore, claimant's attorney is not entitled to a fee.

Claimant's attorney also contends that he is entitled to an attorney fee on the 20% which has been accepted by the Second Injury Fund. I find insufficient evidence that the Second Injury Fund controverted claimant's entitlement to compensation benefits. Documentary evidence entered into the record indicates that claimant's attorney asked that the Second Injury Fund be joined as a party by letter dated March 3, 2004. The Second Injury Fund acknowledged that it had been named as a party in a letter dated March 16, 2004. Interrogatories were sent by the Second Injury Fund to claimant by e-mail on April 28, 2004. Claimant provided answers to interrogatories by letter dated May 7, 2004. In a letter dated May 11, 2004, Terry Pence, the attorney for the Second Injury Fund,

acknowledged receipt of the answers to discovery and stated that the Second Injury Fund would accept liability for wage loss benefits in an amount equal to 20% to the body as a whole.

The question of whether a claim is controverted is one of fact to be determined from the circumstances of each particular case. *Walter v. Southwestern Bell Telephone Company*, 17 Ark. App. 43, 702 S.W. 2d 882 (1986); *Climer v. Drake's Backhoe*, 7 Ark. App. 148, 644 S.W. 2d 637 (1983). In addition, the mere failure to pay compensation benefits does not in and of itself amount to controversion. Parties are permitted an opportunity to investigate a claim and determine the extent of disability. *Buckner v. Sparks Regional Medical Center*, 32 Ark. App. 5, 794 S.W. 2d 623 (1990); *Walter, i.d.*

Once the Second Injury Fund was made a party, it promptly sent interrogatories to the claimant and when answers to that discovery were provided, the Second Injury Fund accepted liability in the amount of 20% to the body as a whole. Under these facts, I find that the Second Injury Fund did not controvert claimant's entitlement to permanent partial disability benefits; therefore, claimant's attorney is not entitled to an attorney fee.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent partial disability benefits for wage loss in excess of the 20% previously accepted by the Second Injury Fund. Claimant's attorney has also failed to prove by a preponderance of the evidence that he is entitled to an attorney fee from either Respondent #1 or the Second Injury Fund.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE