

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F104428

PATRICIA FISH	CLAIMANT
FAST FOOD HOLDINGS	RESPONDENT
EMPLOYERS INSURANCE OF WAUSAU, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 23, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 13, 2005, in Fort Smith, Arkansas. The deposition of Dr. Robert G. Bebout was taken on August 3, 2005 and has been admitted as Respondents' Exhibit No. 2.

A pre-hearing order was entered in this case on June 21, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties added the additional issue of applicability of Ark. Code Ann. §11-9-802(e). A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Opinion of November 21, 2003, has become final and is

res judicata of all issues raised and addressed therein.

By agreement of the parties the issues to be litigated and resolved at that time were limited to the following:

1. The extent of permanent physical impairment and corresponding permanent partial disability.
2. Attorney's fees.
3. whether the penalty provided by Ark. Code Ann. §11-9-802(e) applies to any permanent partial disability for permanent physical impairment.

In regard to these issues, the claimant contends that she is entitled to permanent partial disability benefits in accordance with the impairment rating assigned by her authorized treating physician. The claimant also contends that the respondents have intentionally refused to pay these benefits and should be liable for the penalty provided by Ark. Code Ann. §11-9-280(e).

In regard to these issues, the respondents contend that all benefits have been paid in accordance with the Full Commission's Opinion of November 21, 2003. On the issue of permanent disability benefits, the respondents will contend that the claimant is not entitled to permanent disability benefits based upon the 50% impairment rating to the lower extremity assessed by Dr. Bebout. The respondents will contend that the claimant is not entitled to permanent disability benefits or that she is entitled to no more than 2% to the lower extremity for the compensable injury. The respondents also deny that Ark. Code Ann. §11-9-802(e) is applicable to any benefits payable in the present claim.

Subsequent to the hearing, the claimant raised an additional issue concerning the claimant's portion or one-half of the attorney's fees on the controverted medical services previously awarded (i.e. the total knee replacement and follow up). The claimant contends that the respondents did not withhold the claimant's portion of these attorney's fees from the benefits previously awarded directly to the claimant (i.e. additional temporary total disability benefits). Therefore, the claimant argues that the respondents, themselves, should now be required to pay the claimant's attorney the remaining one-half of the maximum statutory attorney's fee on these benefits for their failure to comply with the Commission's prior Order.

The respondents do not object to this subsequently raised issue being addressed in the current Opinion. The respondents further concede that they did withhold the claimant's portion of the attorney's fee initially awarded from the benefits previously awarded directly to the claimant. Instead, the claimant was paid these benefits in full. The respondents contend that they failed to withhold these amounts because it was "unclear" from the prior Opinion whether they were authorized to do so. The respondents also maintain that they are not liable for the claimant's portion of the awarded attorney's fees and that the claimant's attorney can obtain these fees directly from the claimant or out of any benefits subsequently awarded to the claimant.

DISCUSSIONI. APPLICABILITY OF THE PENALTY PROVIDED BY ARK. CODE ANN. §11-9-802(e)

Ark. Code Ann. §11-9-802 provides the method whereby it can be determined when certain benefits “become due” and provides for various penalties for the late payment of benefits. One of these penalties is contained in Ark. Code Ann. §11-9-802(e), which reads:

“In the event the Commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%) payable to the claimant.”

It is my opinion that it was the legislature’s intent by the enactment of Ark. Code Ann. §11-9-802(e) to intend to expand the late payment penalties provided by subsections (b) and (c) to all benefits payable under the Act, particularly medical benefits or expenses. It is my further opinion that the legislature intended that this Commission have the discretion to raise the amount of the penalties provided by subsections (b) and (c) up to 36% in cases where a respondents’ failure to timely pay these benefits was “willful and intentional.”

In the present case, there has been no award of permanent partial disability benefits for permanent physical impairment resulting from the claimant’s compensable injury. Thus, such benefits could only represent benefits or installments of compensation “payable without an award.” Although the respondents have willfully and intentionally failed to pay such benefits, these benefits have been controverted by the respondents. The claimant’s

entitlement to these benefits is one of the issues involved in the current litigation and has not been finally resolved.

Obviously, the penalty provided by Ark. Code Ann. §11-9-802 (b) would not be applicable under these circumstances to the claimant's entitlement to permanent partial disability benefits for permanent physical impairment. As a result, the penalty provided by Ark. Code Ann. §11-9-802(e) would also be inapplicable. The claimant's request for such a penalty must be denied.

II. THE EXISTENCE AND EXTENT OF PERMANENT PARTIAL DISABILITY ATTRIBUTABLE TO PERMANENT PHYSICAL IMPAIRMENT

The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. It is the obligation of this Commission to determine the existence and extent of permanent physical impairment in a manner that complies with the Act. Although it may be relevant and helpful, expert medical opinion on this issue is no longer absolutely necessary. However, in order to be considered, any expert medical opinion on this issue must be stated "within a reasonable degree of medical certainty," Ark. Code Ann. §11-9-102(16)(B). No consideration can be given by any physician or this Commission to complaints of pain in determining the existence or the percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(16)(A)(ii)(a). The existence and extent of permanent physical impairment must also "be supported by objective and measurable physical or mental findings," Ark. Code Ann. §11-9-704(c)(1)(B). Any assessment of permanent physical impairment must be calculated in a manner that conforms to the

official rating guide adopted by this Commission (at the present time, the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition), Ark. Code Ann. §11-9-521(h). Finally, the compensable injury must be the "major cause" of the degree or percentage of permanent physical impairment assessed, Ark. Code Ann. §11-9-102(4)(F)(ii). The term "major cause" means more than 50% of the cause, Ark. Code Ann. §11-9-102(14)(A).

In the present case, Dr. Robert Bebout, an orthopaedic surgeon and the claimant's primary treating physician for her compensable injury, has assessed a permanent physical impairment of 50% to the claimant's right lower extremity. This assessment was made in his clinic note of December 28, 2004. In his deposition, Dr. Bebout explained that he arrived at this assessment by use of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. He identified the method he used as selecting the appropriate classification under table 65 (it is actually table 66 on page 88 of the Guides) and then applying the results to the recommendations contained in table 64 on page 85 of the Guides. Dr. Bebout further testified that one of the factors he considered to reach his conclusion that the claimant fell into the "fair" category of table 64 was the claimant's complaints of significant pain. He further testified that if no consideration was given to the subjective factors of pain and active range of motion, the claimant would fall in the category of a "good" result from her knee replacement (D.30). Under table 64, a "good" result

would carry a 37% permanent physical impairment rating to the lower extremity.

It is obvious that the claimant's total right knee replacement is not only the "major cause" of this degree of permanent physical impairment recommended by the Guides for a total knee replacement, but is, in fact, the sole cause of this recommended degree of permanent physical impairment. All of the evidence presented shows that the claimant's compensable injury to her right knee played some causal role in her need for the total knee replacement. However, there is a conflict between the opinions of the two medical experts, Dr. Bebout and Dr. James Mulhollan over the "major cause" of the claimant's need for the total knee replacement. Dr. Bebout opines that the claimant's compensable injury was the major cause for her total knee replacement. On the other hand, Dr. Mulhollan attributed the claimant's knee replacement to the natural progression of the degenerative defects involving her right knee and her obesity.

After consideration of all the evidence presented, I find that the expert opinion of Dr. Bebout is entitled to the greater weight and credit. Clearly, the qualifications and credentials of Dr. Bebout are comparable to those of Dr. Mulhollan. Both of these physicians are orthopaedic surgeons with particular expertise in the area of the treatment of knee related injuries and conditions.

However, Dr. Bebout has been the claimant's primary treating physician. He has had numerous occasions to personally examine and evaluate the claimant commencing shortly after her compensable

injury on January 28, 2001 and continuing through the present time. On the other hand, Dr. Mulhollan has seen the claimant on only one occasion (April 30, 2002) and that was only to perform an examination at the request of the respondents.

However, more importantly, the expert opinion of Dr. Bebout is more supported by the other evidence presented. While the claimant may have had pre-existing degenerative changes involving her right knee, prior to her compensable injury, the evidence shows that this degenerative condition was asymptomatic and essentially latent until the trauma of the compensable injury. Dr. Mulhollan's opinion that the pre-existing status of the claimant's right knee and her obesity were the overwhelming or major cause of her "problem" with her right knee and resulting knee replacement are clearly contradicted by the fact that she exhibits even more extensive "degenerative" changes in her left knee, which would also be equally affected by her obesity, yet she has remained essentially asymptomatic and has certainly experienced no "problems" sufficient to result in even a recommendation of a knee replacement. The record clearly shows that the claimant's initial symptoms and complaints with her right knee began contemporaneously with the compensable injury and have continued unabated thereafter. The medical evidence further demonstrates the presence of effusion or fluid accumulation in her right knee joint for a significant period of time after the compensable injury. Such effusion is clearly indicative of a chronic irritation of the knee joint. Prolonged effusion can, itself, produce damage to the synovial

coverings of the joint. These findings would substantiate Dr. Bebout's opinion that the claimant's compensable injury not only resulted in ligamentous damage to the claimant's knee, but also aggravated or accelerated the degenerative synovial changes involving this joint and caused not only the claimant's initial but subsequent chronic symptoms with this portion of her body.

The mere presence of the observed "degenerative" changes in the claimant's right knee, regardless of their etiology, was clearly not the "major cause" for the recommendation and ultimate performance of the right knee replacement. Otherwise, surgery would have been even more strongly recommended on the claimant's left knee, which shows even more extensive "degenerative" changes. The actual cause for the claimant's right knee replacement was the fact that the structural changes in her right knee were causing substantial chronic symptoms and interfering with the function of this portion of her body. The greater weight of the evidence shows that the claimant's compensable injury was the sole cause for her chronic symptoms and limitations involving her right knee.

Although the claimant's compensable injury may not have been the "major cause" of the observed synovial changes in the claimant's right knee, all of the medical evidence (including the reports of Dr. Mulhollan) show that the compensable injury played some causal role in these synovial defects. Although these degenerative synovial changes played some causal role in the claimant's need for the total knee replacement, the "major cause" for this knee replacement was the claimant's chronic severe

symptoms and limitations involving her right knee. These were due solely to the effects of her compensable injury on January 28, 2001.

Thus, the compensable injury of January 28, 2001, was the “major cause” of the total knee replacement that was performed on the claimant’s right knee on February 2, 2004. Under the American Medical Association’s Guides to the Evaluation of Permanent Impairment, Fourth Edition, the total knee replacement was the sole cause of a minimum permanent physical impairment of 37% to the leg. Thus, the claimant’s compensable injury was the “major cause” of this degree of permanent physical impairment.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that her compensable injury was the major cause of a permanent physical impairment of 37% to the leg below the hip. She has further proven that this degree of permanent physical impairment is supported by and based upon objective and measurable physical findings, without any consideration to pain, or other subjective matters, and was calculated in a manner that conforms to the Commission’s official rating guide. The claimant would be entitled to permanent partial disability benefits equivalent to this degree of permanent physical impairment.

III. PREVIOUSLY AWARDED CONTROVERTED ATTORNEY’S FEES

_____The final concerns the respondents’ failure to withhold and pay the claimant’s attorney the controverted attorney’s fee awarded him on the additional medical expenses awarded the claimant in the prior opinion. The respondents contend that they did not withhold

the claimant's portion of this attorney's fee from the temporary total disability benefits awarded to the claimant (in this same opinion) because they were not sure they had been authorized or directed to do so in the prior Opinion.

I cannot understand the respondents' reasoning for their failure to withhold from the benefits previously awarded to the claimant, the claimant's portion of the attorney's fees awarded to his attorney for the controverted medical services also awarded to the claimant.

The Opinion of March 31, 2003 (subsequently affirmed and adopted by the Full Commission by final Order dated November 21, 2003) expressly stated in the Findings of Fact & Conclusions of Law:

“9. The respondents has controverted the claimant's entitlement to the payment of expenses associated with the total knee replacement recommended by Dr. Bebout and any additional temporary total disability benefits accruing after March 21,2002.

10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all controverted benefits herein awarded.” (Emphasis mine)

In the subsequent portion of this Opinion, under the caption “Order,” the Opinion expressly directed:

“The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on all controverted benefits herein awarded. One-half of said attorney's fee to be in addition to such benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from the weekly indemnity benefits herein awarded to the claimant.” (Emphasis mine)

These sections of the Opinion would appear rather clear and subject to only one interpretation. That interpretation being that the respondents were ordered to pay the claimant the maximum statutory attorney's fee on all controverted benefits awarded under the Opinion. Clearly, the disputed medical services of Dr. Bebout represented such controverted benefits awarded under the Opinion. The respondents were further directed to pay one-half of this fee in addition to the benefits awarded and to withhold the remaining one-half of the fee from the "weekly indemnity benefits" that had been awarded to the claimant. If the respondents were in fact confused by this Opinion, they obviously did not bother to seek a clarification from either the Full Commission or myself.

Although I am at a loss to understand why the respondents did not do as ordered, I am convinced that their failure to obey the Order of this Commission was not willful or intentional. The Act clearly places on the claimant the obligation to pay one-half of his portion of the controverted attorney's fees awarded. However, the claimant's attorney could still have a right of recovery against the respondents should their failure to obey the order of the Commission have jeopardized his ability to collect his awarded fee. However, in the present case, the respondents are fortunate that the claimant has been found entitled to additional benefits.

After consideration of all the evidence presented, it is my opinion that the claimant's one-half of the controverted attorney's fees on the medical benefits awarded in the previous Opinion, should be withheld by the respondents from the permanent partial

disability benefits herein awarded for permanent physical impairment resulting from the compensable injury of January 28, 2001. So that there will be no other misunderstanding by the respondents, these amounts are to be in addition to the claimant's portion of the attorney's fees on the controverted permanent partial disability benefits for permanent physical impairment that are being awarded at the present time. The respondents are to also withhold the claimant's portion of these "new" controverted attorney's fees from the permanent partial disability benefits herein awarded to the claimant.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 28, 2001, the relationship of employee-employer-carrier existed between the parties.
3. On January 28, 2001, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$167.00 for total disability and \$154.00 for permanent partial disability.
4. On January 28, 2001, the claimant sustained a compensable injury to her right knee.
5. There is no longer any dispute over the claimant's entitlement to medical services for her compensable injury. All such expenses have or apparently are being paid.
6. There is no dispute, at the present time, over the

- claimant's entitlement to temporary disability benefits.
7. The claimant's healing period from the effects of her compensable injury ended on or about December 28, 2004.
 8. The compensable injury of January 28, 2001 is the "major cause" of a permanent physical impairment and resulting permanent partial disability of 37% to the leg below the hip. This degree of permanent physical impairment is supported by and based upon objective and measurable physical findings with no consideration of pain or other subjective factors. This degree of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this Commission.
 9. The respondents have controverted the claimant's entitlement to any permanent partial disability benefits for permanent physical impairment (although in their contentions the respondents maintain that the claimant is entitled to no more than a 2% permanent physical impairment to the leg, there is no evidence that the respondents have actually accepted liability for or have paid any benefits toward a 2% permanent physical impairment to the leg).
 10. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded.
 11. Ark. Code Ann. §11-9-802(e) is not applicable to the present claim for permanent benefits for permanent

physical impairment.

12. The respondents failed to comply with a prior Order and Award of this Commission and withhold from benefits therein awarded directly to the claimant the claimant's one-half of the maximum statutory attorney's fee on the controverted medical expenses awarded in this prior opinion. However, I do not find that the respondents' failure to obey the prior Order of this Commission was willful or intentional. The primary obligation for this previously awarded attorney's fee remains upon the claimant. The claimant's attorney is entitled to receive this previously awarded, but unpaid fee, from any benefits due and payable directly to the claimant.

ORDER

The respondents shall pay to the claimant permanent partial disability benefits equivalent to a 37% permanent physical impairment to the leg below the hip with such benefits commencing to accrue on December 28, 2004.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the permanent partial disability benefits herein awarded. One-half of this attorney's fee is the obligation of the respondents in addition to these benefits. The remaining one-half of this attorney's fee is to be withheld by the respondents from these benefits.

The respondents shall also pay to the claimant's attorney, the remaining one-half of the maximum statutory attorney's fee on the

controverted medical expenses awarded under the previous Opinion, but which remain unpaid at the time of this Opinion. The respondents shall withhold this amount from the permanent partial disability benefits herein awarded to the claimant.

Any claim herein made for the penalty provided by Ark. Code Ann. §11-9-802(e) should be and hereby is denied and dismissed for the reasons heretofore set out in this Opinion.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge