

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305863

WILLIAM HENRY,
EMPLOYEE

CLAIMANT

RONNIE DUFFIELD GRAVEL CO.,
EMPLOYER

RESPONDENT NO. 1

TRANSPORTATION INS. CO.,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED MARCH 15, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Russellville, Pope County, Arkansas.

The claimant was represented by HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 was represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on January 12, 2005, in Russellville, Arkansas. A prehearing order was entered in this case on November 2, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or at the start of the hearing and are hereby accepted:

1. The employee/employer/carrier relationship existed on April 3, 2003.
2. The claimant sustained compensable injuries to his back on April 3, 2003.
3. The claimant's healing period ended on June 24, 2004 and he has a 10% permanent impairment to the body as a whole as a result of his admittedly compensable injury.
4. The claimant's applicable compensation rates are \$389.00 per week for total disability and \$292.00 per week for partial disability.

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

1. Extent of permanent disability.
2. Attorney's fee.
3. Whether the respondents have controverted a 25% wage loss disability accepted after the October 28, 2004 prehearing conference.

4. Whether respondent no. 1 must first pay the claimant's anatomical rating for the compensable injury prior to payment of any permanent and total disability benefits to which the claimant may be found entitled.
5. Whether respondent no. 1 is entitled to credit for payment of permanent partial anatomical disability benefits against its \$75,000.00 maximum liability pursuant to Ark. Code Ann. § 11-9-502(b)(1).
6. If the respondents are not liable for a controverted attorney's fee on the 25% wage loss accepted by the respondents after October 28, 2004, whether Mr. Walker is entitled to an attorney's fee payable solely by the claimant.

The record consists of the January 12, 2005 hearing transcript and the exhibits contained therein, and consist of Ms. Rudd's January 21, 2005 post-hearing brief, Mr. Newell's February 23, 2005 post-hearing brief, and Mr. Walker's February 25, 2005 post-hearing brief, which I have "blue-backed" to make a part of the record.

DISCUSSION

1. Wage Loss Disability In Excess of Permanent Impairment

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the workers' future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally

incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

In the present case, at the time of the hearing Mr. Henry was 60 years old. He has a high school education, and he has worked as either a welder, as a heavy equipment operator (bulldozers, track hoes, loaders, etc.), or as both, for almost his entire adult life. He was self-employed for approximately a ten year period at some point in the past. He recalled at the hearing having no employees himself while self-employed and acknowledged that he did the work himself and that he did the scheduling.

Mr. Henry sustained an admittedly compensable low back injury while employed by Ronnie Duffield Gravel Company driving a dozier in April of 2003. After a failed attempt to return to work, Dr. John Wilson ultimately performed a discectomy and infusion surgery in Mr. Henry's lumbar spine on February 16, 2004. Mr. Henry did not attempt to return to work after surgery, and was ultimately approved for Social Security Disability.

Mr. Henry participated in two functional capacity evaluations, the first before surgery and the second after surgery. Statistical data indicates that he provided maximum effort during each evaluation. After surgery, Mr. Henry has physical restrictions from lifting, etc., which place him in the "light" duty category for material handling. In addition to his limitations as documented regarding material handling at only the "light" level, I note that Mr. Henry also has pain in the low back which also causes work limitations. I note that Mr. Henry's pain complaints are corroborated by Dr. Wilson's June 24, 2004 physical examination, which indicated mild muscle spasm in Mr. Henry's lumbar spine some four months post-surgery. I further note that the Workers' Compensation Work Status Report prepared by Dr. Wilson's office at Ortho Arkansas on

June 24, 2004 also indicates that Mr. Henry shall remain off work, and that he is unable to return to work. Furthermore, Dr. Wilson acknowledged on June 24, 2004 that Mr. Henry intended to apply for Social Security, rather than attempt to return to work, and Dr. Wilson opined that "I feel this is probably reasonable." Dr. Wilson assigned Mr. Henry a 10% impairment rating following his lumbar discectomy and fusion surgery, which the respondents ultimately accepted and are paying.

After considering Mr. Henry's relatively advanced age, his limited education and work experience, the nature and extent of his injury and impairment and all other relevant factors, I find that Mr. Henry has experienced a 50% impairment to his wage earning capacity in excess of the 10% anatomical impairment rating assigned by Dr. Wilson and accepted by the respondents. Although Mr. Henry contends that he is permanently and totally disabled as a result of his low back pain, I note that Mr. Henry made no attempt to return to work after his fusion surgery, and Mr. Henry's failure to attempt to return to work somewhat impedes my ability to determine the full extent of his loss in wage earning capacity. I also note that Mr. Henry tolerates his pain without the routine use of narcotic medication, and I

note that Mr. Henry continued to work prior to the most recent injury notwithstanding several bouts of low back pain documented in the medical record.

Furthermore, I note that Mr. Henry's perceived intolerance to sitting and riding notwithstanding, he has on three occasions by his own account driven a four-wheeler into the deer woods and remained there long enough during the hunting season of 2004 to get a shoot at a deer. In fact, on one occasion he was successful in killing a deer.

In light of Mr. Henry's ability to tolerate his pain without narcotic medication, in light of his ability to go into the woods on a four-wheeler and remain stationary long enough on three separate occasions to be able to shoot at a deer, and in light of his lack of attempt to return to any type of work after his fusion surgery, Mr. Henry has failed to persuade me that he is permanently and totally disabled from returning to any work. However, as discussed above, after considering all relevant factors, I find that Mr. Henry has sustained a 60% permanent disability: 10% for his documented anatomical impairment and 50% permanent disability in excess of anatomical impairment attributable to wage-loss.

In reaching this conclusion, I note that the respondents' attorney argued at the hearing that I should also reduce Mr. Henry's wage loss award because Mr. Henry experienced documented low back pain before his work-related injury. However, the preponderance of the evidence establishes that Mr. Henry never missed work for back pain prior to his work injury, and under these circumstances, Mr. Henry has established that his compensable injury is the major cause of the 50% wage loss disability awarded herein.

Because I find that a preponderance of the evidence fails to establish that Mr. Henry is permanently and totally disabled, I also find that the Death & Permanent Total Disability Trust Fund has no liability for the benefits at issue in this claim. Consequently, I find moot the Death & Permanent Total Disability Trust Fund's argument that the respondent carrier in this case must first pay the claimant's anatomical rating for his compensable injury prior to payment of any permanent and total disability benefits to which the claimant might have been found entitled.

2. Appropriate Attorney's Fee

Respondent no. 1 asserts that respondent no. 1 did not controvert a permanent disability of 25% in excess of the

claimant's 10% anatomical impairment rating, under circumstances where a prehearing conference was held in this case on October 28, 2004, and by letter dated November 2, 2004 to the claimant's attorney, respondent no. 1 accepted liability for a 25% wage-loss disability. Like the claimant's attorney in his post-hearing brief, I find that the facts and conclusions of the Arkansas Court of Appeals in Lee v. ALCOA Extrusion, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (January 26, 2005) are directly on point, and make clear to me that controversion of wage-loss disability occurs under circumstances where, as here, the claimant's attorney makes a claim for wage-loss disability benefits and a respondent refuses to acknowledge liability for a percentage of wage-loss disability until some months later. The preponderance of the evidence indicates that if the claimant had not retained an attorney, he would not have received any award for wage-loss disability. Consequently, I find that respondent no. 1 controverted the claimant's entitlement to wage-loss disability, including the 25% accepted several days after the prehearing conference held on October 28, 2004.

I also note in passing that respondent no. 1 now also acknowledges an underpayment of benefits based on an

incorrect compensation rate. There appears to be no dispute that respondent no. 1 owes an attorney's fee to Mr. Walker on the difference between the rate at which benefits were paid and the rate at which they should have been paid to date. (See T. 5)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee/employer/carrier relationship existed on April 3, 2003.

3. The claimant sustained compensable injuries to his back on April 3, 2003.

4. The claimant's healing period ended on June 24, 2004 and he has a 10% permanent impairment to the body as a whole as a result of his admittedly compensable injury.

5. The claimant's applicable compensation rates are \$389.00 per week for total disability and \$292.00 per week for partial disability.

6. The preponderance of the evidence establishes that Mr. Henry has sustained a 50% impairment to his wage earning capacity in excess to the 10% anatomical impairment to the body as a whole established by the medical evidence and accepted by the respondents.

7. The preponderance of the evidence establishes that the claimant's attorney is entitled to a controverted attorney's fee on all permanent disability benefits awarded herein in excess of the 10% anatomical impairment rating accepted and paid by the respondents, as well as a controverted attorney's fee on all prior underpayments of benefits at an incorrect compensation rate.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge