

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106883

JAMES R. HENSON, EMPLOYEE	CLAIMANT
GENERAL ELECTRIC, EMPLOYER	RESPONDENT
SEDGWICK CMSI, INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 27, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on May 27, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondents #1 represented by Mr. Mark A. Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

Respondent #2 represented by Mr. David L. Pake, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 27, 2005, to determine various issues set out further below.

A prehearing conference was conducted in this case on April 6, 2005, and a Prehearing Order was filed on April 7, 2005. At the hearing, the parties agreed that the stipulations, issues, as well as the respective contentions of the parties were correctly set out in the Prehearing Order, subject to some amended stipulations announced at the hearing. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" without objection.

At the prehearing conference, it was stipulated that the employment relationship existed between the claimant and respondent #1 at all relevant times, including June 12, 2001; that the claimant sustained a compensable back injury as the result of the specific incident identifiable in time and place of occurrence on said date; that the claimant earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability; that the claimant's healing period ended on October 10, 2002, at which time he was assessed a twelve percent (12%) whole body impairment; that respondent #1 had continued to pay, to the claimant, indemnity benefits at the rate of \$410.00 per week from the date of the injury and continuing through the present, as well as all reasonably necessary hospital, medical, and related expenses.

At the hearing, the parties stipulated that respondent #1 paid indemnity benefits at the rate of \$410.00 per week through April 15, 2005, at which time respondent #2 commenced payment of wage-loss disability in the amount of thirty-five percent (35%) which it accepted. It was further agreed, by all parties, that respondent #1 was not seeking any reimbursement for alleged overpayment from the claimant.

By agreement of all parties, the following issues were presented for determination:

- 1) The extent of claimant's permanent disability.

- 2) The extent of the Second Injury Fund's liability.
- 3) Whether respondent #1 was entitled to reimbursement from respondent #2 for any alleged overpayment.
- 4) The extent of controversy.

Claimant contended, in summary, that he was permanently totally disabled or, alternatively, that he had sustained substantial wage-loss disability in excess of the thirty-five percent (35%) to the body as a whole which had been acknowledged by respondent #2; that respondent #1 had waived any right to reimbursement of alleged overpayment from the claimant, and that reimbursement, if any, would come from the Fund; that although the Fund admitted a thirty-five percent (35%) wage-loss disability, it was not free from liability of attorney's fees, specifically, attorney's fees for permanent total disability.

The respondent #1 contended that any wage-loss disability over and above the twelve percent (12%) impairment rating was the responsibility of respondent #2. Respondent #1 requested reimbursement from respondent #2 for any payments made beyond its obligation. It further maintained that any and all wage-loss was the responsibility of respondent #2, including, but not limited to the thirty-five percent (35%) accepted by the Fund.

Respondent #2 maintained that it was not responsible for reimbursement of any overpayment of temporary total disability because its liability was limited to wage-loss disability only; that it had no understanding concerning the date respondent #1 intended to stop paying temporary total disability and initiate

payment of its permanent impairment, that the Fund stood ready, willing, and able to pay the thirty-five percent (35%) wage-loss disability which it maintained was appropriate based upon the facts of this claim. Respondent #2 conceded that if any wage-loss disability in excess of thirty-five percent (35%) to the body as a whole was awarded, it had controverted same for purposes of attorney's fees, while maintaining that it had not controverted the wage-loss disability acknowledged. Finally, respondent #2 pointed out that it was joined as a party respondent prior to the assessment of permanent impairment.

The claimant was the only witness to testify at the hearing. The record is composed solely of the transcript of the hearing containing numerous exhibits, together with the telephone deposition of Yvonne Richard, the claims representative for Sedgwick CMS, Inc., submitted as "Respondent #1 Exhibit A" and retained in the Commission file in bound form. Subsequent to the hearing, both respondents submitted briefs addressing the issue of whether the Fund should be required to reimburse respondent #1 for any overpayments it may have made to the claimant.

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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that he is permanently totally disabled.
4. The claimant has shown, by a preponderance of the credible evidence, that he has sustained a wage-loss disability of sixty percent (60%) to the body as a whole which was caused by the combined disabilities or impairments, together with the June 12, 2001, compensable injury.
5. Respondent #2 is responsible for all wage-loss disability, specifically, the sixty percent (60%) wage-loss disability awarded herein.
6. Respondent #1 is not entitled to any reimbursement for overpayment of permanent impairment benefits. Respondent #1 did not obtain a final impairment rating from the primary treating physician until April 28, 2004, and is estopped from asserting a credit for any alleged overpayment. Furthermore, respondents have failed to prove that any alleged overpayments were considered advanced payments of compensation within the meaning of Ark. Code Ann. §11-9-807.
7. Respondent #2 is not entitled to a credit or offset pursuant to Ark. Code Ann. §11-9-411.
8. Respondent #2 has accepted a thirty-five percent (35%) wage-loss disability

in this claim. Respondent #2 has controverted all wage-loss in excess of the thirty-five percent (35%) acknowledged.

9. Respondent #1 has paid all appropriate benefits for which it is liable, including continued, reasonably necessary medical treatment and is not obligated for payment of any attorney's fees.

DISCUSSION

The relevant facts in this case are basically undisputed. The claimant, James Roy Henson, is fifty-four (54) years old. (D.O.B. 09/23/1950) He has a high school education. In addition, the claimant obtained on-the-job vocational training in hydraulics through the employer herein. The claimant began working for the respondent, General Electric, in 1970. He was initially hired as a utility person. He then moved into the maintenance department prior to becoming a machine operator. At the time of claimant's compensable injury on June 12, 2001, he was earning \$19.00 per hour; however, worked considerable overtime. His total wages exceeded \$50,000.00 per year. In addition to the immediate claim, the record reflects that the claimant sustained prior injuries and surgeries. The claimant underwent his first back surgery on December 12, 1995. He underwent a second back surgery on April 15, 1996. The record also reflects that the claimant sustained a subsequent knee injury and surgery on or about June 13, 2002. The claimant sustained an admitted, compensable back injury on June 12, 2001. He underwent a third back surgery on August 15, 2001, followed by further surgery, an extensive

fusion at the L4-L5 level on January 10, 2002. The claimant has not been gainfully employed since the surgery and fusion on January 10, 2002. He takes a number of prescription medications, including Neurontin and Metradose, a narcotic for pain, and Lexapro for nerves. It is undisputed that the claimant has significant restrictions in his physical abilities. The record further reflects that respondent #1 provided the claimant with job placement assistance through Rehabilitation Management, Inc. Rather than conduct an exhaustive analysis of the efforts of Heather Naylor, a vocational rehabilitation consultant, suffice it to say that most of the job opportunities identified by Ms. Naylor were entry level positions and that, with a few exceptions, most paid just above minimum wage. The claimant either did not obtain a suitable job offer or was not interested in accepting a low-wage offer. (Resp. Ex. 2, A-D)

WAGE-LOSS DISABILITY

In considering claims for permanent partial disability in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the physical impairment, such factors as the employee's age, education, work experience, and other factors reasonably expected to affect his or her future earning capacity. Such matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass vs. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville vs. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Curry vs. Franklin*

Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

The claimant's entitlement to wage-loss disability is undisputed. The primary issue concerns the extent of that disability. In fact, both respondent #1 and #2 acknowledge that the claimant sustained substantial wage-loss disability in excess of his impairments. Prior to the hearing, respondent #2 accepted and, at the time of the within hearing, had begun to pay a thirty-five percent (35%) wage-loss disability which it maintained was appropriate based upon the facts in this claim. As previously pointed out, the claimant maintained that he was permanently totally disabled or, alternatively, that his wage-loss disability substantially exceeded the thirty-five percent (35%) acknowledged by respondent #2.

Ark. Code Ann. §11-9-522(e) provides that in considering a claim for permanent disability, the Commission and the Courts shall not consider the odd-lot doctrine.

An employee who was injured prior to the applicable date of subsection (e), aforementioned, to the extent that he could perform services that were so limited in quality, dependability, or quantity that a reasonably suitable market for them did not exist could be classified as totally disabled. This employee was said to fall within the former odd-lot category of disabled workers. Again, the odd-lot doctrine has been abolished. Where treating physicians opined that a claimant is capable of performing light-duty work, the Commission was correct to find that he was not totally disabled. *Nelson vs. Timberline Int'l, Inc.*, 57 Ark. App. 34, 942 S.W.2d 260

(1997).

After a review of the entire record, and after a consideration of the claimant's age, education, and work experience, together with the vocational statements, it is herein concluded that a finding of sixty percent (60%) wage-loss disability fairly and accurately reflects the extent of the claimant's wage-loss. The claimant is capable of performing restricted work at reduced wages.

It is further undisputed that the Second Injury Fund is responsible for all wage-loss disability. Accordingly, respondent #2 is liable for the entire sixty percent (60%) wage-loss awarded herein.

EXTENT OF CONTROVERSION

Ark. Code Ann. §11-9-715(a)(2)(B)(Supp. 2003) provides that whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to the claimant's attorneys. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. *Brass vs. Weller*, 23 Ark. App. 193, 645 S.W.2d 647 (1988). Whether or not a particular claim is controverted is a question of fact for the Commission. *Aluminum Company of America vs. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976). The mere fact that a respondent investigates a claim prior to admitting liability does not require a finding of controversion. *Stucco, Inc., vs. Rose*, 52 Ark. App. 42, 914 S.W.2d 767 (1996).

Respondent #2 has timely accepted liability for wage-loss disability in the

amount of thirty-five percent (35%) to the body as a whole. Accordingly, it having been determined that the claimant is entitled to a sixty percent (60%) wage-loss disability, respondent #2 is liable for a controverted attorney's fee on the additional twenty-five percent (25%) wage-loss disability over and above the amount acknowledged by respondent #2.

RIGHTS OF REIMBURSEMENT

Two separate legal issues were presented for determination. The first concerned whether respondent #1 was entitled to reimbursement for the alleged overpayment of indemnity benefits which respondent #1 seeks from respondent #2 while acknowledging that it is not entitled to reimbursement from the claimant. The Fund resisted reimbursement of any amount to respondent #1 taking the position that respondent #1, by waiving any reimbursement from the claimant for any overpayment, could not now seek recovery from the Fund out of the Fund's obligation to pay wage-loss disability. Additionally, the Fund contended that there was no statutory authority within the Act including, specifically, Ark. Code Ann. §11-9-525 authorizing it to pay any monies to any party except the claimant, and that the only benefit authorized to be paid is for permanent partial or permanent total disability. Conversely, respondent #1 cites Ark. Code Ann. §11-9-807 as statutory authority for reimbursement.

In its brief submitted subsequent to the hearing, and for the first time, respondent #2 raised yet another credit issue apparently contending that it is

entitled to a credit or offset pursuant to Ark. Code Ann. §11-9-411. Respondent #2 contends that the Commission has the obligation to comply *sua sponte* with the aforementioned provision while arguing that although the carrier has waived its right to the use of this statute, the Fund has not done so. It maintains a proper credit should be given against the benefits owed by the Fund to the claimant for functional disability, specifically, long-term disability and retirement benefits paid through the employer.

Although the arguments raised by both respondents concerning their right to either reimbursement and/or credit are innovative and merit consideration, neither are persuasive and are herein rejected in their entirety.

First, respondent #1 contends that it is entitled to reimbursement from the Fund for any overpayment of its statutory obligation, maintaining that the Act does not allow the claimant to be paid twice for the same disability; that the Second Injury Fund conceded that it was responsible for claimant's wage-loss disability; and that, because it is undisputed that the employer paid benefits beyond its obligation, it should be able to recover those benefits. Respondents #1 cite as authority for repayment Ark. Code Ann. §11-9-807 which provides:

(a) ... if the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installments or installments of compensation due.

The aforementioned provision simply does not apply to the facts in this case. There is no evidence whatsoever that respondents made advance payments of

compensation. Further, it is apparent that the intent of the aforementioned statute is to allow the employer to make advance payment of compensation to the claimant and infers that reimbursement come from the claimant out of unpaid installments due to the claimant. As reflected by the contentions of the parties, respondent #1 has waived its entitlement to any reimbursement from the claimant. It cannot now claim that it is entitled to reimbursement from respondent #2 by alleging the payments were advance payments of compensation.

I feel compelled to further point out that despite the stipulations of the parties, that the claimant's healing period ended on October 10, 2002, and that the claimant has been assessed a twelve percent (12%) whole body impairment the record reflects that respondent #1 did not obtain an impairment rating from the primary treating physician, Dr. Rebecca Barrett-Tuck until April 28, 2004. (Cl. Ex. A, p.34)

The telephone deposition of Yvonne Richard confirms that respondent #1 did not act with due diligence in determining the end of claimant's healing period, as well as the extent of permanent disability as reflected by her evidentiary deposition taken May 3, 2005, a portion of which follows:

BY MR. PAKE:

Q Ms. Richard, have you changed the type of benefit whether it be from TTD or permanent partial disability? Do you change that in the computer?

A Yes, we do.

Q What's the reason for that?

A It signifies payments made.

Q Okay. Now, you're aware are you not that your attorney has stipulated that the Comp. rates in this case are \$410 for temporary total disability and \$308 for permanent partial disability?

A Yes.

Q Okay. I'm a little bit unclear as to why you continued to designate your payments as temporary total disability benefits and pay at the higher rate all the way from October the 3rd of '02 through October the 6th of '04. Would you explain to me again why you did that?

A It was in our best interest to continue benefits to Mr. Henson as he was not able to work. Based on our IME, second opinion, he was not able to work.

Q I understand that you were finally aware of a rating I guess by Dr. Tuck, and what was the date on which you received that rating?

A The date of the rating was April 2004. (Resp. #1 Ex. A, pp.16-17)

The record reflects that despite the subsequent stipulation concerning the end of claimant's healing period after the claimant's final surgery and release by Dr. Barrett-Tuck, respondent #1 sent the claimant to another physician for an independent medical evaluation, and that the independent medical examiner opined that the claimant was not able to return to work at which point respondent #1 continued to pay temporary total disability which it in fact paid through April 15, 2005. I feel compelled to point out that valid arguments could have been made that the claimant's healing period did not end until April 28, 2004, at which time permanent impairment was assessed and which would have extended the employer's liability for fifty-four (54) weeks beyond April 28, 2004. However, again, these are observations only since it is undisputed that respondent #1 has paid all appropriate benefits for which it is liable and that respondent #2 is currently paying

on the thirty-five percent (35%) wage-loss disability it accepted.

Respondent #2 also submitted additional arguments in its post-hearing brief which will not be set out herein because it is my finding that respondent #1 has failed to offer any valid argument in support of its request for reimbursement.

The final issue submitted for determination is whether respondent #2 is entitled to a credit which it maintains is mandated by Ark. Code Ann. §11-9-411(a) which states:

Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract. (Emphasis supplied)

The provisions of the Workers' Compensation Act are to be strictly construed. A.C.A. §11-9-411 only provides for a credit or offset against benefits previously received for the same period of disability. Respondent #2 is claiming a credit against the claimant's receipt of long-term disability, as well as a credit against the claimant's retirement benefits. First, I feel compelled to point out that A.C.A. §11-9-411 does not permit an offset against retirement benefits. Further, it does not permit a credit for concurrent benefits, but, rather only against benefits previously received for the same period of claimed disability. This provision does not apply. The Fund's belated and novel arguments are without merit. Accordingly, its request for a credit is, likewise, denied.

AWARD

Respondent, the Second Injury Fund, is hereby directed and ordered to pay, to the claimant, wage-loss disability at the rate of \$308.00 per week beginning April 15, 2005, and continuing for 270 weeks, representing a wage-loss disability of sixty percent (60%) to the body as a whole.

Additionally, respondent #2 is directed and ordered to pay the maximum statutory attorney's fee on the controverted portion of this Award, to be paid pursuant to A.C.A. §11-9-715.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge