

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F109650/F412000

RANDY E. LEWIS, Employee	CLAIMANT
AUTO PARTS & TIRE COMPANY, INC., d/b/a FLITELINE MOTORS, Employer	RESPONDENT #1
ZENITH INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JUNE 21, 2005

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by J. MATTHEW MAULDIN, Attorney, Little Rock, Arkansas.

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

STATEMENT OF THE CASE

On May 23, 2005, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A follow-up pre-hearing conference was conducted on May 9, 2005, and an amended pre-hearing order was filed on May 10, 2005. 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 claimant suffered compensable injuries on August 9, 2000 and November 16, 2000 while working for respondent #1.
3. Respondent #1 has paid compensation benefits to claimant including a permanent partial benefits based upon a 9% rating to the body as a whole.
4. Claimant is entitled to the maximum compensation rate in effect for the year of

his compensable injury.

5. The Second Injury Fund has accepted liability for payment of permanent total disability benefits.

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

1. Claimant's entitlement to temporary total disability benefits from March 13, 2002 through October 30, 2002.

2. Respondent #1's entitlement to credit for overpayment of benefits in the event additional temporary total disability benefits are awarded.

3. Attorney fee.

At the time of the hearing claimant also raised as an issue his entitlement to permanent total disability benefits subsequent to age 65. Claimant notes that the Second Injury Fund has accepted liability until the claimant's 65th birthday in accordance with A.C.A. §11-9-522(f). Claimant also raises as an issue the constitutionality of A.C.A. §11-9-522(f).

The claimant contends that he is entitled to temporary total disability benefits beginning March 13, 2002 and continuing through October 30, 2002. Claimant also contends that he is entitled to permanent total disability benefits subsequent to age 65 and that A.C.A. §11-9-522(f) is unconstitutional. Claimant also seeks various attorney fees. First, claimant's attorney contends that the Second Injury Fund controverted claimant's entitlement to benefits in excess of 45 percent to the body as a whole. In addition, claimant's attorney contends that he is entitled to a fee from the claimant on the 45 percent wage loss initially accepted by the Second Injury Fund. Finally, claimant's attorney requests a fee on any additional temporary total disability benefits awarded.

Respondent #1 contends that claimant is not entitled to additional temporary total disability benefits and if any additional benefits are awarded, respondent #1 requests a credit for overpayment of compensation benefits.

The Second Injury Fund contends that A.C.A. §11-9-522 is constitutional and that it has not controverted claimant's entitlement to permanent total disability benefits.

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 his 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 a follow-up pre-hearing conference conducted on May 9, 2005, and contained in an amended pre-hearing order filed May 10, 2005, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits subsequent to March 13, 2002.

3. Claimant has failed to prove by a preponderance of the evidence that A.C.A. §11-9-522(f) is unconstitutional; therefore, the Second Injury Fund is liable for permanent total disability benefits until the claimant reaches age 65.

4. Claimant's attorney is entitled to an attorney fee from the claimant in the amount of 5 percent on the 45 percent wage loss previously accepted by the Second Injury Fund. In addition, the Second Injury Fund has controverted the claimant's entitlement to all benefits in excess of 45 percent to the body as a whole.

FACTUAL BACKGROUND

The claimant is a forty-four year old man who suffered compensable injuries while working for respondent #1 on August 9, 2000 and again on November 16, 2000. As a result of those injuries the claimant underwent an MRI scan which revealed a herniated disc in claimant's cervical spine at C6-7. Claimant was eventually referred to Dr.

Standefer, neurosurgeon, for medical treatment and underwent surgery on August 17, 2001.

Following claimant's compensable injuries he continued to work for the respondent #1 on modified duty until the day before his surgery. However, claimant has not worked for respondent #1 or any other employer since that time. Following claimant's surgery he was evaluated by Dr. Standefer on November 19, 2001. Dr. Standefer noted at that time that claimant continued to have some focal paracervical pain and stated that claimant should remain off work until after his evaluation on January 2, 2002. At the time of Dr. Standefer's January 2, 2002 evaluation, Dr. Standefer referred claimant to Dr. Swicegood for consideration of local injections for continued complaints of pain. Dr. Standefer also ordered continued physical therapy and stated that he was skeptical that claimant would be able to resume his previous occupation. Dr. Standefer noted that the claimant was applying for social security disability which he stated was "certainly justifiable."

On February 6, 2002, Dr. Standefer noted that radiographic studies showed no further surgical problems. Dr. Standefer recommended that claimant continue with conservative care involving medications and avoidance of activities that would worsen his pain. Dr. Standefer noted that claimant would not be able to resume his previous occupation and that he was releasing claimant from his clinic to return as needed. On that date Dr. Standefer also completed a work slip indicating that claimant could return to work as of February 7, 2002 with restrictions. In a report dated March 13, 2002, Dr. Standefer in response to an inquiry from respondent #1 assigned the claimant a permanent physical impairment rating in an amount equal to 9 percent to the body as a whole. Following claimant's release by Dr. Standefer he continued to be seen by Dr. Swicegood for injections.

Respondent #1 accepted claimant's injury as compensable and paid compensation benefits including permanent partial disability benefits based upon the 9 percent rating

assigned by Dr. Standefer. Claimant subsequently filed a claim requesting permanent disability benefits in excess of the impairment rating. At the time of the original pre-hearing conference conducted on February 14, 2005, the Second Injury Fund had accepted liability for permanent partial disability benefits in an amount equal to 45 percent to the body as a whole based upon wage loss. Following settlement negotiations, the Second Injury Fund accepted liability for permanent total disability benefits. Following the Second Injury Fund's acceptance a hearing was scheduled on the issues previously discussed.

ADJUDICATION

TEMPORARY TOTAL DISABILITY BENEFITS.

The injury to claimant's cervical spine is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury a claimant has the burden of proving by a preponderance of the evidence that they remain within their healing period and suffer a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2nd 392 (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. A.C.A. §11-9-102(13). When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended and claimant is no longer entitled to receive temporary total or temporary partial disability benefits. Furthermore, the persistence of pain is not sufficient in itself to extend the healing period or to find that claimant is totally incapacitated from earning wages. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W. 2nd 582 (1982).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he remained within his healing period or that he suffered a total incapacity

to earn wages subsequent to March 13, 2002.

As previously noted, claimant was evaluated by Dr. Standefer on January 2, 2002 and he referred claimant to Dr. Swicegood for consideration of local injections to alleviate pain. Dr. Standefer also indicated that claimant should continue his physical therapy. Dr. Standefer stated that he was skeptical that claimant would be able to resume his previous occupation and stated that claimant applying for social security disability was "certainly justifiable". Claimant's next evaluation with Dr. Standefer occurred on February 6, 2002.

Dr. Standefer stated at that time that radiographic studies showed no further surgical problems. Dr. Standefer went on to state that claimant would not be able to resume his previous occupation and released claimant from his clinic to return as needed. Also on that date, Dr. Standefer completed a work slip indicating that claimant could return to work as of February 7, 2002 with restrictions. Finally, in response to an inquiry from the respondent Dr. Standefer on March 13, 2002 assigned the claimant a permanent physical impairment rating in an amount equal to 9 percent to the body as a whole.

Claimant's contention that he is entitled to additional temporary total disability benefits is based in part on the fact that he continued to receive medical treatment by Dr. Swicegood subsequent to March 13, 2002. However, the medical treatment from Dr. Swicegood was for pain management. As previously noted, the persistence of pain is not sufficient in itself to extend the healing period. Claimant also testified that during this period of time he was undergoing treatment for depression. However, no claim has been made for this condition as a result of claimant's compensable injury. Therefore, that treatment cannot serve as a basis for finding that claimant remained within his healing period.

Furthermore, even if one were to find that claimant remained within his healing period subsequent to March 13, 2002, there is insufficient evidence that claimant was totally incapacitated from working as a result of his compensable injury. To the contrary,

Dr. Standefer completed a work slip dated February 6, 2002 indicating that claimant could return to work with restrictions as of February 7, 2002.

Accordingly, for the foregoing reasons, I find that claimant has failed to prove by a preponderance of the evidence that he remained within his healing period or that he suffered a total incapacity to earn wages as a result of his compensable injury subsequent to March 13, 2002. Having found that claimant is not entitled to additional temporary total disability benefits, respondent #1's request for a credit for overpayment is moot.

PERMANENT TOTAL DISABILITY BENEFITS AFTER AGE 65.

The parties have stipulated that the Second Injury Fund has accepted liability for payment of permanent total disability benefits. However, according to documentary evidence presented in this matter, the Second Injury Fund accepted liability for permanent total disability benefits only until the claimant reaches age 65. The Second Injury Fund's position is based upon A.C.A. §11-9-522(f)(1) which states:

Permanent total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (6), regardless of age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.

As previously noted, claimant contends that this limitation on the payment of compensation benefits is unconstitutional. Claimant relies upon the Supreme Court's holding in *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W. 2nd 154 (1998) wherein the Supreme Court of Arkansas struck down as unconstitutional a similar limitation on payment of permanent total disability benefits. Subsequent to the decision in *Golden*, the legislature redrafted the statute which is now codified at A.C.A. §11-9-522(f)(1). Claimant contends that the new statutory language is likewise unconstitutional based upon

the ruling in *Golden*.

I do note that the language currently codified at A.C.A. §11-9-522(f)(1) is different than the language contained in the statute which the Arkansas Supreme Court considered in *Golden*. Because the language is different, there is a presumption of constitutionality attendant to the legislature's enactment. *Holland v. Willis*, 293 Ark. 518, 793 S.W. 2nd 529 (1987).

After consideration of the relevant law, I find that the Commission is not required to consider the claimant's argument that A.C.A. §11-9-522(f)(1) is unconstitutional. Both the Arkansas Supreme Court and the Full Commission have held that a ruling on constitutional arguments is not required when a party has not notified the Attorney General's Office of a constitutional challenge pursuant to A.C.A. §16-111-106(b). See *Brumley v. Naples*, 320 Ark. 310, 896 S.W. 2nd 860 (1995); *Fowler v. Sanyo Manufacturing*, Full Commission Opinion filed August 20, 2002 (D505825); and *Shew v. Arkansas Excavating, Inc.*, Full Commission Opinion filed March 17, 2000 (E902709).

Given the fact that no evidence was offered that the claimant notified the Attorney General's Office of the challenge pursuant to A.C.A. §16-111-106(b), I find the Commission is not required to consider this constitutional challenge. Therefore, A.C.A. §11-9-522(f)(1) is considered to be constitutional and applicable to this case.

Finally, with respect to this issue, I note that this entire argument may be moot given the fact that claimant is only 44 years of age. The benefits which claimant is requesting will not become due and owing for another 21 years.

ATTORNEY FEE.

The final issue for consideration involves the request for various attorney fees.

First, since no additional temporary total disability benefits were awarded, claimant's attorney is obviously not entitled to an additional attorney fee.

Claimant's attorney also requests a fee from the claimant on the 45 percent wage loss previously accepted by the Second Injury Fund. A.C.A. §11-9-715(a)(2)(C)(i) states:

Whenever the commission finds that a claim has not been controverted but further finds that bona fide legal services have been rendered in respect to the claim, then the commission shall direct the payment of fees by the injured employee or dependents of a deceased employee out of the compensation awarded.

In support of his request for an attorney fee, the claimant's attorney has submitted a document setting out the services he has performed in this case and the time spent performing those services. I also note that claimant acknowledged at the hearing that his attorney has performed work for him and that the request for a fee has been explained to him.

Based upon my review of the evidence presented, I find that claimant's attorney has provided bona fide legal services with respect to the 45 percent wage loss which was previously accepted by the Second Injury Fund. Normally, the attorney fee for injuries prior to July 1, 2001 is 10 percent which is paid one-half by the claimant and one-half by the respondent. I find that claimant's attorney is entitled to a fee from the claimant in the amount of 5 percent of the 45 percent wage loss previously accepted by the Second Injury Fund. The Second Injury Fund is instructed to withhold 5 percent from future payments made to the claimant until this attorney fee is satisfied.

Finally, as previously noted, the Second Injury Fund initially accepted liability for wage loss benefits attributable to 45 percent to the body as a whole. Following some settlement negotiations, the Second Injury Fund eventually accepted liability for permanent total disability benefits. Claimant's attorney contends that the Second Injury Fund controverted claimant's entitlement to benefits in excess of the 45 percent previously paid.

A.C.A. §11-9-715(a)(2)(A) provides that attorney fees can be awarded against the Second Injury Fund if the claim was controverted by the Second Injury Fund.

Here, I find that the Second Injury Fund controverted claimant's entitlement to benefits in excess of 45 percent to the body as a whole. As previously noted, a pre-hearing conference was conducted in this claim on February 14, 2005 and at that time the Second Injury Fund accepted liability for wage loss in the amount of 45 percent to the body as a whole. An issue to be litigated was claimant's entitlement to additional permanent disability benefits.

Subsequent to that pre-hearing conference Peggy Conrad, an accountant for the Second Injury Fund, in a letter dated March 1, 2005 to the claimant noted that the Second Injury Fund had accepted a 45 percent wage loss. Conrad stated that the Second Injury Fund would pay claimant a check every two weeks until their liability ended on approximately October 24, 2006. By letter dated March 8, 2005, Attorney Sharum in a letter to Matt Mauldin, the attorney for respondent #1, noted that the Second Injury Fund had accepted liability for wage loss in the amount of 45 percent. Attorney Sharum also indicated that he wished to know whether a joint petition offer could be made with contributions by both respondent #1 and the Second Injury Fund. In a letter dated April 15, 2005, Attorney Sharum sent a letter to Attorney Mauldin and Attorney Pence of the Second Injury Fund stating in response to an inquiry regarding settlement that claimant would submit an offer of \$90,000.00 plus an attorney fee of \$9,400.00. In response to Attorney Sharum's letter, Attorney Pence by letter dated April 21, 2005 stated that the Second Injury Fund would withdraw its settlement offer and acknowledge liability for permanent total disability benefits.

While it is true that settlement negotiations took place between the parties regarding the extent of the Second Injury Fund's liability, these settlement negotiations took place only after the Second Injury Fund had stipulated that it was accepting liability for only 45 percent wage loss and after a letter was sent to the claimant indicating that it was accepting liability only for a 45 percent wage loss. This was not a situation wherein the

Second Injury Fund was engaging in settlement discussion before determining its liability. Instead, the Second Injury Fund only acknowledged liability for 45 percent wage loss and did not acknowledge liability for permanent total disability benefits until after a hearing was scheduled and settlement negotiations were unsuccessful. In my opinion, it is difficult to find that the Second Injury Fund did not controvert the claimant's entitlement to benefits in excess of 45 percent to the body as a whole when it had previously stipulated to that amount and had notified claimant that it would only accept liability of 45 percent.

Given this evidence, I find that the Second Injury Fund controverted claimant's entitlement to benefits in excess of 45 percent to the body as a whole.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits subsequent to March 13, 2002. Claimant has also failed to prove by a preponderance of the evidence that A.C.A. §11-9-522(f)(1) is unconstitutional due to his failure to notify the Attorney General's Office pursuant to A.C.A. §16-111-106(b). Finally, claimant's attorney is entitled to a fee from the claimant in the amount of 5 percent of the 45 percent wage loss previously accepted by the Second Injury Fund. The Second Injury Fund is instructed to withhold 5 percent of future payments until this fee is satisfied. Finally, the Second Injury Fund has controverted the claimant's entitlement to permanent total disability benefits in excess of 45 percent to the body as a whole.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits in excess of 45 percent awarded herein, one-half to be paid by the claimant and one-half to be paid by the Second Injury Fund. The Second Injury Fund is 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