

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F408467

CALVIN MOSLEY, EMPLOYEE	CLAIMANT
CONWAY SOUTHERN EXPRESS, EMPLOYER; INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED DECEMBER 11, 2006

A hearing in this case was conducted on August 31, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent #1 was represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Terry Pence, Attorney at Law, Little Rock, Arkansas.

Respondent #3 was represented by Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on July 31, 2006. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to six stipulations. Four of these stipulations are listed in the Prehearing Order and were confirmed at the hearing. The parties agreed to the remaining two stipulations at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.

2. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004.

3. Claimant's healing period ended on November 28, 2005.

4. Respondent #1 accepted two permanent impairment ratings, 7% to Claimant's low back and 6% to Claimant's cervical spine.

5. Claimant's average weekly wage is \$891.55; his temporary total disability rate is \$453.00; and his permanent partial disability rate is \$343.00.

6. In 1999, Claimant was paid for a 5% permanent impairment rating to his cervical spine.

At the August 31, 2006 hearing, the parties discussed the issues set forth in the Prehearing Order. As to the first issue listed in the order, the parties agreed that the Commission should decide whether Claimant was entitled to an additional 1% permanent impairment rating to his cervical spine to reach the total of 12% assigned, since he was previously assigned 5% due to his 1999 injury and Respondent #1 accepted 6% due to his August 10, 2004 neck injury. On September 5, 2006, Respondent #1's attorney notified the Commission that Respondent #1 agreed to pay the additional 1% permanent impairment rating to the cervical spine and that there was no need for the Commission to make a decision regarding the first issue listed in the Prehearing Order. Therefore, as confirmed by the parties at the hearing, the issues remaining to be litigated and resolved are limited to the following:

1. Whether Claimant is permanently totally disabled.

2. In the alternative, whether Claimant is entitled to wage loss disability benefits.
3. Whether the Second Injury Fund is liable for benefits under Ark. Code Ann. § 11-9-525.
4. Whether Claimant is entitled to an attorney's fee.

THE RECORD

As indicated above, Respondent #1's attorney addressed the first issue contained in the Prehearing Order in a letter dated September 5, 2006. In order to complete the record in this matter by explaining why the first issue listed in the Prehearing Order was moot, that letter will be blue-backed and made a part of the record herein.

DISCUSSION

At the time of the hearing Claimant was 54 years of age. He graduated from high school and, at some point, attended truck-driving school. After graduating from high school, he worked for AMF Bicycle for two and one-half years as a material handler. He then worked for thirteen years in a Safeway warehouse pulling and filling orders. In 1987 he began driving trucks for J. B. Hunt; on occasion, he would have to load and unload his trailer, but he was otherwise engaged in over-the-road driving. After recovering from a 1999 motor vehicle accident, Claimant worked six months for Integration Distribution. In late 1999 he began working for Conway Southern Express. For a few months he worked the docks, loading and unloading trailers. He then started working the Virco account; this required him to drive a truck and trailer to Conway, load the trailer, load additional trailers that were brought up by other drivers, and return at the end of the day with another loaded trailer. On a busy day he would load about eight or nine trailers; on a less busy day he

would load four or five trailers. Then, about six months prior to his accident, he returned to regional driving for the Respondent employer.

In 1999, while employed by J. B. Hunt, Claimant sustained a neck injury when the vehicle he was driving struck the back of another vehicle. Claimant recalled: "My neck was just stiff, but it was fine after the accident, after I had treatment and everything." Claimant denied he had any symptoms after his initial injury. He testified that Dr. Steven Cathey and Dr. Richard Jordan treated his injury.

In a letter dated July 15, 1999, Dr. Cathey wrote that Claimant "suffered a central cord type injury at the time of a motor vehicle accident" in February of that year. Claimant complained of discomfort in his neck and upper back, as well as occasional "numbness" in his left arm; nonetheless, Dr. Cathey reported that Claimant was feeling well enough to seek new employment and to return to work in the near future. Dr. Cathey opined that Claimant's "neurological deficits have essentially resolved" and that Claimant was at maximum medical improvement. He released Claimant "to resume a full and active lifestyle, without restriction" and assigned a 5% permanent impairment rating.

Claimant presented to Dr. Daniel Dillard on January 8, 2001; Dr. Dillard reported the following history:

Patient had MVA in 1999, suffered trauma to C6, C7 area. He was told by a neurosurgeon at that time, that he may need to consider surgery eventually because of paresthesias and weakness in left arm. He continues to have same symptoms, and would like to have another MRI for re-evaluation. Range of motion has been normal in his neck, although he does have quite a bit of popping.

Dr. Dillard opined that normal range of motion was present in Claimant's paracervical area.

The first page of Dr. Jordan's April 16, 2001 letter is in evidence. He examined

Claimant on April 3, 2001, and recorded the following history:

This man who is a nonsmoker had a motor vehicle accident in February of 1999 in which he hit another semi in the rear. He immediately felt numb all over and his left arm and hand remain somewhat numb and weak since. He has regained some use but continues to have problems. He was told early on after the accident that he was in grave danger of paralysis from cord compression.

Dr. Jordan interpreted an MRI as showing multi-level disc disease from C3 to C7 with canal narrowing. Dr. Jordan's impression was "that because of his canal stenosis and the acute hyperflexion/extension injury Mr. Mosley suffered an actual spinal cord injury at the time of his wreck and has not fully recovered." At the hearing, Claimant testified that he did not remember either his symptoms or his treatment from 2001.

The parties stipulated that Claimant suffered compensable injuries on August 10, 2004. He was towing two trailers; the load shifted in the back trailer, causing the other trailer and his tractor to turn over. Claimant testified to a number of injuries, but the parties stipulated that his neck, low back, and ankle injuries were compensable. After initial treatment at a local hospital, he returned to Little Rock and continued his course of treatment.

In Little Rock, Claimant was initially examined by Dr. Dillard. The doctor assessed "MVA with multiple bruising" when Claimant first presented on August 16, 2004. He remained symptomatic at an August 31, 2004 follow-up, although he did not present any neurological symptoms. However, on September 7, 2004, Claimant complained of cervical pain, among other symptoms; he requested an MRI of his brain and neck. Dr. Dillard recommended either a physiatry consult or a neurological consult. On September 28, 2004, Claimant reported "various aches and pains involving right side of forehead, cervical

area, both trapezia, lumbosacral area[,] and especially left calf where he has had a large hematoma.” Dr. Dillard noted approval for Claimant to see Dr. Kevin Collins, a physiatrist.

Dr. Collins examined Claimant on October 20, 2004. Claimant reported neck pain; upper, mid, and low back pain; a laceration of his left calf; and a hairline fracture of his ankle. Upon examination, Dr. Collins recommended an MRI of Claimant’s lumbosacral spine as well as aggressive physical therapy. An MRI of Claimant lumbar spine undertaken October 22, 2004 resulted in an impression of “[d]egenerative changes as described” at various level, with disc bulges noted at L3-4, L4-5, and L5-S1.

Claimant continued to follow up with Doctors Dillard and Collins. On October 28, 2004, Dr. Dillard noted that “[m]ost of his discomfort has continued to be in the cervical area, both trapezius and lumbosacral area.” Dr. Collins recorded on November 3, 2004 that Claimant “is making no significant progress in therapy” and continued Claimant off work. He also recommended a cervical MRI. An MRI of Claimant’s cervical spine undertaken November 4, 2004 resulted in an impression of “[m]ulti-level severe degenerative change with high-grade central stenosis at C4/5 and lesser central stenosis at other levels as described. The cord demonstrates patchy increased signal from C3/4 through C6/7 inclusively. This is consistent with myelomalacia.”

On November 12, 2004, Claimant presented to Dr. Jordan. The doctor noted that Claimant originally presented in April of 2001 for cervical spondylosis with stenosis. The doctor wrote:

We did not think that there was any acute need for surgery however we explained that further injury certainly would put him at risk.

He returned today and reported that he did have a new accident. He was driving an 18-wheeler and lost control. Since the accident he has had a

marked increase in neck pain and he is also having spasm and weakness in the arms.

Dr. Jordan interpreted an MRI as depicting “multi-level spondylosis with both canal and foraminal compromise.” The decision was made to proceed with a decompression from C-4 to C-6 with fusion. On December 23, 2004, Dr. Collins opined that Claimant’s surgery “needs to happen and it needs to happen quickly. He does have these changes in his spinal cord and there is a risk for spinal cord further paralysis if too much time occurs.”

Dr. Jim Moore undertook a peer review on January 4, 2005. After noting Dr. Jordan’s April 2001 examination related to Claimant’s 1999 injury, Dr. Moore wrote:

With that initial evaluation Dr. Jordan did not feel the patient would necessarily be a surgical candidate. He did, however, have probably an injury to the cervical cord and the possibility of a cervical laminectomy should be considered indicating that the patient would be at risk for further injury should he fall or have another accident. Dr. Jordan’s second report of 11-12-04 describes and demonstrates changes that were not present in the 2001 evaluation.

Dr. Moore cited the severe degenerative changes and evidence of myelomalacia found in the November 4, 2004 MRI study. He opined that “there appears to be certainly changes on the MRI as well as neurologically that would suggest that decompression would be an appropriate measure.” Dr. Moore believed that “there was an aggravation of a pre-existing process.” His diagnosis was multi-level cervical spondylolysis with myelomalacia.

On February 15, 2005 Claimant underwent a cervical laminectomy and posterior fusion at C3 through C6. His postoperative diagnosis was cervical spondylosis and stenosis with myelopathy. Claimant was discharged from the hospital on February 18, 2005 for admission to rehabilitation therapy.

Dr. Collins examined Claimant on February 23, 2005. Claimant reported that his

procedure had not significantly helped his pain or subjective complaints. Physical therapy and medication were prescribed.

Claimant continued to follow-up with Dr. Collins and Dr. Jordan. On May 17, 2005, Dr. Jordan opined that Claimant had “recovered rather well” and that his new studies demonstrated “the posterior instrumentation from C3-6 to be in good position and alignment. The spine appears to be solid.” He noted that it would “be difficult to return him to work, but we will plan to have a functional capacity examination in August and see what his capabilities are at that time.” Studies dated March 21, 2005; May 17, 2005; and July 11, 2005 report the continuing presence of degenerative disc disease at C3-4, C4-5, and C5-6; they also report the absence of any complications resulting from Claimant’s procedure. On examination of Claimant on August 10, 2005, Dr. Collins reported that his neck “looks good” but that Claimant was having problems with low back pain and buckling of his knees.

Claimant underwent magnetic resonance imaging of his cervical spine and lumbar spine on October 5, 2005. As to his cervical spine, the following impression resulted:

1. Postsurgical changes from C3 through C6 with loss of cervical lordosis at these levels.
2. C3/4 demonstrates moderate sized neural foraminal narrowing.
3. C6/7 demonstrates moderate left neural foraminal[.]

As to the lumbar spine, the study produced the following impression:

1. Multilevel degenerative disc disease is noted in the lumbar spine.
2. At L4/5, there is mild to moderate bilateral neural foraminal narrowing.
3. At L5/S1, there is an annular tear noted with moderate to severe bilateral neural foraminal narrowing secondary to a broad-based disc bulge.

Claimant underwent an independent medical evaluation by Dr. Wayne Bruffett on November 28, 2005. After recording Claimant's history, examining Claimant, and reviewing the available studies, Dr. Bruffett offered the following impression and plan:

IMPRESSION:

1. Status post multilevel cervical laminectomy for severe stenosis and myelomalacia which looks to be stable.
2. Spondylolysis and grade 1 spondylolisthesis, L5-S1 with foraminal stenosis, but without specific L5 radiculopathy.

PLAN:

With regards to his cervical spine, I think Mr. Mosley [is] at a point of MMI. His surgery looks like it has reached its anticipated goal and [is] probably stable. The fact that he has stiffness in his neck does not surprise me after all that he has been through.

With regards to his lower extremity symptoms, I really cannot say specifically if this is all related to foraminal stenosis at L5-S1. The fact that his legs buckle could be related to his spinal cord injury in the cervical spine, or it could be related to foraminal stenosis at L5-S1. In speaking with Mr. Mosley, he really does not want to actively treat the lower back at this point. Therefore, I think he is probably at MMI here as well.

Dr. Bruffett assigned a 12% impairment rating for Claimant's cervical spine and a 7% impairment rating for his low back. He and Claimant then discussed the possibility of Claimant returning to work. Dr. Bruffett recorded:

He has not worked in almost a year-and-a-half. He has a 12th grade education and previously drove a truck. He does not feel that he is going to be capable of returning to that line of work, and that really does not surprise me after all that he has been through. If he wants to look into some other line of work, or some other type of occupation, we could get an FCE to help define his capabilities. However, he does not feel that he is going to realistically go into any other line of work. This is really all he knows. I have told him that he probably needs to apply for disability. I do not think an FCE is going to change further treatments.

Claimant underwent a functional capacity evaluation on December 22, 2005.

Although Claimant was unable to complete portions of the examination, the conclusion states that he “is currently demonstrating the ability to perform work in the SEDENTARY category ... in an 8 hour time period based on his material handling tolerances.” The examiners noted that Claimant gave a consistent performance, but also exhibited self-limiting behavior.

Claimant testified that he has not seen a doctor since his functional capacity evaluation, but he would like to do so. He is still symptomatic. His low back “stays stiff. It feels like something is always in knots and it’s always pulling. [He] can never get comfortable. It’s very hard to sleep at night most of the time.” His legs “buckle a lot.” His neck “hurts sometimes, but it feels like it does not belong to [his] body.” He believes he still has the same symptoms that he experienced after the August 10, 2004 compensable injuries but that he just doesn’t hurt as much. He believes his neck surgery was beneficial.

As to future employment, Claimant stated: “I don’t think I can do anything until my neck heals up and my back gets better, and I don’t know if that’ll happen.” When asked if he considered himself totally disabled, he replied: “I know I couldn’t do any of the things that would be required on a job; I know that.” Claimant does not appear to have pursued any type of employment since August 10, 2004.

Q. Have you tried to go to work anywhere since August the 10th of 2004?

A. No, sir.

Q. Have you looked for a job?

A. No, sir.

Q. Have you applied for a job?

A. No, sir.

Q. Have you looked into being trained for a job?

A. No, sir.

Q. Have you thought of anything that you might be able to do?

A. With my education and the abilities that I have, no.

....

Q. I believe at one time Mr. Pence asked if you had tried being a dispatcher or something like that where you could sit at a desk and maybe use the radio or something like that, and I believe at that time you said that was something you might want to try.

A. Well, just like I told Mr. Davis, I wouldn't mind working. I didn't ask for this, none of this. But I would not promise anyone that I could give them a full day's work when I couldn't.

While Claimant has not requested schooling or retraining, that has not been offered by the Respondent employer, either. He does not believe that he can return to truck driving, because of the neck movements required as well as the necessity to climb into a cab.

Claimant testified that his current activities are extremely limited. He watches TV, sits on his porch, goes to the track to walk, and tries to attend church every Sunday. To relieve his pain, he will occasionally take medication or a hot bath or shower. He is restless and does not sleep well. He attends to his own housework and, occasionally, yard work.

Claimant is currently receiving both workers' compensation and social security disability benefits. He estimates that he is receiving "[p]robably about \$3,100 or \$3,200" a month from both sources. This figure includes some permanent impairment benefits.

A. Permanent Total Disability

"Permanent total disability" means inability, because of compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving his inability to earn any meaningful wage in the same or

other employment; he must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

Claimant’s neck and low back injuries are not scheduled under the Act; therefore, his entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant permanently and totally disabled based upon wage-loss factors. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 405, 141 S.W.3d 916, ___ (2004).

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. In considering factors that may affect an employee’s future earning capacity, the court considers the claimant’s motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant’s loss of earning capacity.

Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 228, 233, ___ S.W.3d ___, ___ (2005) (citations omitted). In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) provides that permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. “Major cause” is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A).

I find that Claimant has not sustained his burden of proving by a preponderance of

the evidence that he is permanently totally disabled. Considering all the applicable factors, Claimant still possesses an ability to earn some meaningful wage through employment. The functional capacity evaluation states that he is employable in a sedentary capacity. There is no medical evidence that Claimant is completely unable to earn any meaningful wage. While Dr. Jordan opined that it would be “difficult to return [Claimant] to work,” he did not rule out the possibility. While Dr. Bruffett advised Claimant that “he probably needs to apply for disability,” that appears to be based upon Claimant’s subjective opinion that he is not “going to realistically go into any other line of work.” Both doctors offered their opinions without the benefit of Claimant’s subsequent functional capacity evaluation. The evidence simply will not sustain a finding that Claimant is permanently totally disabled.

B. Wage-Loss Disability Benefits

Claimant seeks wage-loss disability benefits. He has been assessed with two permanent impairment ratings, 7% to his low back and 12% to his cervical spine (5% of which is attributable to his 1999 injury). Therefore, the Commission may consider his claim for wage-loss disability in excess of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1).

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. Logan County v. McDonald, 90 Ark. App. 409, 416-17, ___ S.W.3d ___, ___ (2005).

In determining wage loss disability, the Commission may take into consideration the workers’ age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the workers’ future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. A

claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

McKinney v. Plastics Research & Dev., Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881)(citations omitted); see Ark. Code Ann. § 11-9-522(b)(1); Logan County, 90 Ark. App. at 416-17, ____ S.W.3d at _____. In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A). Claimant has the burden of proving his entitlement to wage-loss disability benefits by a preponderance of the evidence. See Ark. Code Ann. § 11-9-704(c)(2).

At the time of the hearing, Claimant was 54 years of age; he graduated from high school and attended truck-driving school. His employment history consists of jobs that require manual or physical labor. His post-injury functional capacity evaluation demonstrates that he is now only capable of sedentary work, which is a more restricted level of work than he historically performed. He qualified for social security disability benefits. Thus, there is some degree of wage loss following his compensable injuries.

Claimant's motivation and attitude in seeking further employment are questionable. He has not requested retraining; he has not applied for any employment; and he has not worked at all since his compensable injuries. Subjectively, Claimant believes that he cannot work at all; however, this subjective belief is not supported by the functional capacity evaluation and it is not substantially supported by the medical evidence.

After considering all relevant wage-loss factors, I find that Claimant has established

a decrease in his wage-earning capacity equal to 25% to the body as a whole. He is entitled to benefits for this decrease in his wage-earning capacity. Further, I find that Claimant did prove by a preponderance of the evidence that his compensable injuries are the major cause of his decrease in earning capacity. Claimant could perform his job prior to his compensable injuries; since then, the medical evidence and functional capacity evaluation prove that he cannot perform the physical labor that he could beforehand. Claimant's compensable injuries are the sole, and thus the major, cause for his decrease in earning capacity.

C. Second Injury Fund Liability

Respondent #1 argues that the Second Injury Fund, Respondent #2, is liable for benefits under Ark. Code Ann. § 11-9-525. The conditions for imposing liability upon the Second Injury Fund are as follows:

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability impairment. This disability impairment must have continued with the recent compensable injury to produce the current disability status.

Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 5, 746 S.W.2d 539, ___ (1988); see Ark. Code Ann. § 11-9-525.

I find that Respondent #2 is liable for benefits under Ark. Code Ann. § 11-9-525. The first two elements of the test recited above are satisfied. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004 while in the employment of Respondent #1. Prior to those injuries Claimant had a permanent partial impairment, as evidenced by the medical evidence relating to his 1999 injury to his cervical spine and the stipulated 5% permanent impairment rating resulting from this 1999 injury.

At issue is the third element of the test. Respondent #1 argues that Claimant's 1999 injury and 2004 compensable injuries combined to produce his current disability status. Respondent #2 argues that Claimant was released without restrictions following his 1999 injury and that he worked thereafter until his 2004 injuries; thus, Respondent #2 argues, Claimant's current disability is a result of the injuries he suffered in the 2004 accident.

I specifically find that Claimant's 1999 permanent partial impairment combined with his recent compensable injuries to produce his current disability status. It is noteworthy that Claimant's 2004 neck injury was at the same level of his cervical spine as his 1999 injury and that Claimant's physical limitations increased substantially following his 2004 injuries. See Second Injury Fund v. Exxon Tiger Mart, Inc., 70 Ark. App. 101, 105-6, 15 S.W.3d 345, ___ (2000); Second Injury Fund v. Furman, 60 Ark. App. 237, 243-44, 961 S.W.2d 787, ___ (1998). Dr. Jordan noted on November 12, 2004 that there was not an acute need for surgery following Claimant's first injury, but that further injury "certainly would put him at risk." He then documented the changes that followed Claimant's 2004 injuries. Dr. Moore opined on January 4, 2005 "that there was an aggravation of a pre-existing process," after reviewing records relating to Claimant's 1999 and 2004 injuries.

In light of the foregoing, Respondent #2 is liable for benefits based upon the 25% wage-loss disability awarded herein. See Ark. Code Ann. § 11-9-525(b)(4); Weaver v. Tyson Foods, 31 Ark. App. 147, 790 S.W.2d 442 (1990).

D. Attorney's Fee

Ark. Code Ann. § 11-9-715(a)(2)(A) provides:

Whenever the commission finds that a claim against the Treasurer of State, as custodian of the Second Injury Trust Fund..., has been controverted, in whole or in part, the commission shall direct that fees for legal services be

paid from the fund, in addition to compensation awarded, and the fees shall be allowed only on the amount of compensation controverted and awarded from the fund.

Id. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. Lee v. Alcoa Extrusion, Inc., 89 Ark. App. 228, 235, ___ S.W.3d ___, ___, (2005) (citation omitted). A finding of controversion is not required merely because a party investigates a claim prior to admitting liability; however, if a claimant is required to retain an attorney in order to receive an award for wage-loss disability, that is some evidence of controversion. See Lee, 89 Ark. App. at 235-36, ___S.W.3d at ___.

I find that Respondent #2 controverted an award of wage-loss disability benefits; therefore, Respondent #2 shall pay fees for legal services pursuant to Ark. Code Ann. § 11-9-715(a)(2)(A). As noted above, wage-loss disability benefits are awarded herein, and Respondent #2 has been found liable for that award. It appears from the record that Claimant had to retain an attorney to secure these benefits. There is no indication in the record that Respondent #2 accepted Claimant's claim that he was entitled to wage-loss disability benefits. As was its right, Respondent #2's participation in this proceeding went beyond merely investigating its potential liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.
3. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004.

4. Claimant's healing period ended on November 28, 2005.
5. Respondent #1 accepted two permanent impairment ratings, 7% to Claimant's low back and 6% to Claimant's cervical spine.
6. Claimant's average weekly wage is \$891.55; his temporary total disability rate is \$453.00; and his permanent partial disability rate is \$343.00.
7. In 1999, Claimant was paid for a 5% permanent impairment rating to his cervical spine.
8. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits. His functional capacity evaluation demonstrates that he is employable in a sedentary capacity; there is no substantial medical evidence to the contrary.
9. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to 25% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injuries are the major cause of his decrease in earning capacity. He could perform his job prior to his compensable injuries; since then, the medical evidence and functional capacity evaluation prove that Claimant cannot perform the extent of physical labor that he could beforehand.
10. Respondent #2, the Second Injury Fund, is liable for wage-loss disability benefits payable to Claimant. Claimant sustained compensable injuries to his neck, low back, and ankle on August 10, 2004, while he was in the employment of Respondent #1. Prior to those injuries Claimant had an impairment, as evidenced by the medical evidence relating to his 1999 injury and the stipulated 5% permanent impairment rating resulting

from that injury to his cervical spine. Claimant's 1999 impairment combined with his recent compensable injuries to produce his current disability status: his 2004 neck injury was at the same level of his cervical spine as his 1999 injury; his physical limitations increased substantially following his 2004 injuries; and the medical evidence demonstrates that Claimant's 2004 neck injury aggravated a pre-existing process.

11. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715(a)(2)(A), to be paid by Respondent #2.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, to be paid in accordance with Ark. Code Ann. § 11-9-715(a)(2)(A).

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml