

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407747

JOHN T. WOODS, EMPLOYEE	CLAIMANT
CARTER & COLE TIRE SERVICE, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, INSURANCE CARRIER; AIG CLAIMS SERVICE, /TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PTD TRUST FUND	RESPONDENT #3

OPINION FILED JANUARY 31, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on January 5, 2006, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents #1 represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

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

Respondent #3 did not appear.

STATEMENT OF THE CASE

A hearing was conducted January 5, 2006, to determine various issues set out further below.

A prehearing conference was conducted in this claim on November 2, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to clarifying statements relative to

their respective positions. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record herein.

It was stipulated that the employment relationship existed between the claimant and respondents #1 at all relevant times, including July 15, 2004; that the claimant sustained a compensable back injury on said date; that the respondents had paid temporary total disability benefits at the maximum compensation rates of \$453.00 per week for temporary total disability and \$340.00 per week for permanent impairment; that the claimant's healing period ended May 19, 2005, at which time respondents #1 accepted and initiated payments of a thirteen percent (13%) whole body impairment; and that respondents #1 and #2 had controverted liability for wage-loss disability.

The following issues were presented for determination:

- 1) The extent of claimant's wage-loss disability.
- 2) Which respondent is liable for claimant's wage-loss disability, if any.
- 3) The applicable compensation rates.
- 4) The extent of controversion.
- 5) Whether respondent #1 is entitled to a credit for overpayment in the amount of weekly indemnity benefits paid to the claimant.

Claimant contended, in summary, that he is permanently totally disabled as the result of the July 15, 2004, injury, or, alternatively, that he was entitled to substantial wage-loss disability in an amount to be determined by this Commission. At the prehearing conference, the claimant maintained that he was entitled to the

maximum compensation rates and that respondents #1 initially paid benefits at an erroneous compensation rate which was only corrected following his intervention and representation of the claimant, and, therefore, a controverted attorney's fee should be awarded on the increased compensation rate, as well as any wage-loss disability awarded. At the hearing, the claimant amended his contentions relative to the appropriate compensation rate, asserting that based upon the claimant's average weekly wage, the correct rates should be \$440.00 per week for temporary total disability and \$330.00 per week for permanent partial disability.

The respondents #1 contended that it had paid all appropriate benefits to which the claimant was entitled; that the claimant was not entitled to wage-loss disability in excess of the permanent impairment; but, if wage-loss was awarded, it should be the responsibility of respondent #2, the Second Injury Fund. Respondents #1 further claimed a credit for any possible over-payment in the appropriate compensation rates while maintaining that the correct rates were \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability rather than the maximum compensation rates previously paid.

Respondent #2 contended that it did not have any liability in this claim and that all wage-loss disability was the responsibility of respondents #1.

At the prehearing conference, respondent #3 stated that it would accept any determination of the Commission concerning its liability, if any, while maintaining that respondents #1 must first pay the permanent anatomical rating for the

claimant's compensable injury before payment of permanent total disability and, additionally, that respondent #1 was not entitled to a credit for payment of claimant's permanent anatomical rating against its \$75,000.00 maximum liability for permanent and total disability pursuant to A.C.A. §11-9-502(b)(1). By letter dated December 22, 2005, respondent #3 proposed to stipulate to compensation rates of \$440.00 per week for temporary total disability and \$330.00 per week for permanent partial disability which, again, was not agreed to by respondents #1. Respondent #3 advised that since its liability, if any, was a legal question requiring no factual development, that it would not attend the January 5, 2006, hearing.

In addition to the claimant, his sister, Brenda Deckelman, was called as a corroborating witness. Relative to the primary issue concerning the extent of claimant's wage-loss disability, the record is composed solely of the transcript of the January 5, 2006, hearing containing a volume of medical reports, together with additional documentary evidence.

Subsequent to the prehearing conference, the following correspondence was received addressing the issues of the applicable compensation rates, as well as respondents #1's entitlement to a credit for overpayment:

- 1) A December 13, 2005, letter from respondents #1 to the Commission;
- 2) A December 22, 2005, response from claimant's attorney to the Commission;
- 3) A December 27, 2005, letter from respondents #1 to the Commission enclosing a print-out of previous payments; and

- 4) A December 22, 2005, letter from respondent #3 to the Commission.

In addition, subsequent to the hearing, claimant's attorney submitted a January 5, 2006, letter addressing the applicable compensation rates, as well as the extent of controversion. All of the foregoing correspondence has been blue-backed and made a part of the record herein.

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 witnesses and to observe their 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. At the time of claimant's admitted, compensable injury, his average weekly wage was \$657.77 per week, entitling him to compensation rates of \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability.
4. The claimant has failed to establish, by a preponderance of the credible evidence, that he is permanently totally disabled within the meaning of the Arkansas workers' compensation laws.

5. The claimant has established, by a preponderance of the evidence, that, in addition to his admitted anatomical impairment of thirteen percent (13%) to the body as a whole, he also sustained a wage-loss disability of forty percent (40%) to the body as a whole, for an overall permanent partial disability of fifty-three percent (53%) to the body as a whole.
6. All of the claimant's permanent disability is directly and causally related to the July 15, 2004, admitted injury.
7. The Second Injury Fund does not have any liability in this claim.
8. Respondents #1 initially paid indemnity benefits at the erroneous compensation rate of \$347.00 per week from July 16, 2004, through December 16, 2004, at which time, through the efforts of claimant's attorney, the erroneous compensation rate was corrected and a lump sum payment made to offset the improper compensation rate. Respondents #1 controverted the accrued underpayment from July 16, 2004, through December 16, 2004, entitling claimant's attorney to a controverted attorney's fee on the accrued underpayment. Respondents #1 did not controvert the difference in the compensation rates after December 16, 2004, at which point it brought the claimant's benefits current.
9. It is undisputed that respondents #1 have controverted all wage-loss disability in this claim.
10. Respondents #1 are entitled to a credit for overpayment of indemnity

benefits since December 16, 2004, having paid benefits at the maximum compensation rates rather than the proper compensation rates of \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability, respectively.

DISCUSSION

The claimant, John Thomas Woods, is forty-one (41) years old. He has a ninth grade education. The claimant denied vocational training beyond his limited schooling. Claimant's primary work during his adult life has been as a tire buster, mounting and balancing tires, and as an automotive mechanic. The claimant also drove a truck for approximately six (6) months. He described all of his prior employment as extremely physically demanding, requiring a great deal of twisting and heavy lifting. The claimant was employed by respondent, Carter & Cole Tire Service, for approximately fourteen (14) years prior to sustaining his admitted, compensable injury on July 15, 2004. The record reflects that the claimant sustained a previous minor back injury with the same employer herein approximately ten (10) to twelve (12) years before the immediate claim. However, following conservative treatment, the claimant returned to work for the employer, maintaining that he had no additional problems whatsoever related to his back until the July 15, 2004, injury. Again, the injury is undisputed. It was immediately reported to Everett Cole, one of the owners. The claimant was initially treated at the emergency room. He was next examined and evaluated by Dr. Rodney Olinger, a

neurosurgeon with the Semmes-Murphey Spine Institute in Memphis, Tennessee. The claimant underwent surgery on August 17, 2004. The claimant stated that, initially, the surgery seemed to improve his symptoms temporarily. Because of the claimant's continued problems, he was subsequently referred to a pain specialist, Dr. Stephen L. Gipson, who treated the claimant with nerve root injections, as well as medications. The claimant has not returned to work since his admitted injury. At the time of the within hearing, the claimant was taking Methodone and Hydrocodone for pain, as well as Lyrica at night to help him sleep. The record reflects that there has been a recommendation for a spinal cord stimulator to assist the claimant in dealing with his pain. Additional medical was not an issue. Suffice it to say that there was conflicting testimony concerning whether or not respondents had agreed to pay for the proposed spinal stimulator. It was the claimant's opinion that he could not return to work without implantation of the stimulator which, to date, has not been performed. (Tr.31-32, 46-47)

On cross-examination, claimant acknowledged that he was released to return to light-duty work by Dr. Olinger, his primary treating physician. It is undisputed that there is not light-duty work available with the employer herein. The record reflects that the claimant was also evaluated at the request of the respondents by Dr. Tyrer in Jonesboro, Arkansas, who indicated that the claimant could return to work in either a light-duty or possibly moderate-duty capacity. Again, the claimant has not returned to gainful employment. Clearly, the claimant cannot return to work at any

of his prior jobs without an improvement to his overall physical condition. The claimant's most recent employment is simply too physically demanding. Further, although the claimant has a CLD and has previously worked as a truck driver, this type of work would be unreasonable considering the medications the claimant is currently taking. The claimant did state that if his pain was eliminated through the use of a spinal cord stimulator, he wanted to return to work. He even indicated that if his pain was eliminated, he might be able to return to work for the respondent which is highly doubtful given the nature of his work for the employer. (Tr.62-64)

WAGE-LOSS DISABILITY

The claimant sustained an injury to that portion of his body which is not scheduled under the Act. Therefore, the claimant'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 concerning the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as a worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility and demeanor.

Glass vs. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); *Curry vs. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Cross vs. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). 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 living at that time, he is entitled to compensation for permanent and total disability. *Minor vs. Poinsett Lumber & Manf. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

I find that the claimant has simply failed to prove that he is permanently and totally disabled. The medical evidence reflects that the claimant can return to work in a light-duty to possibly moderate work capacity. The Workers' Compensation Act provides that in considering a claim for permanent disability, the Commission and the Courts shall not consider the odd lot doctrine. A.C.A. §11-9-522(e). After a full consideration of the facts, issues, and the law, I find that a wage-loss disability of forty percent (40%) to the body as a whole, over and above the claimant's anatomical impairment, fairly and accurately reflects the extent of claimant's wage-loss disability.

It is the hope of this Administrative Law Judge that the parties will cooperate in allowing the claimant to obtain follow-up medical care and treatment, including, but not limited to the spinal cord implant previously recommended. Again, the issue of claimant's entitlement to continued medical treatment was not at issue. I feel

compelled to point out that, in the event there is a change in claimant's physical condition, which may reduce his wage-loss disability, an application may be made to modify the within Award pursuant to Ark. Code Ann. §11-9-713 (Repl. 2002)

I further find that respondents #1 and not the Second Injury Fund is responsible for all wage-loss disability. Suffice it to say that there is no evidence whatsoever that the claimant had a pre-existing impairment or disability before the immediate claim. Admittedly, the record reflects that the claimant sustained a prior, minor injury involving his back, ten (10) to twelve (12) years before the within claim; however, the claimant did not sustain any impairment or disability as the result of the prior injury which is required to establish Second Injury Fund liability. Accordingly, the within claim against respondent #2 is respectfully denied and dismissed.

COMPENSATION RATES

The claimant contends that based upon the payroll records, his average weekly wage was \$659.43 which would yield compensation rates of \$440.00 per week for temporary total disability and \$330.00 per week for permanent partial disability. Respondents #1 correctly point out that excluding the week of the injury, the appropriate compensation rates would be \$439.00 per week for temporary total disability and \$329.00 per week for permanent partial disability. Rather than conduct an exhaustive analysis of the documentation, it is apparent that the claimant improperly added eleven (11) weeks of straight-time salary which included

the partial week that the claimant was injured, in addition to the full ten (10) weeks of overtime that the claimant worked, therefore creating an average weekly wage of \$659.43 rather than the correct average weekly wage of \$657.77 when utilizing the full ten (10) weeks that the claimant worked. In his letter of October 4, 2005, claimant's attorney attempted to project the claimant's average weekly wage, including the partial week which is an improper calculation. If ten (10) weeks of overtime are utilized, only the ten (10) weeks of regular salary should be included. (Cl. Ex. C, pp.1-2)

EXTENT OF CONTROVERSION

In his brief, submitted subsequent to the hearing, claimant's attorney correctly points out that prior to his intervention in the claim, respondents erroneously paid the claimant \$347.00 per week which was the correct compensation rate based upon his regular earnings without considering overtime earnings. Once claimant's attorney became involved and requested an increased wage rate, respondents agreed and paid the accrued underpayment in lump sum to offset the difference. Thereafter, respondents #1 continued to pay at another erroneous compensation rate, specifically, the maximum rates as reflected by the stipulations rather than the appropriate rates. It is apparent that respondents paid the inappropriate rates in error. It did not require any litigation to resolve the underpayment issue. Accordingly, I find that the claimant's attorney is entitled to a controverted attorney's fee on the accrued underpayment, specifically, the lump

sum paid to offset the underpayment, but, is not entitled to a controverted attorney's fee on the difference between the initial benefits paid and the correct compensation rates once corrected because respondents showed good faith in meeting its obligations under our workers' compensation laws without requiring any litigation related to said issue. In fact, respondents erroneously began overpaying the claimant his weekly indemnity benefits which raises yet another issue concerning respondents' entitlement to reimbursement and/or a credit.

This Commission has previously held on numerous occasions that while a respondent is not entitled to reimbursement, it is entitled to a future credit for overpayment in paying benefits at a rate higher than those the claimant is legally entitled to receive. *Trimble vs. Transervice Corporation*, WCC #E107197, Full Commission Opinion filed June 3, 1997; *Swem vs. University of Arkansas*, WCC #F203675, Full Commission Opinion filed November 2, 2004.

AWARD

Respondent, AIG Claims Service, is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$339.00 per week, beginning May 20, 2005, and continuing for 238.5 weeks, representing an overall permanent partial disability of fifty-three percent (53%) to the body as a whole, specifically, claimant's admitted thirteen percent (13%) whole body impairment, together with a forty percent (40%) wage-loss disability.

All accrued benefits shall be paid in lump sum and without discount, and,

respondents may claim credit for all benefits previously paid, including, a credit for the overpayment in the appropriate compensation rates.

Additionally, claimant's attorney, Mr. Marc I. Baretz, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid in accordance with the provisions of Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

Issues not addressed herein are specifically reserved for future determination.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge