

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506457

CLARENCE BASS, EMPLOYEE	CLAIMANT
ARKANSAS DEPARTMENT OF CORRECTION, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, CARRIER	RESPONDENT

OPINION FILED MAY 25, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 28, 2007, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE THOMAS MICKEL, Attorney at Law, Conway, Arkansas.

Respondents represented by the HONORABLE RICHARD SMITH, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of attorney's fees at the respondents' expense.

At issue is whether or not this claim was controverted pursuant to Ark. Code Ann. §11-9-715(a)(2)(B). All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find this claim has not been controverted.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on June 25, 2005 at which time the claimant sustained compensable injuries at a compensation rate of \$399.00/\$299.00. Medical expenses, temporary total disability benefits until August 11, 2006, and a 14% impairment rating to the body as a whole were paid before the respondents accepted the claimant as permanently

and totally disabled in February, 2007.. The claimant receives Social Security Disability benefits.

The claimant sustained a head injury in an altercation with prisoners. The claimant, age (47) has a high school education and training as a welder. His work experience for the last fourteen years has been as a prison guard. The claimant contends his claim was controverted by the respondents and attorney's fees are owed.

The respondents contend all appropriate benefits have been paid and the claim was never controverted. The respondents accepted the claimant as permanently and totally disabled.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The claimant and adjustor, Margaret Langley, testified at the hearing.

The claimant was injured in an altercation with prisoners and suffered a head injury with memory loss. The claim was accepted as compensable and benefits were being paid when the claimant hired his attorney, Tom Mickel.

A prehearing conference was held on December 12, 2006 and the case was set for a hearing in February, 2007 on the issue of wage loss. The hearing was cancelled when the respondents accepted the claimant as permanently and totally disabled.

The claimant was pleased with the services of his attorney, referring to him as a "shoulder to cry on." The claimant's physician, Dr. Silas, retired and Attorney Mickel explained the need for the claimant to see a neurologist. The claimant agreed to see Dr. Baskin who confirmed the diagnosis of Dr. Silas and assessed a 14% impairment rating. Attorney Mickel also explained permanent partial disability benefits and arranged for an Functional Capacity Evaluation (FCE) and vocational rehabilitation evaluation.

Claims Adjuster, Margaret Langley testified Dr. Baskin's rating was issued on August 11, 2006 and Dr. Baskin requested an FCE. Permanent partial disability benefits were paid for six months. Ms. Langley offered services (the FCE and vocational rehabilitation evaluation) that Mr. Mickel delayed in the hopes of reaching a settlement. Ms. Langley informed Mr. Mickel that settlement was not a possibility. The FCE was conducted on November 30, 2006 with the vocational rehabilitation evaluation on January 24, 2007. Ms. Langley testified that after a staff meeting on February 7, 2007, the carrier accepted the claimant as permanently and totally disabled. Ms. Langley testified that she suspected the claimant would be totally disabled but she needed the evaluations in order to justify her decision, (Tr. p. 24, 27-28, 30-31, 40). The claimant was accepted as totally disabled within a week of obtaining the evaluation results.

Date of Injury	June 25, 2006
Hired Attorney	January 2, 2006
Impairment Rating	August 11
Settlement Negotiations	?
Hearing Request	October 3
Functional Capacity Eval.	November 30
Prehearing Conference	December 12
Vocational Rehab (cancelled)	December 19
Vocational Rehab Eval.	January 24, 2007
Accepted as Permanent & Total	February 7
Wage Loss Hearing (cancelled)	February 22

FINDINGS AND CONCLUSIONS

The determination of whether a claim is controverted is a question of fact. The purpose of a finding of controversion is to determine liability for the claimant's attorney's fees, placing the burden of litigation expense on the party which made it necessary. Aluminum Company of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). The Court has determined that failure to pay compensation or the dilatory payment of benefits is not controversion per se, but it does shift the

burden to the carrier to justify their actions. There is no controversion in cases where the carrier delayed payments while making a good faith investigation of the nature and extent of the injury or because of some other reasonable excuse. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976), Hamrick v. Colson Co., 271 Ark. 740, 610 S.W.2d 281 (1981), Turner v. Trade Winds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980), Climer v. Drake's Backhoe, 7 Ark. App. 148, 644 S.W.2d 637 (1983). The evaluations (FCE, vocational rehab.) Are a reasonable investigation of the claim and the claimant was never without indemnity benefits.

It is certainly understandable that a claimant with a head injury and memory loss would want the assistance of counsel to oversee his claim. However, I find the carrier acted promptly in accepting and paying this claim and therefore I find the claim has not been controverted.

If attorney Mickel wishes to file a Motion or an Agreed Order for attorney's fees and/or expenses pursuant to Ark. Code Ann. §11-9-715(a)(2)(c), I will take the matter under consideration. This provision allows an award of attorney's fees for providing bone fide legal services at the expense of the claimant, not the respondent.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on June 25, 2005 at which time the claimant suffered a compensable injury.
2. The carrier accepted the claimant as totally disabled within one week of obtaining the results of evaluations for wage loss. The claimant was never without indemnity benefits. Therefore this claim has not been controverted.

This claim for controverted attorney's fees at the expense of the carrier is hereby denied.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge