

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207905

DANNY V. CATES, EMPLOYEE

CLAIMANT

FRANK VILLINES ENTERPRISES,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 17, 2008

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on May 14, 2008, in Harrison, Boone County, Arkansas.

The claimant was represented by The Honorable Laura J. McKinnon, Attorney at Law, Fayetteville, Arkansas.

The respondent was represented by The Honorable Jeffrey G. Malm, Attorney at Law, Harrison, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 14, 2008, in Harrison, Arkansas. A Prehearing Order was entered in this case on March 12, 2008. This Prehearing Order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

STIPULATIONS

The following stipulations were submitted by the parties either during the prehearing conference or at the time of the hearing, these are hereby accepted.

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The parties agree that the Administrative Law Judge's opinion of September 30, 2005 is res judicata on all the issues addressed therein.

3. No benefits have been paid.

4. The claimant's average weekly wage at the time of his injury was \$250.00. Therefore, the claimant is entitled to a temporary total disability rate of \$167.00, and a permanent partial disability rate of \$154.00.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Permanency-anatomical impairment rating and wage-loss disability.

2. Penalties for unpaid medicals, unpaid indemnity benefits, and attorney's fees pursuant to Ark. Code Ann. § 11-9-802; 11-9-712; 11-9-715; 11-9-716; 11-9-801; and 11-9-802 [sic], (based on review of the claimant's response to the prehearing questionnaire, this is a clerical error, and should be reflected as 11-9-711); and Commission's Rule 099.10.

3. A controverted attorney's on the additional indemnity benefits, if awarded.

CONTENTIONS

The claimant's and respondent's contentions are contained in their prehearing responses, and are hereby incorporated herein by

reference.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of March 12, 2008; the claimant's Prehearing Response; and the respondent's Prehearing Response, as these were all marked as Commission's Exhibit No. 1. The claimant's Medical Packet was marked as Claimant's Exhibit No. 1. The claimant's Outstanding Medical Bills Packet was marked as Claimant's Exhibit No. 2. The Opinion dated September 30, 2005, was marked as Claimant's Exhibit No. 3. The Arkansas Speciality Care Centers' Statement dated June 12, 2003, was marked as Claimant's Exhibit No. 4. The Hearing Transcript of July 7, 2005, is incorporated herein by reference, as it has been marked as Claimant's Exhibit No. 5.

The parties filed post-hearing briefs, and Mr. Malm submitted a letter dated July 15, 2008, these are incorporated herein by reference, as these have been marked as Commission's Exhibit No. 2.

The following witness testified at the hearing: the claimant.

DISCUSSION

The claimant age 53 (9/4/54), has a 10th grade education. He testified that he has performed security work and lived on a farm most of his life. The claimant admitted he had difficulty getting a drivers' license, as he failed the exam three times, and had to take the test orally. According to the claimant, as a truck driver, he had problems following a map and directions, as he got

lost a lot. He admitted that he is not good at reading or math. The claimant denied ever having a job as a cashier or anything that required the use of math skills.

He admitted to having undergone prior back surgery a couple of years before his most recent one. The claimant maintains that this affected his right leg, and the lower part of his back. He admitted that he was able to return to work after the first surgery, as he went to work for Frank Villines.

According to the claimant, he worked for the respondent-employer for a period of over a year. He admitted to being able to do this job. However, the claimant testified that after this injury, the lower part of his back and left leg hurt. The claimant agreed that this was completely different from the first injury. He further testified that he has not ever completely gotten over this second injury.

The claimant admitted that he draws Social Security, but he could not recall how long he has been drawing it, but did admit that it has been a long time. The claimant maintains that he has tried to find a job. Specifically, the claimant testified that he has worked at the dog pound, but they let him go because he was too slow. According to the claimant, this job lasted only three hours. The claimant testified that he tried to obtain work as doing short runs, but was unable to do so.

He admitted he found part-time work at Mar-Tron, as he was

paid \$6.00 an hour, and worked only part-time. However, the claimant testified he had problems performing his job duties, as he was unable to sit or stand for prolonged periods. According to the claimant, he left this job due to medical problems he was experiencing as a result of his work-related injury.

With respect to the prior award (of September 30, 2005), the claimant admitted that he has not received any money from Mr. Villines, nor has he been provided anything showing where his attorney was paid any attorney's fees. He further admitted that his medical bills have not been paid pursuant to this award.

The claimant essentially testified he is unable to do very much walking or standing. According to the claimant, he hurts in his back and down his left leg.

On cross examination, the claimant admitted he has a two-acre place. He admitted he has chickens and dogs, Chihuahuas. The claimant admitted that he feeds the dogs.

The claimant admitted that at the time of the last hearing, he was working for Mar-Tron, a wiring place. According to the claimant, he sat at a desk and worked with wire. He admitted to having worked for this company a year and one month. He further admitted that his hourly rate of pay was \$6.00. After this the claimant admitted he worked for the Humane Society (previously referred to as the dog pound). The claimant admitted he has not worked since this time, however, he maintains that he tried to put

in applications and stuff, but he has failed to get any work.

He testified that he has been on Social Security Disability for approximately "four and a half years." Before going to work for the respondent-employer, the claimant admitted he worked as a truck driver for Cannon Express, for about year, as they went out of business.

The claimant admitted that his first back surgery occurred in 1994, which was for the lower part of his back. He maintains that he looked for a job some two weeks prior to the hearing. According to the claimant, he looked for a job at a place adjacent to Work Force Services, as it is a place for disabled people/the Rehabilitation Commission.

On redirect examination, the claimant testified that he takes Hydrocodone for pain, which makes him extremely drowsy. However, he testified he only takes this on an as-needed-basis for pain. According to the claimant, he usually takes two pain pills per day, every six hours.

Upon being questioned by the Commission, the claimant admitted he is on Social Security Disability due to his education and back. He further testified that he worked security for the respondent-employer, three nights on patrol and through the daytime, he ran with the Armored vehicle. According to the claimant, his hourly rate of pay was \$6.00, forty hours a week.

In a letter dated August 25, 2003, Dr. Ronald N. Williams

reported the following to the claimant's attorney:

Thank you for your letter of August 8, 2003 regarding Mr. Cates. As you know, Mr. Cates had a lumbar laminectomy at the L5-S1 interspace. The American Medical Association publication Guides to the Evaluation of Permanent Impairment indicates that an operatively treated disc derangement of the lumbar spine with residual produces as a 10% whole person impairment.

The parties stipulated that the Administrative Law Judge's opinion of September 30, 2005 is res judicata on all the issues addressed therein. Specifically, the Administrative Law Judge found, in pertinent part:

1. The claimant sustained his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back on July 11, 2002, and the claimant proved by preponderance of the evidence that he sustained a compensable injury to his left knee as a result of this work incident.

2. Claimant sustained his burden of proving that he is entitled to reasonably necessary medical treatment in connection with his compensable back injury. Dr. Williams reported that the claimant's January 3, 2003 microdiscectomy at L5-S1 provided the claimant with some relief, indicating that it was necessary to reduce or alleviate his symptoms resulting from his compensable injury. This medical treatment was connected with claimant's injury; the need for treatment did not arise until his July 11, 2002 incident.

3. Claimant sustained his burden of proving that he is entitled to temporary total disability benefits from July 12, 2002 until August 27, 2002, and then from November 28, 2002 until January 3, 2003.

4. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715. The parties stipulated that Respondent controverted this claim, which would include the disability benefits awarded in this Opinion.

The Administrative Law Judge directed the respondent to pay

the aforementioned benefits in accordance with the Findings of Fact and Conclusions of Law. However, in the instant matter, the parties stipulated that the aforementioned medical, indemnity, and attorney's fees have not been paid as directed in this award.

ADJUDICATION

A. Penalties

Ark. Code Ann. §11-9-802 provides:

(d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount. (e) In the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant.

In an opinion filed September 30, 2005, an Administrative Law Judge essentially found that the treatment provided by Dr. Williams, and other medical providers for the claimant's compensable back and left knee injury was reasonably necessary in connection with the claimant's compensable incident of July 11, 2002. The Administrative Law Judge ordered the respondent to pay these medical benefits in accordance with this finding. The respondent did not appeal the Administrative Law Judge's decision.

The parties stipulated the medical benefits awarded in the September 30, 2005 opinion have not been paid. The claimant also credibly testified that these benefits have not been paid. The respondent has not offered into evidence for consideration, any excuse or reason as to why these medical expenses have not been paid.

However, the claimant has placed into evidence without any

objection from the respondent, documentation of outstanding medical bills for his compensable injury totaling some \$36,044.88. At the time of the hearing, the claimant's attorney clarified that expenses unrelated to the claimant's compensable injury had been inadvertently included in this documentary evidence. These expenses include the November 1, 2002 charge from Baxter Regional Medical Center, in the amount of \$2,008.48, and the November 1, 2002, charge from Mountain Home Anesthesia, in the amount \$1,055.00. With these expenses having been deducted, this leaves the respondent owing a balance of \$32,981.40, on the medical benefits for the claimant's compensable injury.

On the basis of the record as a whole, and after weighing the evidence impartially and without giving the benefit of the doubt to either party, I find that the respondent's refusal to pay the previously awarded medical treatment per the September 30, 2005 Opinion is willful and intentional. Therefore, pursuant to Ark. Code Ann. § 11-9-802(e), I find that the respondent shall be liable for a 36% penalty on these unpaid medical benefits, payable to the claimant.

The respondent shall be liable for medical expenses for the claimant's compensable injury in the amount of \$32,981.40. The penalty due to the claimant comes to \$11,873.30.

With respect to the temporary total disability compensation awarded to the claimant per the Opinion of September 30, 2005. It appears that the claimant is due \$1,955.57, in indemnity benefits pursuant to this award.

The parties have in essence stipulated that the respondent has not paid to the claimant any installment on this award of temporary total disability compensation. The claimant credibly testified that he has not received any payment for these benefits from the respondent.

Based on the foregoing, I am constrained to find that these installments of compensation are more than fifteen (15) days past due. Therefore, pursuant to Ark. Code Ann. § 11-9-802 (c), I find that the respondent is liable for a twenty percent (20%) penalty, payable to the claimant. This penalty comes to a total of \$391.11.

Per this prior Opinion, the claimant's attorney was awarded the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715, as this was a controverted attorney's fee on the indemnity benefit awarded therein.

Specifically, the total amount awarded for the indemnity benefits amounted to \$1,955.57. The claimant's attorney is therefore entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded therein, one-half of which was to be paid by the claimant and one-half was to be paid by the respondent. The attorney's fee due to the claimant's attorney amounts to \$488.89 (total indemnity \$1,955.57 times 25%).

B. Anatomical Impairment and Wage-Loss Disability

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination

of the existence or extent of physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c) (1).

Pursuant to Ark. Code Ann. § 11-9-522(g) and Commission's Rule 099.34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used to assess anatomical impairment. Dr. Williams in the present matter assigned a 10% anatomical impairment rating based on Chapter 3, Table 75 of the Guides. The parties agree that the claimant has not received compensation for the 10% rating assessed by Dr. Williams. Based on the evidence before, I find that the claimant proved he is entitled to this 10% anatomical impairment rating, that the rating was based on objective and measurable physical findings, and that the compensable injury was the major cause of the claimant's 10% anatomical impairment. Ark. Code Ann. § 11-9-102(4) (F) (ii) (a).

This 10% anatomical impairment rating amounts to \$6,930.00 (45 weeks times \$154.00, the permanent partial disability rating). The respondent shall be liable to the claimant for this amount.

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 such disability based upon a consideration of the medical evidence and other matters, including age, education, and work experience. See Ark. Code Ann. § 11-9-522(b) (1); Cross v. Crawford County Mem. Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). In the present matter, I find that the claimant sustained wage-loss disability in

the amount of 20% over and above his anatomical impairment.

The claimant is 54 years old and has a 10th grade education. The evidence in this matter demonstrates that the claimant can barely read and has difficulty with math. He has prior work experience as a factory worker, security officer, and a truck driver. It is noted in the prior Opinion that following the claimant's January 3, 2003 back surgery with Dr. Williams, he failed to show up for his six-week follow-up. Also, in this Opinion, the Administrative Law Judge found that the claimant's healing period ended on the date of his January 3, 2003 surgery. There is no proof that Dr. Williams or any other physician placed any physical limitations or restrictions on the claimant as a result of his compensable back injury. The claimant admits that he has been drawing Social Security Disability for approximately four years. Although the claimant has worked some since his compensable injury, this has primarily been part-time work. Hence, I am not persuaded by the claimant's testimony, wherein he essentially asserts that his compensable injury has restricted his ability to perform work at a full-time level, in light of the fact that he has not been given any physical restrictions by his treating physician or any other doctor as a result of his compensable back injury. Considering that the claimant is drawing Social Security Disability, it is quite reasonable that only part-time work would be sought by him.

Therefore, based on the claimant's age, education, work work experience, and the compensable injury, I find that the

claimant sustained wage-loss disability in the amount of 20% over and above his anatomical impairment rating.

This award of a 20% wage-loss disability amounts to \$13,860.00 (20% impairment rating to the body as a whole equals 90 weeks times \$154.00, the permanent partial disability rating). The respondent shall be liable to the claimant for this amount.

C. Attorney's Fee on Additional Indemnity Benefits

The respondent has controverted this claim for permanency benefits. Attorney's fees shall thus be allowed on the amount of compensation for the indemnity benefits controverted and awarded herein, pursuant to Ark. Code Ann. §11-9-715 and Commission's Rule 099.10.

The total amount awarded for the ten percent (10%) anatomical impairment rating and the 20 percent (20%) wage-loss disability amounts to \$20,790.00. Claimant's attorney is entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondent. The attorney's fee due to the claimant's attorney amounts to \$5,197.50 (total indemnity \$20,790.00 times 25%).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The parties agree that the Administrative Law Judge's opinion of September 30, 2005 is res judicata on all the issues addressed therein.
3. No benefits have been paid.

4. The claimant's average weekly wage at the time of his injury was \$250.00. Therefore, the claimant is entitled to a temporary total disability rate of \$167.00, and a permanent partial disability rate of \$154.00.
5. Per the prior award of September 30, 2005, the respondent shall be liable for medical expenses for the claimant's compensable injury of July 11, 2002, in the amount of \$32,981.40.
6. The respondent's refusal to pay the claimant's medical expenses per this award is willful and intentional. Therefore, the respondent is liable for a 36% penalty (\$11,873.30), payable to the claimant.
7. Per the prior award, the respondent is liable to the claimant for indemnity benefits totaling \$1,955.57.
8. The respondent has failed to pay these indemnity benefits within fifteen (15) days after they became due. Therefore, the respondent is liable for an amount equal to twenty percent (20%) thereof, in the amount of \$391.11, payable to the claimant.
9. The claimant's attorney is due \$488.89, in attorney's fees for this prior award, one-half of which is to be paid by the claimant and one-half to be paid by the respondent, thus, to be paid in accordance with Ark. Code Ann. §11-9-715, and Commission's Rule 099.10.
10. The respondent has controverted the payment of a 10% permanent partial disability rating, and the claimant's entitlement to any wage-loss disability.
11. The claimant proved that he is entitled to a 10% anatomical impairment rating for his compensable lumbar injury, which amounts to \$6,930.00. The respondent shall be liable to the claimant for this amount.
12. The claimant proved that due to his compensable back injury, he suffered a loss of earning capacity in the amount of 20% over and above his anatomical impairment, which is valued at \$13,860.00. The respondent shall be liable to the claimant for this amount.

13. The claimant's attorney is entitled to the maximum attorney's fee totaling \$5,197.50, on the indemnity benefits (anatomical impairment rating and wage-loss disability) awarded herein, this fee is to be paid in accordance with Ark. Code Ann. § 11-9-715 and Rule 099.10.

AWARD

The respondent is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth in this Opinion. Specifically, the respondent is directed to pay a total of \$67,991.38 in indemnity benefits, medical benefits, and penalties. The claimant attorney is entitled to a maximum attorney's fee totaling \$5,686.39, one of which should be paid by the claimant and one-half to be paid by the respondent. This fee should be paid in accordance with Commission's Rule 099.10. All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

A copy of this Order has been forwarded to the Compliance Division for possible sanctions against the employer pursuant to Arkansas Code Ann §11-9-401 and §11-9-406.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml