

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109355

RUSSELL LEE, EMPLOYEE	CLAIMANT
ALCOA EXTRUSION, INC. SERVICE CENTER, EMPLOYER	RESPONDENT NO. 1
ACE PROPERTY & CASUALTY CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 27, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE F. MATTISON THOMAS III,
Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 represented by HONORABLE MICHAEL RYBURN,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed in part
and reversed in part.

OPINION AND ORDER

Respondent No. 2, Second Injury Fund, appeals an
administrative law judge's opinion filed May 19, 2003. The
administrative law judge found that the claimant had been
rendered permanently and totally disabled from engaging in
gainful employment. The administrative law judge directed
Respondent No. 2 to pay permanent total disability benefits
to the claimant. The administrative law judge found,

"Respondent #2 has controverted the payment of wage loss benefits to the claimant." After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the claimant was permanently and totally disabled. The Full Commission finds that the claimant sustained wage-loss disability in the amount of 25%. We find that Respondent No. 2 controverted the claimant's entitlement to wage-loss disability.

I. HISTORY

Russell David Lee, age 45, testified that he finished 12th grade. Following high school, Mr. Lee worked on a furniture company assembly line for about two years. The claimant began working as a "puller" for the respondent-employer in April 1977. "I went from a tail stretcher to a head stretcher," the claimant testified, "and then from there I went to a saw man, and then I went from there to maintenance." The claimant agreed that his work in maintenance was "a physical-type job." The claimant testified that he sustained work-related injuries to his back in 1990 and 1994, which injuries apparently did not require surgery.

The parties stipulated that the claimant sustained a compensable injury on August 7, 2001. The claimant

testified that he felt his back "lock up" after helping another employee lift a saw table. The claimant testified that he initially did not think he was injured, but that after two days, "I couldn't hardly walk." Respondent No. 1 accepted compensability, providing medical treatment and temporary total disability compensation. Dr. Robert E. Germann performed a left L4-5 intralaminar laminotomy and removal of herniated disk on August 29, 2001. The claimant testified that surgery did not relieve his pain. The claimant testified that physical therapy "made it worse."

Dr. Germann wrote on December 28, 2001, "According to the FCE, we will let him try to go on light duty with no lifting greater than eight pounds constantly, no repetitive bending, and no standing longer than 30 minutes." Dr. Germann reported on January 15, 2002, "In the office today, he states he was working and they placed him on a conveyor belt. He was turning and had an onset of back pain and passed out. One wonders whether this was due to his diabetes or not....I feel that he could continue to work but a sitting job would be better."

Dr. Germann pronounced maximum medical improvement and assigned a 10% permanent partial impairment rating on February 12, 2002. Respondent No. 1 indicated to the

Commission that it was paying a 3% permanent impairment rating actually attributable to the injury. The claimant's entitlement to anatomical impairment is not an issue before the Commission.

The record contains a Claimant's Response To Pre-Hearing Questionnaire, filed June 13, 2002. The claimant contended, "The restrictions placed on the claimant are so restrictive that when combined with claimant's age and educational level he has been rendered unemployable." The claimant listed the issues for litigation as "extent of the injury," "wage loss," "Second Injury Fund liability," "possible vocational rehabilitation," "loss of earning capacity," and "attorney's fees."

Respondent No. 2 corresponded with the administrative law judge and the other parties on July 19, 2002:

This letter is to inform you that the Second Injury Trust Fund acknowledges that it has been joined as a party in the above styled case.

The Second Injury Trust Fund has on this date sent written Interrogatories and Requests for Production of Documents to legal counsel for both the claimant and the respondent employer/insurance carrier....

The Second Injury Trust Fund desires to be represented at any prehearing conference at which the issue of the extent of the claimant's wage loss disability is ripe....

Finally, the Fund would request that you treat this letter as Motion to Compel Answers to Interrogatories pursuant to Arkansas Rules of Civil Procedure, Rule 37 in the event that any of the parties fails to fully respond to such Interrogatories and Requests for Production of Documents within the time prescribed by the Arkansas Rules of Civil Procedure, Rule 33.

The record indicates that the administrative law judge initially scheduled a pre-hearing conference for July 30, 2002, and that such conference was re-scheduled for August 20, 2002 at the request of the Second Injury Fund.

Respondent No. 2, Second Injury Fund, served a Pre-Hearing Questionnaire to the other parties on or about August 12, 2002. Respondent No. 2 listed the issues to be litigated as "Extent of claimant's disability; claimant's entitlement to vocational rehabilitation; Second Injury Fund liability." Respondent No. 2 contended, "Claimant has not yet responded to discovery requests served by the Second Injury Fund. Therefore, the Fund cannot state its position until discovery has been completed. However, if vocational rehabilitation is being offered by the carrier, this issue should be addressed before any consideration of wage loss disability." Respondent No. 2 stated that the Prospects For Settlement were "Unexplored at this stage."

Dr. Patrick D. Antoon wrote to the claimant's attorney on November 7, 2002:

Mr. Russell Lee as you well know suffered herniated lumbar disc several months ago working for Alcoa. He has not recovered from his lumbar disc surgery. It is unlikely that Mr. Lee will recover enough to return back to the work force. It is my medical opinion that Mr. Lee's long-term ability to return to work is doubtful. It is my medical opinion that Mr. Lee is 100 percent disabled at this time and should be considered for long-term disability and permanent disability.

On November 18, 2002, the Second Injury Fund requested a continuance of a November 23, 2002 hearing, so that the Fund could depose Dr. Antoon.

The claimant's attorney referred the claimant to a vocational specialist, Bob White, who provided a Vocational Assessment on December 2, 2002:

Put simply, Russell Lee does not meet the criteria for entry level unskilled sedentary work. He lacks the stamina and endurance (persistence and pace) to complete an 8 hour work day or 40 hour work week on a consistent basis.

His life style is less than sedentary and all of his energy is directed at being pain free.

Russell Lee is not employable in his current capacity and I see no future improvement that would change his status.

A pre-hearing conference was held on December 17, 2002, from which a pre-hearing order was filed on December 18, 2002. The order noted that hearing would take place "on the

issue of wage loss disability/permanent total disability[.]”

The parties deposed Dr. Antoon, a family practitioner, on January 17, 2003. Respondent No. 2's attorney examined Dr. Antoon:

Q. Why is it that you feel Mr. Lee is 100 percent disabled?

A. Well, I examine him frequently, I watch him walk and I watch him sit and stand. He's unable to squat. He's unable to even walk at times when he comes in here without assistance from a cane. I just don't feel like he's able to maintain any kind of gainful employment, that would put him in any kind of jeopardy from falling and further injuring his back....

Q. My question is: a ten percent rating for a one level back lumbar laminectomy, which Mr. Lee underwent, has it been your experience that many of those type of patients, in your opinion, are 100 percent disabled?

A. It's situational. I would think that someone that doesn't have morbid obesity, that is able to rehabilitate properly, and recover from surgery can go back to gainful activities and carry a normal lifestyle....

Q. You mentioned morbid obesity. What is that, doctor?

A. Mr. Lee's stature with his height-to-weight ratio puts him in a morbidly obese weight category....

Q. In your medical opinion, is his weight playing a role in the fact that his back has not recovered as well as it might have followed back surgery?

A. I feel like there is a large percentage in his inability to recuperate or rehabilitate due to his body size, that's correct....

Q. If Doctor Germann hoped that he could return to light duty with some restrictions, would you have any reason to disagree with him on that?

A. As a company doctor, I wouldn't let him go back.....

Q. You're the company doctor for Alcoa?

A. That's correct.

Q. You wouldn't let him go back to Alcoa or you wouldn't let him go back to any work at all?

A. I wouldn't let him go back to any work, if it were me.

Respondent No. 2 wrote to the administrative law judge and the parties on January 21, 2003:

Having now completed discovery by taking the deposition of Dr. Patrick Antoon, the Second Injury Fund acknowledges its liability for wage loss disability benefits in an amount equal to twenty five percent (25%) to the body as a whole. By copy of this letter, I am requesting Mr. Ryburn provide me with a copy of his client's payout reflecting when his client ended its liability for payment of the anatomical impairment rating. Upon receipt, my client will bring claimant's payments current and then begin bi-weekly payments of permanent partial disability.

By coy (sic) of this letter, I am advising Mr. Ryburn and Mr. Thomas of my client's position.

Hearing before the Commission was held on February 5, 2003. The claimant contended that Respondent No. 2, Second

Injury Fund, had controverted the claimant's entitlement to wage-loss disability. The Fund contended that it "has acknowledged its liability of wage-loss in the amount of 25 percent." The Second Injury Fund's attorney presented the claimant with a check at hearing without a deducted attorney's fee.

The claimant testified at hearing:

Q. Mr. Lee, how long would you say you are able to sit at one time?

A. Not very long. I'm not going to put a time on it because sometimes it's a little bit longer than others and sometimes it's just a yo-yo. I do better when I lay down. When we go somewhere, Joanie [claimant's spouse] carries me out of the house and we have to stop, you know, several times between Magnolia and Texarkana where I can get out and walk a little bit, and we will get back in and go on down the road a little bit and she will pull over and let me out and walk some more.

Q. Are you able to stand for any length of time?

A. No, sir, not very long.

Q. When you say you go out and walk, how far are these walks?

A. Without stopping?

Q. Yes, sir.

A. No more than 20 feet, then I have to stop and stand up straight and rest a little bit, and then carry on and walk a little bit farther and then when it eases up a little bit, I will, you know, tell Joanie to come on up and I will get in the truck and we will go on.

Q. Since your surgery, have you tried to work any?

A. Not for myself but I did go back to Alcoa for a short time....It was on an assembly line and I had to just sit here, you know, just moving, twisting, which was aggravating me, and, you know, and then I fell several times.

Q. At some point you had to quit?

A. Yes, sir.

Q. Why did you have to quit?

A. I couldn't do my job.

The administrative law judge found, "Claimant has been rendered permanently and totally disabled from engaging in gainful employment as a result of his August 7, 2001, compensable injury when his age, education, permanent restrictions and limitations are considered." The administrative law judge found, "Respondent No. 2 has controverted the payment of wage loss benefits to the claimant." Respondent No. 2, Second Injury Fund, appeals to the Full Commission.

II. ADJUDICATION

A. Wage loss

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to

earn a livelihood. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961). Ark. Code Ann. § 11-9-522(b) provides:

(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

Ark. Code Ann. § 11-9-519(e) provides:

(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

In the present matter, the Full Commission finds that the claimant failed to prove he was permanently and totally disabled. The claimant is only 45 years old and was educated through the 12th grade. The claimant's primary work history is with the respondents, which work includes industrial and sometimes manual labor. The claimant testified that he sustained workplace injuries in 1990 and 1994 which did not require surgery. The parties stipulated that the claimant sustained a compensable injury to his back in August 2001. Dr. Germann subsequently performed surgery

at L4-5, but the claimant testified that neither surgery nor subsequent physical therapy relieved his pain.

Dr. Germann assigned temporary work restrictions, pursuant to a functional capacity evaluation, in December 2001. Dr. Germann stated in January 2002, "I feel that he could continue to work but a sitting job would be better." Dr. Germann, the treating neurological surgeon, did not opine that the claimant was permanently and totally disabled. Instead, Dr. Germann assigned only a 10% physical impairment rating (3% attributable to the current injury) in February 2002. Dr. Antoon stated in November 2002, "He has not recovered from his lumbar disc surgery." The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion.

Maverick Transp. v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000). Dr. Antoon's opinion that the claimant had not recovered from surgery is entitled to minimal weight when compared to Dr. Germann's assessment that the claimant had reached maximum medical improvement in February 2002. Dr. Antoon, a family practitioner, opined in November 2002, "Mr. Lee is 100 percent disabled." Dr. Antoon testified at deposition that this opinion was based on the claimant's pain and what he described as "objective" findings, which

included range of motion testing. Nor does the Commission place significant weight on Dr. Antoon's statement that the claimant "cannot withstand an FCE." The record indicates that the claimant had previously undergone a functional capacity evaluation, based in part on which the treating neurological surgeon released the claimant to restricted work. The Full Commission also finds that the claimant is not motivated to return to work. A lack of interest in returning to work impedes our assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). We note the claimant's admission at hearing that he had been physically able to participate in an extended camping trip. Nor do we find the opinion of Bob White, the claimant's selected vocational specialist, to indicate that the claimant proved he was entitled to permanent total disability.

The Full Commission finds that the claimant proved he was entitled to wage-loss disability of 25% in excess of the claimant's 10% anatomical impairment. The Full Commission's finding in this regard is based on the claimant's relatively young age, the claimant's high school education, and the claimant's varied work history. We note the opinion of Dr. Germann, the primary treating surgeon, that the claimant was

able to return to at least restricted work duties. Dr. Germann did not opine that the claimant was permanently and totally disabled. The record also indicates that the claimant is not motivated to return to work. When considering all of this evidence before the Commission, we find that the opinions of Dr. Antoon and Mr. White in the present matter are entitled to minimal weight.

B. Controversion

Ark. Code Ann. § 11-9-715(a)(2)(B) (Repl. 2002) provides that whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to the claimant's attorney. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988). Whether or not a particular claim is controverted is a question of fact for the Commission. Aluminum Co. of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). The mere fact that a respondent investigates a claim prior to admitting liability does not require a finding of controversion. Stucco, Inc. v. Rose, 52 Ark. App. 42, 914 S.W.2d 767 (1996).

The administrative law judge found in the present matter, "Respondent #2 has controverted the payment of wage loss benefits to the claimant." Respondent No. 2 states that it "acknowledged its liability for wage loss benefits in the amount of 25% to the body as a whole four days after taking the evidentiary deposition of the claimant's treating physician and medical expert....Following the deposition, the Fund promptly acknowledged its liability. It was error, therefore, for the Administrative Law Judge to find the entire claim has been controverted."

The respondents therefore appear to argue that, after they deposed Dr. Antoon and learned his opinion that the claimant was permanently and totally disabled, their voluntary decision to pay only 25% wage-loss did not constitute controversion.

As stated *supra*, one of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. In the present matter, after Dr. Germann's assessment of an anatomical rating, the claimant completed a pre-hearing questionnaire in June 2002. The claimant listed as an issue for *litigation* (our emphasis) the extent of his "wage loss." Respondent No. 2 stated in July 2002 that wage-loss

disability was not yet "ripe." Respondent No. 2 told the administrative law judge that it was conducting discovery. The Commission notes that in August 2002, Respondent No. 2 listed for *litigation* (our emphasis) the "Extent of claimant's disability." A pre-hearing order from December 2002 stated that there would be a hearing on wage loss and permanent total disability. The record indicates that if the claimant had not retained an attorney, he would not be receiving any award for wage-loss disability. The Full Commission therefore affirms the administrative law judge's finding that Respondent No. 2 controverted the claim.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to wage-loss disability in the amount of 25%. We reverse the administrative law judge's decision that the claimant has been rendered permanently and totally disabled. The Full Commission finds that Respondent No. 2 controverted the claimant's entitlement to wage-loss disability, including our award of 25%. The claimant's attorney is entitled to a fee on the claimant's indemnity benefits, pursuant to Ark. Code Ann. § 11-9-715(a) (Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred

dollars (\$500), pursuant to Ark. Code Ann. § 11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority finding that claimant is not permanently and totally disabled. The award of only 25% to the body as a whole is inadequate compensation under the facts of this case.

The Second Injury Fund has acknowledged its liability for permanent disability benefits. Thus, it must be remembered that any physical condition affecting claimant's ability to earn meaningful wages can be considered in determining the extent of permanent disability. Obesity is certainly a condition that may be included in this analysis.

Initially, I note that there is insufficient evidence to support the majority's finding that claimant is

not motivated to return to work. Claimant has suffered at least two prior work-related injuries to his back. Following each injury and after conservative treatment, claimant returned to his job, which involved considerable manual labor. It was only after the present injury that claimant has been unable to return to work.

The majority places great weight on the opinion of Dr. Germann that claimant should try to return to work. In fact, claimant followed this suggestion and did return to work for the employer for a short period of time. Even though claimant was able to sit and stand as needed, he was physically unable to perform the light duties required of the position. In other words, claimant tried to return to light-duty work and was physically unable to do so. Claimant should not be penalized now with a finding that he lacks motivation to return to work. Bob White, a vocational specialist, and Dr. Antoon, claimant's primary treating physician, have both opined that claimant cannot work. Claimant is not required to continue to make futile attempts at returning to work.

Moreover, Dr. Antoon, who is not only claimant's treating physician but the company doctor for this employer,

stated that as claimant's treating physician, he would not allow claimant to return to work.

Additionally, Dr. Germann's opinion that claimant should attempt a return to work with restrictions was voiced in December 2001 and January 2002. Dr. Germann did not release claimant from a neurosurgical standpoint until February 2002. At that time, claimant's treatment was transferred solely to Dr. Antoon. Dr. Antoon had the benefit of seeing claimant on a continuous and regular basis for at least another year. The opinions of Dr. Antoon and Bob White cannot be disregarded without arbitrarily doing so.

Finally, without belaboring the point, the facts in the present case are strikingly similar to, and just as compelling as, those in Whitlatch v. Southland Land & Development, ___ Ark. App. ___, ___ S.W.3d ___ (January 21, 2004) (CA03-736). There are certainly no significant distinguishing facts between the two claims. In Whitlatch, the Court of Appeals had no difficulty reversing the Commission's award of only 50% for wage-loss disability after the Commission found that claimant was not permanently and totally disabled. The Court directed the Commission to

enter an order awarding benefits for permanent total disability.

The opinion of the Administrative Law Judge should be affirmed. Accordingly, I must respectfully dissent.

SHELBY W. TURNER, Commissioner