

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E711809

GARY SCHALSKI, EMPLOYEE	CLAIMANT
FAMILY CLEANERS & LAUNDRY, EMPLOYER	RESPONDENT NO. 1
STATE FARM & CASUALTY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MARCH 3, 2004

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by HONORABLE CAROL WORLEY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The claimant appeals and Respondent No. 2 cross-appeals
an administrative law judge's opinion filed June 5, 2003.
The administrative law judge found that the claimant proved
he sustained a compensable injury, but that the claimant
failed to prove he was entitled to an anatomical impairment
rating or wage-loss disability. The administrative law
judge found that the claimant failed to prove he was

entitled to additional medical treatment subsequent to November 2001. The administrative law judge found that the Second Injury Fund should pay an attorney's fee on the benefits received by the claimant. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion with regard to compensability, anatomical impairment and wage-loss disability, and reasonably necessary medical treatment. We reverse the administrative law judge's finding that the Second Injury Fund should pay an attorney's fee.

I. HISTORY

Gary Schalski, age 49, testified that he dropped out of school while in the ninth grade. Mr. Schalski testified that his entire work history consisted of working in dry cleaners and laundries. The claimant began working for Family Cleaners & Laundry in about 1992.

The claimant was referred to Dr. Albert D. MacDade in August 1995. Dr. MacDade reported, "This is a forty year old right handed white male who runs a dry cleaning business - Family Cleaners. He has been having back and right lower extremity pain for the last 5-6 weeks. He remembers no specific precipitating event, just got out of bed one morning and woke up with it." In September 1995, the

claimant was diagnosed with "L4 disk protrusion on the right with L5-S1 root lesion." Dr. MacDade performed a "Generous partial hemilaminectomy," "Lateral recess decompression and removal of protruded L4 disk," and "Foraminotomy."

The claimant testified that he felt occasional back pain after being released by Dr. MacDade, but that he did not seek additional medical treatment before 1997.

The parties stipulated that the employment relationship existed on September 2, 1997. The claimant testified that he felt "a sharp pain" in his back after lifting a pail of laundry soap at work. Marilyn Rauser, the owner of Family Cleaners and the claimant's sister, testified that she witnessed the specific incident. Respondent No. 1 agreed that the claimant sustained a compensable injury to his low back on September 2, 1997.

After examining the claimant on September 18, 1997, Dr. J. Michael Standefer's impression was, "Past medical history of lumbar disc disease status post right L4-5 hemilaminotomy with L4-5 diskectomy and decompression of right L5 root including foraminotomy," "interval development of recurrent low back and bilateral lower extremity pain," and "rule out recurrent lumbar disc protrusion." Dr. Standefer recommended conservative care and additional diagnostic

studies. The claimant followed up with Dr. Standefer on September 22, 1997:

In the interim since the previous clinic visit, he has had an MR scan of the lumbar spine. The study is conducted both with and without gadolinium and demonstrates changes consistent with the patient's previous surgery at L4-5 on the right. I see no evidence of any new disc protrusion.

I reviewed these findings with the patient. Continued conservative care will be in order at this time. Widespread degenerative changes in the lumbar spine are noted on the patient's MR scan as well as a component of canal narrowing at the T12-L1 level. We will plan to treat him with physical therapy using heat treatment, ultrasound and massage to the lumbar spine as well as analgesic medication and anti-inflammatory medication....

A physical therapist saw the claimant on September 24, 1997, and noted, "The current episode of symptoms began on 9/2/97 when he was lifting a 25 lb drum of laundry soda (sic) at which time he got a sudden onset of pain in the lumbar spine. He reports that now after 20 days the pain has radiated down into both hips and legs with it being worse on the right side....Spasm is palpated moreso (sic) around the L5 S1 regions bilaterally and sciatic notches bilaterally."

Dr. John R. Swicegood reported on December 19, 1997:

Gary is a forty-three year old white male that relates a laminectomy in 1985 (sic) and was basically doing okay until October of this year when he had the acute onset of increasing low back

pain with pain radiating into his bilateral hips and legs. He denies any neurologic changes....On exam, he is very tender about the left L4 area. In fact, he has a clear discernible muscle knot at the level of L4....In review of his studies, on the MRI he does have multilevel lumbar spine disk bulges. My impression is that this pain may well be post laminectomy related as he does have some peridural fibrosis noted in the previous surgical area or perhaps he is having some aggravation of the nerve roots from his other associated disk disease. At any rate, perhaps an epidural can be of some help to him....

Dr. Swicegood performed an L5 epidural steroid injection.

The claimant began treating with Dr. Robert G. Bebout on March 16, 1998. Dr. Bebout's initial impression was "multiple disc bulging," and the claimant was treated conservatively with an exercise program. Dr. Bebout gave the following impression on August 28, 1998:

Chronic lower back pain, failed lumbar laminectomy syndrome with some chronic radiculopathy.

At this point in time, I think he has reached maximum point of improvement. We will give him a permanent disability impairment rating according to the Evaluation of Permanent Impairment 4th Edition American Medical Association, at 10% which is the DRE impairment category #3 of the lumbar spine for chronic pain with some radiculopathy.

The parties stipulated that Respondent No. 1 accepted and paid a 10% rating to the claimant's low back.

The record indicates that the claimant began pain management with Dr. Robert D. Fisher in March 1999.

A representative of North Winds Investigations, Inc. wrote to the respondent-carrier on April 11, 2000:

An investigation of Gary Schalski commenced on March 31, 2000 and continued through April 5, 2000. As a result of this investigation it was determined that the subject is actively working in the family owned laundry business. The subject is capable of physically lifting laundry laundry (sic), separating clothes, and bending over repetitiously while at no time displaying signs of hesitation or disability.

(The respondents received similar reports from North Winds Investigations on April 20, 2000 and May 1, 2000.)

On December 18, 2001, Dr. Fisher diagnosed "post lumbar laminectomy pain syndrome with right S1 chronic radicular pain."

Dr. Jim J. Moore provided a neurosurgical independent medical examination on January 15, 2002:

The patient then is essentially intact neurologically. His studies as reviewed, the 1995 MRI, certainly does demonstrate a disk bulge at the L4/5 level. The myelogram is not available but apparently this is also confirmative of a disk herniation L4/5 right. The post-op MRI of the lumbar with and without Magnavist does show some very minimal epidural fibrosis mostly at L4/5, some slight bulge and degenerative at L3/4. The thoracic MRI is not particularly impressive in my mind.

The patient presents then with an interesting history. It would appear that the lifting injury was a precipitating factor for his ongoing complaints of pain. Any adhesions or fibrosis that would be present in the epidural space would obviously be related to the 1995 surgical procedure and not to the lifting injury. The patient does describe shooting, lancinating pains into the lower extremities. It might be nerve based in view of the one EMG that suggested the possibility. Certainly some medication such as Neurontin could be tried to see if this would offer him some resolution. I do think the patient is also deconditioned and would be a good candidate for a progressive strengthening program, possibly even use of an electric muscle stimulating device to improve circulation in the muscle tissues. I do not concur or agree with epidural wide applications....Ongoing use of the Duragesic patches appears appropriate at this point as long as Dr. Fisher feels comfortable in ongoing management of them.

On January 31, 2002, Dr. Moore clarified his evaluation:

I believe the patient's problems as occurred on 9-2-97 would be on the basis of musculoligamentous sprain and strain superimposed on pre-existent (sic) post-operative changes so far as the patient's disk surgery of 1995. The treatment that has been provided by Dr. Fischer (sic) in my mind would tend to relate to the 1995 problem and injury. So far as the 1997 injury a soft tissue process should clear within a period of one and certainly two years. I recommended some treatment. This part would be based on the 1997 lifting episode.

Dr. Moore diagnosed "Post-laminectomy syndrome/lumbar, lumbosacral sprain/strain, & lumbar radiculitis." Dr. Moore sent yet another clarification on February 7, 2002, noting,

"I already commented upon my opinions so far as the soft tissue injury process clearing within one and certainly two years. More specifically I would feel that this patient would be at this time at MMI from the 1997 soft tissue injury. Any residual findings such as epidural adhesions would be related to the 1995 injury which required surgery."

The impression of Dr. Arthur M. Johnson on March 7, 2002 was "Degenerative disc disease of the lumbar spine." Dr. Johnson planned, "We will send the patient for diskogram of L3-4, 4-5, and 5-1 to determine if his pain is reproducible at one of these spinal levels. We will see him back in the clinic after the diskogram is performed to determine if any additional surgical intervention may be of benefit to him." Dr. Johnson noted on May 7, 2002 after a lumbar diskogram, "He did have degenerative disc disease changes at L3-4 and L4-5, but no focal disk rupture; therefore, the patient's disease is more consistent with degenerative changes as opposed to spontaneous rupture and no surgical procedure would be of benefit in treatment of his condition. It is recommended that he continue with conservative/nonoperative treatment options for his pain. He is discharged from the Neurosurgery clinic."

Mr. Schalski claimed entitlement to additional worker's compensation. The claimant contended that he sustained a compensable injury to his low back. The claimant contended that the Second Injury Fund did not have standing to challenge compensability. The claimant contended that if the Second Injury Fund controverted compensability, then the Fund was "stepping into the shoes" of Respondent No.1 and would be subject to an attorney's fee if compensability was found.

Respondent No. 1 contended that the claimant was not entitled to additional medical treatment. Respondent No. 1 contended that the claimant's "current injury" was not the "major cause" of his disability or need for medical treatment.

Respondent No. 2 contended that the claimant could not prove he sustained a compensable injury to his lumbar spine on September 2, 1997, supported by objective medical findings, "nor can the claimant prove that any existing objective findings are causally connected to his September 2, 1997 work related episode." Respondent No. 2 contended that if the claimant sustained a compensable injury on September 2, 1997, then the claimant could not prove entitlement to permanent benefits, because "the compensable

injury is not the major cause of his disability or impairment pursuant to Ark. Code Ann. § 11-9-102(4)(F).” Respondent No. 2 contended that since the existence of a compensable injury was one of the three elements of Second Injury Fund liability pursuant to Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988), therefore, that the Fund had standing to challenge compensability. Respondent No. 2 essentially contended that the attorney’s fee statute in effect at the time of the injury precluded an attorney’s fee award from the Fund for compensability. Respondent No. 2 contended that the claimant was not permanently and totally disabled, and that there had been “no combination of disabilities to invoke Second Injury Fund liability[.]”

After a hearing before the Commission, the administrative law judge found, “The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on September 2, 1997.” However, the administrative law judge found that the claimant failed to prove he was entitled to a 10 percent anatomical impairment rating, “therefore, no wage loss or Second Injury Fund liability is found in this matter.” The administrative law judge found that the

claimant failed to prove he was entitled to additional medical treatment after November 2001. Finally, the administrative law judge found, "The Second Injury Fund necessitated this claimant proving that he sustained a compensable injury on September 2, 1997, therefore, they should pay the maximum statutory attorney's fee on the benefits received by this claimant for his compensable injury from the date of injury until he reached maximum medical improvement on August 28, 1998."

The claimant appeals the administrative law judge's opinion with regard to permanent impairment, wage-loss disability, Second Injury Fund liability, and reasonably necessary medical treatment. Respondent No. 2, Second Injury Fund, cross-appeals, stating that the administrative law judge erred "by failing to make a finding that the claimant failed to prove that the compensable injury was the major cause of his permanent disability or impairment." Respondent No. 2 also states that the administrative law judge erred in assessing attorney's fees against the Fund.

II. ADJUDICATION

A. Compensability

Respondent No. 2, Second Injury Fund, contends that the claimant failed to prove he sustained a compensable injury

on September 2, 1997. The pertinent statutory provisions of Act 796 of 1993 require that the claimant prove by a preponderance of evidence that he sustained an accidental injury causing physical harm to the body, arising out of and in the course of employment, and requiring medical services or resulting in disability or death. The injury must also be identifiable by time and place of occurrence, and the claimant must establish a compensable injury by medical evidence supported by objective findings. See, Ark. Code Ann. § 11-9-102(A) *et seq.* The preponderance of evidence in the present matter indicates that the claimant sustained a compensable injury on September 2, 1997. The claimant credibly testified that he felt a sharp pain in his back after lifting a pail of soap at work on September 2, 1997; the claimant's sister said she witnessed the specific incident. The claimant subsequently required medical treatment. A physical therapist reported "spasm" on September 24, 1997, and Dr. Swicegood reported "a discernible muscle knot" on December 19, 1997. Muscle spasms reported by a physician or physical therapist constitute objective findings pursuant to Act 796. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). There is no indication that the "discernible

muscle knot" reported by Dr. Swicegood was within the claimant's voluntary control. See, Ark. Code Ann. § 11-9-102(16). The record therefore clearly shows objective medical findings establishing a compensable injury. The Full Commission therefore affirms the administrative law judge's finding that the claimant sustained a compensable injury on September 2, 1997.

B. Anatomical Impairment/Wage Loss

The claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Act 796 of 1993, as codified at 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" means more than fifty percent (50%) of the cause, and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. § 11-9-102(14). 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)(B). Pursuant to Ark. Code Ann. § 11-9-522(g), the

Commission has adopted the Guides to the Evaluation of Permanent Impairment, Fourth Edition, for assessing anatomical impairment. However, to the extent that they allow subjective criteria to assess an impairment rating, the Guides must yield to the statutory definition of anatomical impairment as defined by the legislature. Rizzi v. Sam's Wholesale Club, Workers' Compensation Commission E515370 & E112991 (April 1, 1999).

In the present matter, the administrative law judge found that the claimant was not entitled to a 10% impairment rating as a result of the claimant's compensable injury. The administrative law judge determined that Dr. Bebout's 10% rating was based on inappropriate subjective criteria. Dr. Bebout's August 1998 report appears to refer to p. 102 of the Guides, "DRE Lumbosacral Category III: Radiculopathy." Dr. Bebout did not cite any objective medical findings in referring to Category III. The claimant on appeal argues that the diagnosis of "radiculopathy" was based on objective findings, but the claimant does not identify any such objective findings. Moreover, the record does not show that the claimant sustained a herniated disc as a result of his 1997 compensable injury. We note that the claimant had previously undergone surgery in 1995 after

being diagnosed with an L4 disc protrusion on the right. Following the September 1997 compensable injury, Dr. Standefer saw "no evidence of any new disk protrusion." Dr. Bebout described "multiple disc bulging" in 1998, but he did not identify a herniated disc as a result of the compensable injury. Dr. Moore did not find in 2002 that the claimant had ruptured a disc. Dr. Johnson stated in March 2002, "He did have degenerative disc disease changes at L3-4 and L4-5, but no focal disk rupture; therefore, the patient's disease is more consistent with degenerative changes as opposed to spontaneous rupture and no surgical procedure would be of benefit in treatment of his condition." We recognize that the Commission may assess its own impairment rating rather than rely solely on our determination of the validity of ratings assigned by physicians. Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904 (2001). In the present matter, we can find no objective criteria from the Guides with which to assess the claimant a permanent impairment rating.

The Full Commission therefore affirms the administrative law judge's finding that the claimant failed to prove he was entitled to a permanent physical impairment rating. We note that Respondent No. 1 has paid out the 10% rating assessed by Dr. Bebout. The administrative law judge

also correctly determined that the claimant was not entitled to wage-loss disability. To be entitled to wage-loss disability, the claimant must first prove that he sustained a permanent physical impairment as a result of his compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). Since the claimant failed to prove by a preponderance of the evidence that he sustained permanent anatomical impairment as a result of the compensable injury, the Commission need not adjudicate whether the Second Injury Fund is liable for any wage-loss disability.

C. Medical treatment

The employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.3d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). The administrative law judge found in the present matter, "The claimant has

failed to prove his entitlement to additional medical treatment for his September 2, 1997, injury subsequent to November 2001." The Full Commission affirms this finding. As noted *supra*, the claimant did not rupture a disc as a result of the injury and did not undergo surgery. In August 1998, nearly one year out from the injury, Dr. Bebout assessed "Chronic lower back pain, failed lumbar laminectomy syndrome with some chronic radiculopathy." Dr. Bebout did not expressly attribute the claimant's chronic pain and radiculopathy to the September 1997 injury. Nor were there were any additional reports of "spasm" or "knotting" after December 1997. In January 2002, now over four years after the injury, Dr. Moore stated that the claimant was "intact neurologically." We recognize Dr. Moore's note, "It would appear that the lifting injury was a precipitating factor for his ongoing complaints of pain." However, Dr. Moore also opined, "a soft tissue process should clear within a period of one and certainly two years." At this time, over six years have elapsed since the claimant's soft tissue injury. Dr. Moore stated in 2002, "I would feel that this patient would be at this time at MMI from the 1997 soft tissue injury."

The Full Commission finds that the claimant has reached maximum medical improvement from his compensable injury. Therefore, the claimant has failed to prove that he is entitled to additional medical treatment pursuant to Ark. Code Ann. § 11-9-508(a). Nor would additional pain management be causally related to the compensable injury, pursuant to Chronister v. Lavaca Vault, Workers' Compensation Commission D704562 (June 20, 1991). The finding of the administrative law judge in this regard is affirmed.

D. Attorney's fees

The long-standing rule in Arkansas is that attorney's fees cannot be awarded unless specifically provided for by statute. Furman v. Second Injury Fund, 336 Ark. 10, 983 S.W.2d 923 (1999), citing Arkansas Okla. Gas Corp. v. Waelder Oil & Gas, Inc., 332 Ark. 548, 966 S.W.2d 259 (1998). Ark. Code Ann. § 11-9-715(a)(2) (Repl. 1996) provides:

(A) 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* (emphasis supplied).

One of the purposes of Ark. Code Ann. § 11-9-715 is to place the burden of litigation expense on the party which makes litigation necessary by controverting the claim.

Prier Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

The administrative law judge found in the present matter, "The Second Injury Fund necessitated this claimant proving that he sustained a compensable injury on September 2, 1997, therefore, they should pay the maximum statutory attorney's fee on the benefits received by this claimant for his compensable injury from the date of injury until he reached maximum medical improvement on August 28, 1998." The administrative law judge reasoned that the Second Injury Fund "has controverted this claim for compensability and since the claimant has been required to prove his entitlement to benefits subsequent to his September 2, 1997, injury, the claimant's attorney should be entitled to an attorney's fee from the Second Injury Fund for benefits paid to this claimant up to Dr. Bebout's assessment of impairment rating on August 28, 1998."

The Full Commission finds that the administrative law judge erred as a matter of fact and law. First, the record does not show that the Second Injury Fund made litigation

necessary. Respondent No. 1 initially accepted compensability of the September 1997 injury and paid benefits. The claimant subsequently contended that he was entitled to additional benefits, which claim Respondent No. 1 controverted. It is true that the Second Injury Fund was made a party and controverted compensability of the claim, but litigation would have taken place whether or not the Fund controverted the claim. The Fund caused no "delay" in the benefits that Respondent No. 1 voluntarily paid. It is apparent, therefore, that the Second Injury Fund did not "make litigation necessary." Nor does the record show that the claimant was required to submit additional evidence of record as a result of the Second Injury Fund's controversion of compensability. Second, the Commission has determined that the Second Injury Fund is not liable for wage-loss disability. Therefore, there will be no award of monies from the Fund in the present matter. Without such an award by the Commission, the Second Injury Fund is not liable for an attorney's fee. Ark. Code Ann. § 11-9-715(a)(2)A); Furman, *supra*. We can find no legal authority or factual basis to affirm the administrative law judge's award of an attorney's fee against the Second Injury Fund in the present matter.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury on September 2, 1997. We also affirm the administrative law judge's finding that the claimant failed to prove he was entitled to an anatomical impairment rating, wage-loss disability, or additional medical treatment. The Full Commission reverses the administrative law judge's finding that the Second Injury Fund should pay an attorney's fee on the benefits already received by the claimant. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.