

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. E903941 & E710724

DONALD J. CATLETT, EMPLOYEE	CLAIMANT
ARKANSAS ALUMINUM ALLOYS, INC., EMPLOYER	RESPONDENT NO. 1
WAUSAU, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 1, 2005

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

Claimant represented by the HONORABLE DONALD C. PULLEN,
Attorney at Law, Hot Springs, Arkansas.

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

Respondent No. 2 represented by the HONORABLE DAVID PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed.

OPINION AND ORDER

Respondent No. 2 appeals an administrative law judge's
opinion filed September 9, 2004. The administrative law
judge found that the claimant proved he was permanently and
totally disabled, and that Respondent No. 2 was liable for
benefits. After reviewing the entire record *de novo*, the
Full Commission affirms the opinion of the administrative
law judge.

I. HISTORY

Donald J. Catlett, age 62, testified that he had received a general education diploma. Mr. Catlett testified that he had taken courses in appliance repair, and that he had obtained a millwright's degree from a vocational-technical college. The claimant began working at Reynolds Metals in 1969. The claimant testified that his entire career consisted mainly of working as a maintenance mechanic, which job required frequent stooping, bending, and climbing.

The claimant testified that he sustained a left leg injury in 1980 and subsequently received a 10% anatomical impairment rating. The claimant's testimony indicated that he took an early retirement from Reynolds in 1995, and he began working for the respondent-employer in about February 1996. The claimant testified that he sustained a low back injury and surgery in 1997, and that he was off work for eight weeks. The claimant returned to work for the respondents in January 1998.

It was stipulated that the claimant sustained a compensable injury on March 23, 1999. The claimant testified that, after climbing up a handrail to repair a

piece of equipment, "I fell all the way back down to the floor, hitting a trough on my left side that came out of the furnace, and then hit the concrete on my back." The claimant testified that he did not return to work following the March 23, 1999 compensable injury.

The claimant was eventually referred to Dr. James M. Arthur, who reported on July 9, 1999:

Don Catlett, as you know, is a gentleman who was injured at work in March of this year and sustained a cervical and lumbar injury, as well as some rib fractures and other minor injuries. He apparently fell off a piece of equipment on March 23, 1999 and fell eight to ten feet. The injury caused him to fracture some transverse processes in the lumbar spine. Since that fall he has had back and bilateral leg pain. Over the past three weeks, prior to his visit, to my office on June 28, 1999 he had been working part-time two to three hours a day at Arkansas Aluminum Alloy. He has had extensive physical therapy treatment since the injury in March, and also had been treated with spinal manipulation performed by Cleve Smith, and also had been dietary supplements prescribed by St. Joseph's Occupational Rehabilitation Service.

His MRI reveals a bulging disc to the left at L3, 4 and a central bulge at L4,5, as well as L5, S1 right foraminal disc herniation....I performed a lumbar myelogram on him with a CT scan to follow and then had him back in the office on July 9, 1999. The cervical/lumbar myelogram and CT scan reveals pronounced generalized bulging of the L4, 5 disc as well as some facet arthropathy at that level, producing lumbar canal stenosis. He has no evidence disc herniation at L5, S1 at that time and has a mild generalized bulge at L3,4 as well.

His lumbar canal stenosis at L4, 5 is definitely causing some of his symptoms at this point. He has had a rather extensive trial of conservative therapy up to now and has essentially produced no improvement. I discussed the risks, benefits and options with him, including a possible lumbar laminectomy and discectomy with decompression of the spinal canal. He and his wife intend to think about this and get back in touch with me. I believe this would be viable option in this case since the other treatment so far as (sic) been unsuccessful.

The claimant testified that he underwent surgery in January 2000.

Dr. Arthur stated on March 14, 2001:

I feel that Mr. Catlett has reached his MMI at this time. I have advised Mr. Catlett that I do not expect him to return to work. He has a twenty-five percent (25%) permanent partial impairment based on the whole man, using the AMA guidelines, for his lumbar spine injury.

The claimant continued to receive some injection therapy following his release from Dr. Arthur.

Dr. Arthur informed the claimant's attorney on September 25, 2002, "Mr. Catlett was given a twenty-five percent permanent partial impairment for his injury related to the March 23, 1999 accident alone. His previous injury in 1997 would have amounted to a five percent impairment if I had assessed that. Mr. Catlett would have had a total impairment of thirty percent at this time if that was added

in, but the twenty-five percent rating I gave him was due to the March 23, 1999 accident."

A pre-hearing order was filed on April 28, 2004. The claimant contended that he was entitled to a 25% permanent impairment rating, permanent total disability, continuing medical treatment, and attorney's fees. Respondent No. 1 contended that it had accepted a 25% permanent impairment rating. Respondent No. 1 contended that medical treatment had not been controverted, and that the claimant was "not entitled to any wage loss benefits from Respondents No. 1." Respondent No. 2, Second Injury Fund, contended that it had "responsibility for wage loss benefits and has accepted 35% in permanent disability benefits in addition to Respondent No. 1 paying the permanent impairment rating. Respondent No. 2 contends this 35% rating amounts to \$37,170."

The parties agreed that the issues to be litigated were "1. A 25% permanent impairment rating. 2. Wage loss benefits. 3. Medical treatment. 4. Attorney's fees."

Hearing before the Commission was held on July 30, 2004. The parties agreed that the claimant's healing period ended on March 13, 2001. Counsel for Respondent No. 1 stated with regard to permanent impairment, "The payout

would have been about two years after that." The following discussion took place:

MR. PAKE: We accept a 35 percent in wage loss, and there's no allegation that that's controverted. We actually started paying that before the rating was paid....

JUDGE MARSHALL: And you pretty much started that after you did your discovery and were brought in on the case?

MR. PAKE: Right; yes, ma'am. Actually, again, this 25 percent rating that was paid by the employer was only paid within the last week or two, I believe. Is that right?

MR. PULLEN: Yes.

MR. PAKE: And we did the same thing. We calculated out 25 weeks. We knew that that had been - Excuse me; 25 percent worth. And we knew that had been firmed up, so, as soon as discovery was over, we accepted a certain percentage when it looked like we were going to be able to settle it. And that was accepted without controversion. So we actually paid a little lump sum amount to start, and then we've been paying weekly benefits since then. That actually put the cart before the horse - which is unusual in these cases - because that started before the ratings had been paid.

JUDGE MARSHALL: Have you paid that out so far, or is it still ongoing?

MR. PAKE: It's still ongoing....Shortly after completing discovery, the Fund accepted 35 percent in wage loss disability in this case. That was uncontroverted. The contention of the Fund would be that the claimant can not prove that he's entitled to any wage loss benefits over and above the 35 percent accepted. The Fund concedes that,

if any benefits over 35 percent are accepted, that they are controverted.

The claimant testified that his primary work around the aluminum business had been mechanics. The claimant testified on direct:

Q. Now, since your surgery with Dr. Arthur way back in 2000, what have you been able to do? Just basically, how do you spend your time since you haven't been working?

A. Mostly sitting in the chair. I had to go buy me another chair. I've got a chair that's got a muscle stimulator, you know, with a heating pad and different things up and down the spine. I also got a foot deal. I get it and keep my legs up on it. I just can't do, really, anything. It's very hard to deal with....

Q. Are you able to go up the stairs?

A. I can't. I've got to stay downstairs....

The claimant testified on questioning from Respondent No. 2's attorney that he was unable to return to work.

The administrative law judge (ALJ) found that the end of the claimant's healing period was March 13, 2001, and that Respondent No. 1 had accepted a 25% permanent impairment rating. The ALJ found that Respondent No. 2 "has accepted a 35% wage loss." The ALJ found the claimant proved he was permanently and totally disabled, and that

Respondent No. 2 was liable for permanent total disability.
Respondent No. 2 appeals to the Full Commission.

II. ADJUDICATION

A. Disability

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the 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 future earning capacity. Ark. Code Ann. §11-9-522(b)(1). 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 affirms the administrative law judge's finding that the claimant proved he was permanently and totally disabled. The claimant is now age 62 with only a general education diploma. The claimant has worked almost exclusively as a mechanic in aluminum plants. This work frequently involves strenuous

manual labor. The claimant has sustained a number of injuries and surgeries to various anatomic regions (the Fund implicitly concedes that it is statutorily liable for any wage loss the claimant receives). The claimant sustained a compensable injury in 1999 and underwent another low-back surgery in 2000. Although the claimant has been assessed with a total of only 30% anatomical impairment, he now suffers from chronic pain and is now largely confined to a recliner at home. The claimant walks with a cane and cannot climb stairs. The record shows the claimant to be a credible witness. The clear weight of evidence shows that the claimant cannot return to his old job of a mechanic in a metals plant. The decision of the administrative law judge is affirmed.

B. Controversion/Attorney's Fee

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 or as custodian of the Death and Permanent Total Disability 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.

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). In order to assess a controverted attorney's fee against the Fund, there must be an award from the Commission. Schalski v. Family Cleaners & Laundry, Workers' Compensation Commission E711809 (March 3, 2004).

In the present matter, counsel for the Second Injury Fund notes language from the ALJ's order, to wit: "The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715" Counsel correctly states, "The law judge did not explain any further whether the award of attorney's fees

excluded a fee on the first 35% in wage loss benefits voluntarily accepted by the Fund." The Fund argues:

A cursory review of the transcript reveals that there was some discussion of the 35% in functional disability benefits accepted by the Fund. At no point in the discourse was there ever an allegation that those benefits were controverted. Additionally, there is no proof in the record of controversion of those benefits. In all probability, the law judge may have simply omitted any discussion of such amount as an oversight. Since the Fund was appealing the issue of the extent of the claimant's disability anyway, it has used that opportunity to get clarification of that particular issue. It is contended that the Fund does not owe a fee on the 35% it accepted, and the Fund expects that the claimant will not contend otherwise in its brief.

The claimant did not respond to this argument below and does not respond on appeal; neither does Respondent No. 1. Although the Second Injury Fund does not provide the Commission with any statutory authority or case law on this matter, we find that Respondent No. 2 is not liable for an attorney's fee on the 35% wage loss it voluntarily paid. The preponderance of evidence demonstrates that Respondent No. 2, Second Injury Fund, did not controvert the 35% wage loss it voluntarily paid. The attorney's fee statute, *supra*, provides an attorney's fee for any compensation controverted "and awarded." See also Schalski, *supra*. The instant claimant was not awarded 35% wage loss. The Full

Commission has determined that the claimant proved he was permanently and totally disabled. We find that the Second Injury Fund is liable for a fee only on the 65% wage-loss disability it has expressly and admittedly controverted.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was permanently and totally disabled. We therefore affirm the findings of the administrative law judge. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 1996). Pursuant to Ark. Code Ann. §11-9-715(a) (2) (A), Respondent No. 2 is liable for a controverted attorney's fee on the 65% wage-loss disability it has controverted. For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

