BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211780

KENNETH NEESE, EMPLOYEE	CLAIMANT
C. BEAN TRANSPORT, EMPLOYER	RESPONDENT NO. 1
COMPENSATION MANAGERS, INC., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 2, 2005

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

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

Respondents No. 1 represented by the HONORABLE WALTER MURRAY, Attorney at Law, Little Rock, Arkansas.

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

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

OPINION AND ORDER

Respondent No. 2 appeals and Respondent No. 1 cross-appeals an administrative law judge’s opinion filed April 16, 2004. The administrative law judge found that the claimant proved he was entitled to additional temporary total disability compensation through September 18, 2003.

The administrative law judge found that Respondent No. 1 controverted the claimant’s entitlement to a 15% anatomical impairment rating. The administrative law judge found that the claimant proved he was entitled to wage-loss disability in the amount of 5% in addition to the 25% wage-loss disability accepted by Respondent No. 2. The administrative law judge found that Respondent No. 2 controverted the claimant’s entitlement to 25% wage-loss disability.

After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission affirms the administrative law judge’s award of temporary total disability compensation, and we affirm the administrative law judge’s finding that Respondent No. 2, Second Injury Fund, controverted the claimant’s entitlement to 25% wage-loss disability. The Full Commission reverses the administrative law judge’s finding that the claimant proved he was entitled to wage-loss disability in the amount of 5% in addition to the 25% wage-loss disability accepted by Respondent No. 2, and we reverse the administrative law judge’s finding that Respondent No. 1 controverted the

claimant’s entitlement to the 15% anatomical impairment rating.

I. HISTORY

Kenneth L. Neese, age 46, testified that he did not go past the ninth grade in school but received a GED in the U.S. Navy. Mr. Neese testified that he had worked in the areas of sheet metal, construction, and welding. The claimant testified that he sustained an injury in approximately 1991, and that he afterward received training to become a truck driver. The claimant agreed on cross-examination that he did not return to work for several years following the 1991 injury.

The claimant testified that he began working for C. Bean Transport, Inc. in January 2000. The claimant described his duties as driving a truck, occasionally assisting in unloading freight, and vehicle maintenance. The parties stipulated that the claimant sustained a compensable injury to his low back on July 11, 2002. The claimant testified that while pulling a handle to release pins on a trailer, “I pulled them a couple of times and I went and gave them a double handful big yank, and when I

did, something gave away in my back." The parties stipulated that "medical expenses have been paid by Respondents No. 1 to about April 2003."

On May 7, 2003, Dr. Anthony L. Capocelli, Jr. assigned the claimant a 15% whole person impairment rating. The claimant's attorney wrote to an adjuster with the respondent-carrier on May 19, 2003:

> Enclosed you will find a copy of a May 7, 2003 letter from Dr. Capocelli assessing Mr. Neese at 15% impairment rating to the whole person.
>
> Please initiate payment of permanent partial disability benefits based upon the 15% impairment rating unless the respondent's (sic) are controvering (sic) Mr. Neese's entitlement to permanent partial disability benefits.
>
> Also, I hereby request that you specifically advise me whether the respondent's admit liability for a 15% impairment to the body as a whole regarding Mr. Neese's injury at C. Bean Transport.

Dr. Cappocelli reported on September 18, 2003:

> He is status post lumbar fusion surgery in January of 2003 followed by last seeing him in March of 2003 at which time we had recommended that the patient undergo a course of physical therapy. At that time we felt he had significant pain medication and though his x-rays look quite good his symptoms certainly prompted the need for further physical therapy etc....

> At this point he is going for a plain x-ray of the lumbar spine today and if that study looks reasonable then I am going to discharge him from my care in the belief that there is really nothing further that I can do for him. He at this point has a 15% whole person impairment based on the two level procedure, second operation, status post fusion with some brief residual rigidity. In regards to MMI, I do not think that the patient is at MMI at this point and it would be my thought that he is likely to require a significant period of time in treatment to reach that point. From my perspective this is best done by a PM&R or a chronic pain specialist and I will not at this point issue final work restrictions and would suggest that that ultimately be decided by a subsequent physician who will handle his chronic treatment. At this point I feel that there is no further need for intervention by us if his current x-rays look good today and at this point I will discharge him from my care.

The parties deposed Dr. Cappocelli on September 30, 2003. Dr. Capocelli testified that he had performed a "multilevel fusion" on the claimant. The claimant's attorney questioned Dr. Capocelli:

> Q. What restrictions, in your opinion, should Mr. Neese observe at this point, as far as his physical activities are concerned?
>
> A. I would think that in terms of physical activity, there's a maximal amount of lifting that he would do would be no more than 20 pounds, occasionally, during a day, at max, and that would be from the arm to the shoulder - waist to shoulder kind of lifting, with no bending,

> squatting, you know, routinely over - constantly over a day, no climbing or anything along those lines. I would probably grade him in the light to sedentary work level, at best.
>
> Q. And are those limitations placed upon him as a result of his job-related injury that occurred in July of 2002?
>
> A. They are.

A pre-hearing conference was held on October 3, 2003, and a pre-hearing order was filed on October 7, 2003. The parties stipulated, "Respondents No. 1 have accepted and are paying a 15 percent impairment rating."

The claimant contended, among other things, that he was entitled to "temporary total disability benefits from the date they were terminated in April until September 18, 2003. The claimant contended that Dr. Capocelli's impairment rating does not end the claimant's healing period. Rather, the impairment rating was assessed in order to show that the claimant's permanent impairment will be at least 15 percent. The claimant's temporary total disability benefits were terminated by the insurance carrier and as a result the claimant's treating surgeon, Dr. Capocelli, was requested to express an opinion in regard to the claimant's permanent

impairment without addressing whether the claimant has in fact reached the end of his healing period. The claimant contends that he was still under active medical treatment when the respondents terminated his benefits and when the impairment rating was assessed. The claimant contends that a permanent impairment rating was faxed to the insurance company on May 19, 2003, and that if they had not initiated payment in regard to that impairment rating within fifteen (15) days of their receipt of that rating they have controverted all permanent disability in this case. The claimant contends that any temporary total disability benefits not previously paid have been controverted because the respondents arbitrarily ended the claimant's temporary total disability payments while the claimant was still under active medical treatment."

Respondent No. 1 contended that it had paid all benefits for which the claimant was entitled. Respondent No. 2 contended that it would "state its contentions at a later time."

According to the pre-hearing order, the parties agreed to litigate the following issues:

1. Additional medical.
2. Additional temporary total disability from April 2003 to September 18, 2003.
3. Wage loss over the 15 percent impairment rating.
4. Second Injury Fund liability.
5. Attorney's fees to include a fee on the 15 percent impairment rating.

The record indicates that on December 4, 2003, Respondent No. 1 provided a set of answers to Interrogatories propounded by Respondent No. 2. Respondent No. 1 copied the answers to the administrative law judge and the claimant. Respondent No. 1 indicated in its Answers that it accepted "a 15% degree of disability," and that "Respondent No. 1 has paid PPD to the Claimant a total of $4,736.00 at a rate of $296.00 for twelve weeks and $592.00 for two weeks." Further, "Respondents No. 1 contend that Claimant is not entitled to any additional medical or indemnity benefits."

The post-hearing record contains two copies of an ORDER FILED DECEMBER ____, 2003. One copy of the Order was stamped "Received" by the Commission on December 16, 2003 and was signed by all the attorneys of record but not the administrative law judge. The administrative law judge

signed a second copy of the Order, which copy was signed by counsel for the claimant and Respondent No. 1 but not counsel for Respondent No. 2, Special Funds. Both copies of the Order contained the following identical relevant language:

> 6. The Claimant has sustained a 15% permanent impairment to the body as a whole as a result of his July 11, 2002 back injury and Respondent No. 1 shall pay permanent partial disability benefits for a period beginning at least as early as October 1, 2003 and continuing until 67.5 weeks of permanent partial disability benefits have been paid.
> 7. All issues not specifically resolved by the findings set forth in this Order are specifically held in abeyance. Said issues, including but are not necessarily limited to, the Claimant's entitlement to additional temporary total disability benefits, wage loss disability and entitlement to attorney's fees on any benefits not paid prior to the Pre-Hearing Order that was filed in this case on June 26, 2003.

Heather Naylor, a vocational rehabilitation consultant, provided a Vocational Evaluation for AWCC Special Funds on February 4, 2004:

> Based on the review of the records that I received to date, it is my opinion the (sic) Mr. Neese could return to the workforce in certain *Light/Sedentary* jobs. Mr. Neese is 45 years old and could be expected to work for about another 20 years until his usual retirement age. His

> physician has stated that he may continue to improve from a physical standpoint over time.
>
> Although he lacks significant transferable skills to the *Light/Sedentary* work categories, it is my opinion that he could be expected to return to the workforce in unskilled/semi-skilled occupations, entry level, which would only require a short demonstration or a short amount of on-the-job training in order to perform (examples of jobs noted in this report). If Mr. Neese is interested in receiving vocational/return-to-work assistance, I am available to assist him with this process. Such vocational services could include: resume development, job search assistance, labor market research, job search skills training, and interview skills training.

The attorney for Respondent No. 2, Special Funds, wrote to the administrative law judge on February 12, 2004:

> Unfortunately, Eddie advised my office Monday that our settlement attempts in this case were unlikely to be successful. Consequently, the Second Injury Fund is accepting 25% functional disability in this claim. It is our position that due to Respondent No. 1's delays in supplying requested discovery and the parties' settlement negotiations, the Second Injury Fund has not controverted this claim.
>
> Pursuant to the December, 2003 Agreed Order, Respondent No. 1 is paying out the 15% rating as of October 1, 2003. According to our calculations, Respondent No. 1 will pay out on October 15, 2005, at which time the Second Injury Fund will assume payment of its 25% functional disability liability. The Fund respectfully requests the parties to promptly advise if the

> October 15, 2005 payout date does not correspond with their calculations.
>
> Attached is the Second Injury Fund's hearing exhibit packet. Included in the medical exhibit packet is a February 4, 2004 vocational evaluation performed by Heather Naylor, which the Second Injury Fund intends to introduce.
> Pursuant to the medical records, Dr. Capocelli's deposition, and Rehab Management, Inc.'s vocational evaluation, it is the Second Injury Fund's position that the claimant is not permanently and totally disabled.
>
> By fax copy of this letter, I am advising the parties of the Second Injury Fund's position and providing a copy of the vocational evaluation mentioned above.

A hearing was held on February 19, 2004. The claimant testified that he was "a healthy, productive person" before the compensable injury but became "a total wreck" afterward. The claimant testified that he cannot sit still for more than 20 minutes, cannot lift more than approximately 10 pounds, cannot sleep very well, and is depressed. The claimant testified on direct examination:

> Q. Do you know of any job that you could perform in your present physical condition on a regular basis?
>
> A. None that I'm aware of, sir.
>
> Q. Can you go a full eight hours at a time without having to lay down and rest?

A. No, sir.

Q. And what would cause you to have to lay down and rest?

A. The discomfort and the pain.

Q. How long would you need to lay down? If your pain got so bad that you needed to get off your feet and lay down, how long would you need to lay down?

A. If it was really bad I'd have to lay there for a long time....Two hours or more, three hours.

The administrative law judge found, in relevant part:

6. Respondents No. 1 have accepted and are paying a 15 percent impairment rating.
7. The Second Injury Fund has accepted a 25 percent disability above the claimant's 15 percent impairment rating.
8. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable injury. See discussion above.
9. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from his last benefit check in April 2003 through September 18, 2003. See discussion above.
10. The claimant has proven by a preponderance of the evidence that he is entitled to additional wage loss in the amount of 5 percent over and above his impairment rating of 15 percent and the 25 percent disability which the Second Injury Fund has accepted. See discussion above.
11. The Second Injury Fund is liable for an additional 5 percent wage loss disability based on this claimant's limited education, limited

> transferrable job skills and his physical impairment. Also see discussion above.
> 12. The claimant's attorney is entitled to a controverted fee on the 15 percent impairment which Respondents No. 1 controverted but subsequently accepted. The claimant's attorney is also entitled to the maximum statutory attorney's fee on the 30 percent disability which the Second Injury Fund is responsible for paying. Respondents No. 1 are also responsible for payment of the maximum statutory attorney's fee on the temporary total disability benefits awarded herein. See discussion above.

Respondent No. 2, Second Injury Trust Fund, appeals to the Full Commission. Respondent No. 2 states "2. That the April 16, 2004 Administrative Law Judge Opinion finding the Second Injury Fund liable for an additional 5% functional/wage loss disability benefits in excess of the 25% previously accepted by the Second Injury Fund is contrary to the law and facts and is not supported by a preponderance of the evidence. 3. That the April 16, 2004 ALJ opinion finding the Second Injury Fund liable for an attorney fee on the 25% functional/wage loss disability it accepted prior to the hearing is contrary to the law and facts and is not supported by a preponderance of the evidence." Respondent No. 1, the respondent-employer, cross-appeals the administrative law judge's finding "that

they controverted Claimant’s entitlement to a 15% impairment rating as well as the corresponding award of attorney’s fees based thereupon.”

II. ADJUDICATION

A. Temporary disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge found in the present matter, “The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from his last benefit check in April 2003 through September 18, 2003.” Counsel for Respondent No. 1 states that the claimant “was within his healing period until September 18, 2003.” Despite Respondent No. 1's statement that the claimant remained within his healing period until September 18, 2003, the Full Commission notes the parties’ stipulation that medical expenses were not paid after April 2003. The claimant contended at the pre-hearing conference that he was entitled to temporary total disability compensation from the

time it was terminated in April 2003 until September 18, 2003. The Full Commission finds that the claimant proved he remained within his healing period and was totally incapacitated to earn wages from April 2003 through September 18, 2003. We therefore affirm the administrative law judge's award of additional temporary total disability compensation, and we find that Respondent No. 1 controverted the claimant's entitlement to temporary total disability.

B. Anatomical Impairment/Controversion

The administrative law judge found, "The claimant's attorney is entitled to a controverted fee on the 15 percent impairment which Respondents No. 1 controverted but subsequently accepted." The Full Commission reverses this finding. Ark. Code Ann. §11-9-715(Repl. 2002) provides:

> (a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.
> (B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee....
> (2)(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.
> (B)(i) In all other cases 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 attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.
> (ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

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). It is well-settled that the mere failure of an employer to pay compensation benefits does not amount to controversion, especially in instances when the carrier accepts the injury as compensable and is attempting to determine the extent of disability. Hamrick v. The Colson Company, 271 Ark. 740, 610 S.W.2d 281 (1981).

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 Full Commission finds in the present matter that Respondent No. 1 did not controvert the 15% anatomical rating assessed by Dr. Cappocelli. The parties stipulated that the claimant sustained a compensable injury on July 11, 2002, and Respondent No. 1 initially provided benefits. Dr. Cappocelli assigned a 15% anatomical impairment rating on May 7, 2003. The claimant's attorney corresponded with the respondent-carrier on May 19, 2003 and requested that permanent partial disability payments begin. We recognize that Respondent No. 1 did not pay the 15% rating until on or about October 1, 2003. Nevertheless, the expert testimony of Dr. Cappocelli in September 2003 indicated that the claimant had remained within his healing period during that time. "Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the employee's healing period has ended. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Respondent No. 1 would not be liable to begin paying permanent partial disability while the claimant remained within his healing period.

Dr. Cappocelli wrote on September 18, 2003 that he would discharge the claimant from his care. Dr. Cappocelli testified on September 30, 2003 that the claimant was at maximum medical improvement. Respondent No. 1 began paying permanent partial disability on or about October 1, 2003. At the pre-hearing conference held on October 3, 2003, the claimant contended that he was entitled to temporary total disability compensation until September 18, 2003. The claimant did not contend that he was entitled to an award of permanent partial disability. The preponderance of evidence therefore does not demonstrate that the instant claimant required the services of an attorney in order to defend his right to receive permanent partial disability in accordance with Dr. Cappocelli's 15% rating. See, Henning, *supra*; Cagle Fabricating & Steel, Inc. v. Patterson, 43 Ark. App. 79, 861 S.W.2d 114 (1993).

C. Wage Loss/Controversion

The administrative law judge found, “The claimant has proven by a preponderance of the evidence that he is entitled to additional wage loss in the amount of 5 percent over and above his impairment rating of 15 percent and the 25 percent disability which the Second Injury Fund has accepted.” The Full Commission reverses this finding. 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 earning capacity. Ark. Code Ann. §11-9-522(b)(1).

Respondent No. 2, Second Injury Fund, does not contend that it is not liable for the claimant’s wage-loss disability pursuant to Ark. Code Ann. §11-9-525. Respondent No. 2 instead argues that the claimant is not entitled to an additional 5% wage-loss disability in addition to the 25% wage-loss disability Respondent No. 2 has now accepted. The preponderance of evidence in this matter, with regard to

wage-loss disability, supports the argument of Respondent No. 2.

The claimant is only age 46 and obtained a general education diploma while serving in the Navy. The claimant has a diverse work history, which includes sheet metal work, construction, welding, and truck driving. The parties stipulated that the claimant sustained a compensable low-back injury in July 2002. Following a lumbar fusion, Dr. Cappocelli subsequently assigned the claimant a 15% anatomical impairment rating, which is being paid by Respondent No. 1. Dr. Cappocelli testified at deposition that he would rate the claimant "in the light to sedentary work level, at best." In February 2004, a vocational rehabilitation consultant attempted to assist the claimant by identifying several jobs within the claimant's light/sedentary physical restrictions. Yet the claimant admitted at hearing that he had not sought any employment within his physical restrictions. We do not find credible the claimant's testimony that he was physically unable to pursue any employment at all. The evidence demonstrates that the claimant was not motivated to find employment, and

this lack of motivation impedes our assessment of the amount of the claimant's wage-loss disability. Ellison v. Therma Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Based on the claimant's relatively young age, his diverse work experience and training, and the claimant's lack of motivation to find work within his physical restrictions, the Full Commission finds that the claimant did not prove he was entitled to wage-loss disability greater than the 25% amount now accepted by Respondent No. 2. We therefore reverse the administrative law judge's award of additional wage-loss disability in the amount of 5%.

Finally, the Full Commission affirms the administrative law judge's finding that Respondent No. 2 controverted the claimant's entitlement to wage-loss disability in the amount of 25%. The parties stipulated that the claimant sustained a compensable injury in July 2002. Respondent No. 1 accepted and began paying a 15% anatomical impairment rating after the end of the claimant's healing period. A pre-hearing conference was held on October 3, 2003. Pursuant to the pre-hearing conference, the parties agreed to "litigate"

the issues, “3. Wage loss over the 15 percent impairment rating. 4. Second Injury Fund liability.” The record contains a series of correspondence between the attorneys for Respondent No. 1 and Respondent No. 2 in December 2003 and January 2004. Respondent No. 2 argues that it was relying on the discovery efforts of Respondent No. 1 in order to make a decision regarding whether or not to ultimately accept responsibility for wage-loss benefits. The Commission is unable to determine why another Respondent’s discovery efforts or lack of discovery would affect the Fund’s ability to determine whether or not to accept a claim for wage loss.

Moreover, the Full Commission notes Respondent No. 2's agreement with the Order signed by the parties and filed in December 2003, which Order expressly indicated that one of the issues yet to be resolved was the claimant’s entitlement to wage-loss disability. On February 12, 2004, one week before the scheduled hearing before an administrative law judge, Respondent No. 2 indicated that it was accepting “25% functional disability in this claim.”

The Arkansas Court of Appeals has recently affirmed the Commission in a similar matter where we found that if the claimant had not retained an attorney, then the claimant likely would not have obtained any award for wage-loss disability. See, Lee v. Alcoa Extrusion, Inc., CA 04-591 (Ark. App. 1-26-05). The Full Commission likewise determines in the instant matter that if the claimant had not retained an attorney, he likely would not have received the 25% amount eventually accepted by Respondent No. 2. Our decision in this regard primarily lies on the parties' listing for "litigation" the claimant's entitlement to any wage-loss disability, in addition to Second Injury Fund liability. The Full Commission does not find that Respondent No. 2's efforts to settle the case require a finding of controversion. See, Lambert v. Baldor Electric, 44 Ark. App. 117, 868 S.W.2d 513 (1993).

Based on our *de novo* review of the entire record, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission affirms the administrative law judge's award of temporary total disability compensation from the time of the

claimant's "last benefit check in April 2003 through September 18, 2003." We find that Respondent No. 1 controverted the claimant's entitlement to this period of temporary total disability compensation. The Full Commission reverses the administrative law judge's finding that Respondent No. 1 controverted the claimant's entitlement to the 15% anatomical impairment rating. The Full Commission reverses the administrative law judge's finding that the claimant proved he was entitled to "wage loss in the amount of 5 percent over and above his impairment rating of 15 percent and the 25 percent disability which the Second Injury Fund has accepted." We find that the claimant proved he was entitled to wage-loss disability in the amount of 25%, and that Respondent No. 2, Second Injury Fund, controverted the claimant's entitlement to the award of wage-loss disability. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional 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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part from the principal opinion. Specifically, I concur with the finding that Respondent No. 2 liable for attorney's fees on the wage-loss award because it controverted the claimant's entitlement to those benefits. I dissent, however, from the reduction of claimant's wage-loss disability award and the finding that Respondent No. 1 did not controvert the claimant's entitlement to the 15% impairment rating.

I find that the claimant is entitled to at least the 30% wage loss disability awarded to him by the Administrative Law Judge. The claimant's past work history involved heavy manual labor both as a welder and

as a truck driver. While the principal opinion notes that the claimant has a "diverse work experience and training," the claimant's current physical limitations, which is in the light to sedentary range, clearly precludes him from engaging in his past jobs. Further, it should also be noted that the claimant has no post high school education or vocational training except as a truck driver. While the claimant appears to be intelligent and has previously held management positions, and is not permanently and totally disabled, it is obvious that his potential wage earning vocations have been substantially narrowed. Consequently, it would be very difficult for him to find employment comparable to his pre-injury salary. In this regard, it should be noted that the claimant was earning a salary sufficient to entitle him to receive benefits at the maximum disability rate. I, therefore find that the award of 30% wage loss disability should be affirmed.

I also find that Respondent No. 1 is obligated to pay the claimant an attorney's fee based upon its failure to promptly pay the impairment rating from Dr.

Capocelli. The respondent was aware that Dr. Capocelli opined that, when reaching the end of his healing period, the claimant would be entitled to an impairment rate of 15% to the body as a whole. Further, the respondent had taken the position that the claimant was at the end of his healing period in April 2003. Dr. Capocelli advised them in writing and in his deposition of September 30, 2003 that the claimant was at the end of his healing period on September 18, 2003. However, the respondent did not formally accept liability for permanent impairment benefits until December 2003. The respondent has not provided any rationale or basis for not instituting payment based upon this impairment rating. Further, their refusal to provide the claimant any sort of disability benefits after April 2003, necessitated the claimant to hire an attorney and pursuing this matter to litigation. Accordingly, I find that the this respondent forced this case into litigation and should bear the responsibility for paying the claimant’s attorney’s fees.

For these reasons, I concur in part and dissent in part.

____
SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority opinion. I concur with that part of the majority opinion wherein the majority reversed the Administrative Law Judge's award of 5% wage loss disability in addition to the 25% wage loss disability accepted by Respondent No. 2. Furthermore, I concur with the majority finding that Respondent No. 1 did not controvert the claimant's entitlement to the 15% anatomical impairment rating. However, I must dissent from that portion of the majority opinion wherein the majority affirms the Administrative Law Judge's finding that the Second Injury Fund has controverted the claimant's entitlement to 25% wage loss disability.

In reference to the latter, in a letter dated August 5, 2003, the Fund acknowledged that it had been joined as a party to this claim and stated that it had initiated discovery on that same date. On September 16, 2003, the Fund formally requested that a hearing scheduled for September 25, 2003 be continued due to the claimant's and Respondent No. 1's failure to respond to the Fund's request for discovery. In a letter dated September 19, 2003, Mr. Murray apologetically acknowledged his failure to notify the Fund of a deposition scheduled with Dr. Capocelli for September 9th, which consequently, was rescheduled. The record indicates that the claimant's attorney, Mr. Eddie Walker, mailed Claimant's Answers to Interrogatories and Request for the Production of Documents to the Fund on September 19, 2003. In that letter, Mr. Walker stated his objection to the scheduled hearing being postponed due to the Fund having not received requested discovery. The claimant's counsel further stated, "Also, a review of my file indicates that Mr. Murray sent Judy Jolley, Special Funds Administrator, a copy of medical records

on July 9, 2003. Additionally, I sent Ms. Rudd authorizations for release of medical information and social security information on August 20, 2003.” In response to these statements, Fund attorney, Judy Rudd, wrote:

> Mr. Walker’s discovery responses arrived in this office at approximately 4:00 p.m., Friday, September 19, 2003. [less than seven days before the scheduled hearing.] ...Respondent No. 1 joined the Second Injury Fund as a party to this claim on August 4, 2003. Although the joinder letter is mysteriously dated July 9, 2003, it was not received in this office until August 4, 2003. The Second Injury Fund promptly accepted joinder based upon the documentation received and propounded discovery on both claimant’s and Respondent No.1's attorneys. Respondent No. 1 has yet to respond to the Second Injury Fund’s requests. ...Without completion of discovery, the Second Injury Fund is unable to state its contentions in this matter.

On December 5, 2003, Mr. Murray responded to a letter from the previous day from the Fund’s attorney regarding discovery. In his letter, Mr. Murray explained that his reason for delay in responding to the Fund’s

requests for discovery was due to his difficulty in obtaining out-of-state medical records. Mr. Murray requested that the claimant's attorney, Mr. Eddie Walker, "make every effort to obtain those records since he represents the claimant." In correspondence dated December 9, 2003, Mr. Walker agreed to hold other issues in abeyance if Respondent No. 1 would stipulate that the claimant sustained a 15% permanent impairment due to his compensable injury, for which the respondent carrier would pay permanent partial disability benefits. Respondent No. 1 agreed to these terms and on or about December 10, 2003, an Order was entered reflecting the same. Because of Respondent No. 1's continued difficulty in obtaining the claimant's medical records, the Fund's discovery remained incomplete until January 9, 2004, when it was agreed that there were no other medical records to be provided. Unsuccessful settlement negotiations commenced shortly thereafter between the claimant and the Fund. Finally, in correspondence dated February 12, 2004, the Fund advised the Administrative Law Judge that it was accepting a 25% wage loss

disability in this claim, with payments to begin at the time of Respondent No. 1's payout date. Presently, respondent No. 1's last benefit payment was scheduled for payment on January 16, 2005.

Arkansas Code Annotated §11-9-715(2)(A) provides that the Second Injury Fund is responsible for payment of an attorney fee "whenever the commission finds that a claim against the ... Second Injury Trust Fund ... has been controverted in whole or in part. ... ." Moreover, the question of whether or not a claim is controverted is one of fact to be determined by the circumstances of each particular case. New Hampshire Ins. Co. v. Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984); See also, Buckner v. Sparks & Second Injury Fund, 32 Ark. App. 5, 794 S.W.2d 623 (1990); citing Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986). The facts in this claim do not support a finding that the Fund controverted the claimant's 25% wage loss functional disability benefits for the following reasons. First, the record reveals that the Second Injury Fund accepted liability in a

timely manner upon completion of discovery. Whether or not the Fund knew in late July or early August of 2003 that it had been joined in this claim, the record clearly reflects that upon being certain of joinder, the Fund promptly initiated discovery. Thereafter, the Fund made diligent efforts to obtain discovery and, through no fault of its own, did not complete its discovery until January 9, 2004. The Arkansas Court of Appeals said in Buckner, supra, that discovery is a legitimate and necessary tool for investigation of any claim to which the Fund has been made a party. Moreover, the Fund's participation in discovery efforts does not mean that is has controverted a claim. Specifically, the Court of Appeals stated:

> Filing interrogatories and participating in the taking of depositions are methods of gathering information for the investigation the Fund must make in any case in which it has been made a party. Otherwise, it has no knowledge about the matter. This investigation does not mean that the claim is controverted by the Fund. Buckner, supra.

Respondent No. 1 maintains that it had difficulty obtaining out-of-state medical records. The evidence reveals that Respondent No. 1's attorney made an effort to provide the Fund with at least partial discovery, and that he requested assistance from the claimant’s attorney in obtaining medical records. The claimant’s attorney, on the other hand, provided the Fund with authorization to obtain their own medical records. Although the Commission does not have to adhere to the Arkansas Rules of Civil Procedure, the claimant’s attorney having provided medical releases did not excuse him from furnishing timely responses to discovery requests. Regardless of the reasons for the discovery delays, the record indicates that the Fund’s discovery process was not completed until January 9, 2004, after which time the Fund promptly began settlement negotiations. Furthermore, the record confirms that when the Fund was unable to obtain a settlement contribution from Respondent No. 1 by January 27, 2004, it made an individual offer of settlement to the claimant. In the case of Lambert v. Baldor Electric,44 Ark. App. 117, 868

S.W.2d 513 (1993), the Arkansas Court of Appeals recognized that the Second Injury Fund may pursue a settlement without controverting a claim. In that case, the claimant argued that attorney’s fees should have been awarded against the Second Injury Fund or the employer because the Second Injury Fund controverted the claim by entering into settlement negotiations. Although in Lambert it was undisputed that the Second Injury Fund acknowledged permanent and total disability immediately after the claimant requested a hearing before the Commission, the claimant argued that the Second Injury Fund’s failure to admit to the compensability of the claim prior to a request for a hearing constituted a controversion of the claim. The Court of Appeals found that the Second Injury Fund had entered into legitimate settlement negotiations with the claimant, and that it had not controverted the claimant’s claim. Likewise, in the instant case the Fund’s failure to either admit to the claim or announce controversion prior to its accepting liability does not constitute controversion. In this case, the Fund accepted 25% wage loss liability

after its attempt to pursue a joint settlement agreement with Respondent No. 1 failed. The Arkansas Supreme Court has agreed with the Commission's assertion that such settlement negotiations should be encouraged to avoid needless litigation. Lambert, supra. The Second Injury Fund correctly asserts that its attempts to avoid needless litigation through the pursuit of settlement should not be penalized with an award of attorney fee against it for the 25% functional wage loss disability it accepted. For these reasons, the Fund did not controvert the claimant's entitlement to 25% disability.

Based upon the above and foregoing, I respectfully concur in part and dissent in part with the majority opinion.

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KAREN H. McKINNEY, Commissioner