NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312628

SUE J. COURTNEY, EMPLOYEE — CLAIMANT

SOUTHEAST ARKANSAS HUMAN DEVELOPMENT CENTER, EMPLOYER — RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER — RESPONDENT

OPINION FILED JUNE 15, 2006

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

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed December 14, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on November 13, 2003 at which time the claimant sustained a compensable back injury at a compensation rate of $210.00/$158.00. Medical expenses,

temporary total disability benefits (from November 15, 2003 to February 2, 2004 and from February 6, 2004 to April 1, 2005) and a 6% anatomical impairment rating as assessed by Dr. Scott Schlesinger on April 1, 2005, has been accepted.

2. The claimant has proven by a preponderance of the credible evidence of record that Dr. Saer's course of recommended treatment is reasonable and necessary in connection with the compensable injury pursuant to Ark. Code Ann. §11-9-508.

3. Respondents are directed to pay the temporary total disability benefits from April 1, 2005 to a date yet to be determined as the claimant remains in her healing period, totally incapacitated from working.

4. The delay in payment of permanent partial disability benefits constitutes controversion.

5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990)(D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting

attorney’s fees on medical benefits and services for injuries after July 1, 2001.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 14, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant’s injury occurred after July 1, 2001, the claimant’s attorney’s fee is governed by the

provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of $500.00 in accordance with Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The claimant began working for the respondent employer in 1999 taking care of children. On November 13, 2003, the claimant was trying to restrain a patient in a straight-jacket when she fell against a wall, injuring her back. The claimant has been treated by Drs. Joe Wharton,

Barry Baskin, David Redding, Ed Saer, Scott Schlesinger and Thomas Hart. Dr. Wharton's records show that the claimant was diagnosed with extensive multi-degenerative disk disease and traumatic sacroilitis. Dr. Wharton excused the claimant from work and prescribed medication and physical therapy. Dr. Wharton's report of March 15, 2005, indicates that the claimant developed adverse side-effects from the medication.

The claimant was examined by Dr. Redding on January 21, 2004. Dr. Redding prescribed epidural steroid injections as well as a rigid lumbosacral corset and a TENS unit. Dr. Redding mentioned surgical intervention in his reports of March 22, and April 21 of 2004. However, he concluded that because the claimant has not responded to treatment, she was not a surgical candidate.

Dr. Baskin examined the claimant on May 13, 2004. He opined that her work related injury exacerbated pre-existing degenerative disk disease and recommended intradisk injections and changes in her medications. He ultimately referred the claimant to Dr. Ed Saer whom the claimant saw on September 16, 2004. Dr. Saer's report demonstrates that the claimant was a candidate for surgery to address pain caused by her degenerative disk disease at L4-5 and L5-S1.

Dr. Schlesinger examined the claimant on November 1, 2004. He opined that the work related injury aggravated, but did not cause the claimant's pre-existing degenerative disk disease. He did not feel that surgery would be beneficial. In his report dated April 1, 2005, he recommended that the claimant discontinue her narcotic pain medication, and use anti-inflammatory medical instead. He assessed the claimant with a 6% permanent anatomical impairment rating. He commented that her April 1, 2005, functional capacity evaluation displayed inconsistent and unreliable effort.

The claimant contends that she is entitled to an attorney's fee for the respondents' controversion of the anatomical impairment rating as well as additional medical treatment in the form of surgery as recommended by Dr. Saer. In my opinion, the claimant has failed to meet her burden of proof.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is

reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to additional medical treatment. Dr. Saer has recommended surgery to relieve the pain of the claimant's degenerative disk disease. The evidence demonstrates that Dr. Redding prescribed epidural steroid injections, a lumbosacral corset and a TENS unit. Dr. Baskin recommended intradisk injections and medication changes. Dr. Hart performed injections and discussed surgery. Dr. Schlesinger concluded that the work injury aggravated, but did not cause the claimant's pre-existing degenerative disk disease and that surgery would

not be beneficial. He recommended traction, a TENS unit and that the claimant discontinue her narcotic pain medication. He assessed the claimant with a 6% anatomical impairment rating and noted that the functional capacity evaluation displayed inconsistent and unreliable efforts.

The Commission has a duty to translate the evidence on all the issues before it into findings of fact. The Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. <u>Weldon v. Pierce Brothers Construction Co.</u>, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Commission is never limited to medical evidence in arriving at its decision. Further, The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate claimant's claim. <u>Roberts v. Leo Levi Hospital</u>, 8 Ark. App. 184, 649 S.W.2d 402 (1983). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. <u>CDI Contractors v. McHale</u>, 41 Ark.

App. 57, 848 S.W.2d 941 (1993). The Commission has the duty of weighing the medical evidence as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. Id.

I give more weight to the recommendation of Dr. Schlesinger who recommended conservative treatment and concluded that surgery would not be helpful. The claimant has longstanding degenerative disk disease which was not caused by injury. Dr. Schlesinger explained in explicit detail why he did not recommend fusions for degenerative disk disease. Specifically, he stated that it was unlikely to relieve the claimant's symptoms and he believed in using fusions to address spinal instability rather than degeneration and pain. He also noted that he saw no changes in the claimant's MRI from 2002 to 2003. Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment in the form of surgery as recommended by Dr. Saer.

The next issue that must be addressed is the controversion of the permanent impairment rating. The respondents contend that they did not controvert the payment

of the anatomical impairment rating. I agree with the respondents.

The Arkansas Workers' Compensation Law specifically provides that the Commission shall direct that a fee be paid to the claimant's attorney when a claim has been controverted in whole or in part. See, Ark. Code Ann. §11-9-715. Making the respondents liable for at least a portion of the attorney's fees serves the legitimate social purposes of discouraging oppressive delays in recognition of liability, deterring arbitrary and capricious denials of claims, and insuring the ability of a necessitous employee to obtain adequate legal representation. See, Aluminum Company of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). Whether a claim is controverted is a fact question that must be determined from the circumstances of each particular case. Masonite Corporation v. Mitchell, 16 Ark. App. 209, 699 S.W.2d 409 (1985); Climer v. Drake's Backhoe, 7 Ark. App. 148, 644 S.W.2d 637 (1983); Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986). The mere failure to pay compensation benefits does not amount to controversion, in and of itself. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d

477 (1983). Likewise, controversion may not be found where the respondent accepts its compensability but delays payment in a reasonable attempt to investigate the extent of the claimant's disability. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976); Hamrick v. The Colson Company, 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981). However, assuming a position which requires the claimant to retain the services of an attorney to take the actions necessary to assure that the employee's rights are protected may constitute controversion. New Hampshire Insurance Co. v. Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984); Turner v. Trade Winds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980).

It is clear from the testimony of Linda Amaden, the claims manager, that she had absolutely no intention of controverting the claimant's permanent anatomical impairment rating. There was a period of approximately three weeks from the time that Ms. Amaden discussed the anatomical impairment rating with the claimant's husband in the form of an offer of settlement and the claimant received payment. Ms. Amaden left for vacation and upon returning determined that the claimant's husband had not replied to her offer of settlement.

It is well settled law that the mere fact of a delay in payment of benefits does not constitute controversion of those benefits, especially where the compensability of the injury has been accepted. Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986). In this case, it is clear from the testimony of Ms. Amaden, that she had no intention of controverting the anatomical rating. She explained that there was considerable difficulty in getting Dr. Schlesinger's written report, after he had declared the claimant as having reached maximum medical improvement. Barbara Acuff, the nurse case manager, who attended the final appointment with the claimant, advised Ms. Amaden by telephone that Dr. Schlesinger had ended the claimant's healing period, and that he was going to rate her. However, Dr. Schlesinger had not yet given the claimant a rating. Therefore, Ms. Amaden had a basis for ending temporary total disability payments, but did not have the information necessary to begin permanent partial payments. In fact, she testified that she had no idea what the rating would be and there was a possibility that there would be a 0% permanent impairment rating. Ms. Amaden

testified that she did not actually receive the rating from Dr. Schlesinger until May 13, 2005.

In my opinion, it is blatantly obvious from the evidence, that the record does not support the Administrative Law Judge's finding that "the carrier had notice of the rating through their agent, the case manager assigned to accompany the claimant to all of her doctor's visits." Although the rating report was dated 4/1/05, it is not clear when Ms. Acuff received it and we know that Dr. Schlesinger did not tell her what the rating would be during the office visit. The respondent carrier received it in their mail room on May 6, 2005, and it was sent directly to the bill review staff at Systemedics. The first time Ms. Amaden saw it was on May 13th. She then discussed the rating with her supervisor, decided to accept the 6%, and also to make a settlement offer. She called the claimant's husband, who was handling the telephone negotiations for the claimant, and made the offer. Ms. Amaden explained to the claimant that she could either settle for an agreed amount or, if not, she would be entitled to the 6% permanent anatomical impairment rating, as well as vocational evaluation/rehabilitation, job placement assistance, and

continued medical treatment as recommend by Dr. Schlesinger. Mr. Courtney indicated that they wanted to think it over, and possibly discuss the matter with a lawyer friend. Ms. Amaden advised them the dates that she would be gone on vacation and asked them to call her back when they had made a decision. She specifically told Mr. Courtney that she would be gone until May 31, and he said he would get back to her after that.

The claimant and her husband never called back about the offer before Ms. Amaden left on vacation. Ms. Amaden testified that she found no messages or memoranda to indicate they had called about the claim while she was gone. The next communication she received was a letter from Mr. Buckner, the claimant's attorney. Ms. Amaden assumed that meant the claimant did not wish to settle, so she ordered payment of the benefits due under the 6% rating. In my opinion the finding of the Administrative Law Judge, which is adopted by the majority, that the "claimant had to engage the services of counsel in order to obtain the permanent partial disability benefits as well as continuing medical treatment" is not supported by these facts. There is no evidence that the respondents ever challenged the

claimant's entitlement to the 6% permanent anatomical impairment rating. Ms. Amaden simply offered to settle the claim in its entirety, and honored the claimant's request for time to think about the offer, possibly consult a lawyer friend, and get back to her. There is nothing in the record to suggest that the respondents linked acceptance of a settlement offer to the claimant's right to receive benefits under the rating. Quite the contrary, in fact, as noted above, Ms. Amaden explicitly told Mr. Courtney that if they declined the settlement, the claimant would be entitled to the rating, plus a rehabilitation program as well as continued medical treatment. There is absolutely no justification for the Administrative Law Judge to comment that "For the carrier to link the payment of the rating with a settlement offer may be construed as oppressive conduct."

Nowhere in the testimony of either the claimant or her husband is there any suggestion whatsoever that either of them felt oppressed or enticed or otherwise coerced. Although the claimant has not worked for some time, and has only had temporary total disability benefits as income, her husband is a public school teacher. There is simply no evidence that their finances influenced their decision in

any way. In fact, they never even bothered to respond to the settlement offer at all. All they had to do was decline the offer and, as they had been advised by Ms. Amaden, the claimant would have begun drawing the permanent partial disability benefits, begun a rehabilitation program, a job search program, and medical treatment as recommended by Dr. Schlesinger.

Therefore, after reviewing all of the evidence in this case, I find that the respondents did not controvert the claimant’s permanent anatomical impairment rating. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner