BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610239

ALBERT CAMP, EMPLOYEE CLAIMANT

GREEN COUNTY TECH.,
A SELF INSURED EMPLOYER RESPONDENT NO. 1

SECOND INJURY FUND, CARRIER RESPONDENT NO. 2

OPINION FILED MAY 4, 2009

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

Claimant represented by HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

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

Respondent No. 2 represented by HONORABLE BRANDON CLARK, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

Respondent No. 1 and Respondent No. 2 appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he was entitled to a 9% permanent anatomical impairment rating and a finding that the claimant sustained a 25% loss in wage earning capacity as well as a finding that Respondent No. 2,

the Second Injury Fund, had controverted the wage loss award. After conducting a de novo review of the record, we affirm, in part, reverse, in part, and modify, in part, the decision of the Administrative Law Judge. Specifically, we affirm the finding that the claimant sustained a 9% permanent anatomical impairment rating. However, we modify the finding that the claimant is entitled a 25% loss in wage earning capacity. We find that the claimant is only entitled to a 20% loss in wage earning capacity which was accepted by the Second Injury Fund. Further, we find that the Second Injury Fund did not controvert the wage loss award and therefore, the claimant's attorney is not entitled to an attorney fee. Therefore, we reverse the finding that Respondent No. 2 controverted the wage loss award.

The claimant was employed by the respondent employer as a physical education and elementary school teacher. He also drove a school bus. Starting in 1995, the claimant had the first of four back surgeries. The last surgery was in 2006, when the claimant sustained an injury

on September 29, 2006, which is the subject of the present claim. The claimant was treated by Dr. Greg Ricca who performed a single level fusion at L4-5. Dr. Ricca assessed the claimant with a permanent anatomical impairment rating of 9% resulting from this injury and surgery. The respondents paid 1% in permanent partial disability and controverted the remainder. The respondents contended that the claimant had a recurrent problem and the opinion of Dr. Carle, a certified rating expert who assessed the claimant with 0% impairment, took precedent and was the appropriate anatomical impairment rating. The claimant contends that he is entitled to indemnity benefits to correspond to a 9% permanent anatomical impairment rating.

Respondent No. 1 accepted and paid permanent partial disability benefits for the 1% permanent anatomical impairment which it asserted was appropriate for the claimant’s injury. The claimant’s treating physician, Dr. Ricca, who performed three of the claimant’s four surgical procedures, opined that the extent of the

claimant’s anatomical impairment for the fusion surgery was 9% to the whole person. Respondent No. 1 submitted the claimant’s medical records to Dr. Scott Carle who opined that the final injury and surgical procedure resulted in 0% permanent anatomical impairment.

The Guides to the Evaluation of Permanent Impairment (4th ed. 1993) has been adopted by the Commission to be used in assessing anatomical impairment. 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) (Repl. 2002).

Contrary to the assessment of Dr. Carle, the September 29, 2006, surgery performed by Dr. Ricca, which included a single level fusion, was necessary to treat a recurrent herniated nucleus pulposus at L4-5. Dr. Ricca detailed the basis for his assessment of the claimant’s permanent anatomical impairment as follows:

> In your letter, you also asked about an additional permanent impairment rating over the 10% Mr. Camp received for his first surgery.

The lumbar surgeries I count are:

1) Lumbar Discectomy in 1994
2) Lumbar Discectomy in 2001
3) Lumbar Disectomy in 2004
4) Lumbar Discectomy and Fusion L4-5 in 2006

I followed the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition from the American Medical Association. Table 75 on page 3/113; section II addresses surgical treatment of intervertebral discs. It is appropriate to use this section for the first 3 surgeries. The appropriate ratings are as follows:

1) Lumbar Discectomy in 1994 (10%)
2) Lumbar Discectomy in 2001 (additional 2%)
3) Lumber Discectomy in 2004 (additional 1%)

Table 75 on page 3/113; section IV addresses spinal fusions. Subpart C (Single-level spinal fusion with or without decompression without residual signs or symptoms) yields an impairment rating of 9%. I believe that this rating is independent of the 13% partial impairment of the whole for the surgeries from 1994 through 2004 listed above.

Thus, based on my review of Mr. Camp's records and my review of the AMA Guides to the Evaluation fo Permanent

> Impairment, Fourth Edition, from the American Medical Association Mr. Camp realizes at least a 9% partial impairment of the whole person for the lumbar fusion he had on 9/26/6. [sic]

Asked to clarify, Dr. Ricca, in a letter dated July 10, 2008, stated:

> Based on the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition, Table 75, Mr. Camp should realize a 9% partial impairment rating for a single level spinal fusion with or without decompression without residual symptoms (IV.C.).
>
> It is my understanding that Mr. Camp's worker's [sic] compensation carrier believes that only a 1% partial impairment is appropriate because of multiple surgeries. Mr. Camp had 4 prior lumbar surgeries. Table 75 Parts II and IV both state that for the third or subsequent operations one should add 1% per operation. I suspect this is why Mr. Camp's carrier felt that only 1% should be added. I believe this interpretation to be in error.
>
> Mr. Camp's prior surgeries were all simple discectomies, which are under Part II of Table 75. His surgery of 9/26/06 was a fusion, which is under Part IV of Table 75. These are independent surgical procedures and a

> fusion is a whole different world from a discectomy. It is not reasonable to consider a "subsequent" discectomy to equal a "subsequent" fusion. So, Mr. Camp's lumbar fusion has to be evaluated within part IV. He only had one fusion operation and this is why he should receive the value under Table 75, Part IV, Subpart C. Single-level spinal fusion with or without decompression without residual signs or symptoms. That gives Mr. Camp a 9% Partial Impairment of the Whole Person.
>
> I hope the above information is helpful to you. If you have any other questions of if I could furnish you with any other information please contact my staff or me and we will do what we can to help you.

Dr. Carle, in assessing the claimant's anatomical impairment at 0% did not perform a physical examination of the claimant, but rather based the assessment on his review of the claimant's medical records.

The respondents acknowledged that if the claimant had undergone a fusion without any prior surgery that he would have a 9% permanent anatomical impairment rating according to the <u>AMA Guides</u>. However, the claimant had three

previous surgeries and a previous impairment rating of 13% to the body. The respondents argument that the 9% totally encompassed the previous 13%, in our opinion, is not an accurate assessment. Two of the three prior surgeries before this latest injury were at L3-4. These are different levels. Dr. Carle, in his review of the claimant’s medical records, explained that Table 75 used the range of motion model and that this method should not be used as a sole means for determination of impairment. He advocated using the DRE’s.

After reviewing both the opinion of Dr. Ricca and the opinion of Dr. Carle, we give more weight to the opinion of Dr. Ricca. 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. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Commission is never limited to medical evidence in arriving at its

decision. 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. CDI Contractors v. McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993). It is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission; the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). 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. We find that Table 75 is the proper method to use in assessing the claimant's permanent anatomical impairment. Accordingly, we find that

based upon Table 75 the claimant is entitled to a 9% permanent anatomical impairment for his fusion surgery.

The next issue that must be addressed is the issue of the claimant’s wage loss disability benefits. The Administrative Law Judge awarded a 25% loss in wage earning capacity. The Second Injury Fund had previously accepted a 20% loss. The Administrative Law Judge found that the Second Injury Fund had controverted all wage loss. In our opinion, the Second Injury Fund did not controverted this claim. The Administrative Law Judge found that but for the services of an attorney to pursue the claim Respondent No. 2, the Second Injury Fund, would not have acknowledged its liability for benefits. We disagree with this finding as the facts do not bear this out. The Second Injury Fund was joined into the claim by Respondent No. 1. Respondent No. 1 paid permanent partial disability benefits to the claimant based upon an anatomical impairment of 1%. Several months after these benefits were paid out and probably because they had not received any communication from the claimant, Respondent

No. 1 filed a Motion to Dismiss on May 19, 2008. On May 20, 2008, the claimant’s attorney filed a response to the Motion to Dismiss asking that the motion be denied and requesting a hearing on the issue of wage loss disability. On May 22, 2008, the Administrative Law Judge sent a letter to the claimant with copies to both the respondents directing all the parties to complete a Prehearing Questionnaire no later than June 11, 2008. A Prehearing Telephone Conference was scheduled for June 17, 2008. It is of note that the Second Injury Fund did not receive a copy of Respondent No. 1's Motion to Dismiss, but did receive a copy of the Administrative Law Judge’s letter regarding the Prehearing Questionnaire on May 27, 2008. On June 6, 2008, the Second Injury Fund filed its response to the Prehearing Questionnaire. On June 6, 2008, the Fund received the claimant’s response to the Prehearing Questionnaire, and on June 9, 2008, received Respondent No. 1's responses. At the Prehearing Telephone Conference on June 17, 2008, the Second Injury Fund acknowledged liability for 20% loss in wage

earning capacity. The acceptance of this 20% is reflected in the Prehearing Order filed June 17, 2008.

In our opinion, there is nothing in the record to support the finding that the claimant was required to employ an attorney in order for the Fund to acknowledge its liability for wage loss. The Fund acknowledged its liability on June 17, 2008, thirty-two days after receiving notice that the claimant requested a hearing on wage loss disability. The Fund is allowed to have time in which to investigate a claim prior to admitting liability. The fact that a respondent investigates a claim prior to admitting liability does not require a finding of controversion. Stucco, Inc., vs. Rose, 52 Ark. App. 42, 914 S.W.2d 767 (1996). Further, failure of the Second Injury Fund to admit a claim prior to a request for a hearing does not amount to controversion of the claim. Lambert v. Baldor Elec., 44 Ark. App. 117, 122, 868 S.W.2d 513 (1993). Filing interrogatories and participating in taking depositions also does not mean that a claim is controverted by the Fund. It is clear that

permanent disability in the form of wage loss became ripe and the Fund acknowledged its liability. Clearly, the Fund is not liable for an attorney’s fee for the 20% loss in wage earning capacity it accepted prior to the hearing during the Prehearing Telephone Conference.

The next issue that must be addressed is whether or not the assessment of 25% loss in wage earning capacity should be affirmed. A review of the evidence demonstrates that the claimant has only proven a 20% loss in his wage earning capacity.

The Arkansas Workers’ Compensation Law provides that when an injured worker’s disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he/she sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000);

Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he/she is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). The

Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. Emerson Electric, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker’s failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas

v. Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2)(Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at

wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

Finally, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Supp. 2005) provides:

> (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
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> (b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Supp. 2005).

Further, "disability" is defined as an "incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury." Ark. Code Ann. § 11-9-102(8) (Supp. 2005).

Considering the context in which the terms "permanent benefits" and "disability" are used in Ark. Code Ann. § 11-9-102(4)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

The evidence demonstrates that the claimant was able to return to work for the respondent employer at the same salary that he was earning before the September 26, 2006, injury. In fact, the claimant received a step increase. Although the claimant did not go back to work as a physical education teacher, he did work as the teacher in the Time Out class working with children on their assignments from regular classes and remaining quiet. However, the claimant was unable to return to his position as a school bus driver. When we consider the claimant's age, college education, and work experience as a teacher, a

profession he has been able to continue, together with his post-injury income, and a multitude of other factors, we find that the claimant has proven by a preponderance of the evidence that he sustained a 20% wage loss disability. The claimant may not be able to return to driving a school bus, but his loss in income is less than 20%.

Moreover, the claimant is also employed as a Southern Baptist minister and has been since 1998. The claimant resigned a pastorate at New Hope Baptist Church in Caraway to accept a call to pastor Centerhill First Baptist Church closer to his home. The claimant’s salary was $50.00 a week less but the claimant did not have to make a 45-minute drive to Caraway. It is clear that the claimant’s change of pastorates arguably eliminated the time and travel expenses of a 90-minute round trip by the claimant approximately four times a week that he had to go to perform his pastor duties. The claimant continues to carry out an active ministry as pastor of a church that is “just around the corner”. Simply put, after weighting all the wage loss

factors, we find that, at the most, the claimant proved a 20% loss in wage earning capacity. Accordingly, we modify the decision of the Administrative Law Judge and find that the claimant has proven by a preponderance of the evidence that he is entitled to a 20% loss in wage earning capacity in addition to his 9% permanent anatomical impairment. The claimant's attorney is not entitled to an attorney fee on this award as respondent No. 2 accepted this amount and did not controvert this claim.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

After a de novo review of the record, I concur in part and dissent in part from the majority opinion. I concur that the claimant sustained a 9% permanent anatomical

impairment rating. However, I cannot agree with the majority's reduction of the claimant's wage loss from 25% to 20% or with the finding that the Second Injury Fund did not controvert the wage loss award. I find that the record supports the award of 25%, or more, in wage loss, especially taking into account the claimant's inability to drive a bus or teach physical education. I also find that absent the claimant's attorney's request for a hearing the Second Injury Fund would not have accepted liability in this claim. The Fund was joined into the claim in sufficient time to investigate the claim, but did not do so until the request for hearing. Thus, the claim was controverted, and an attorney's fee is appropriate. For the aforementioned reasons, I concur with the permanent anatomical impairment rating but must respectfully dissent from the majority opinion on wage loss disability and controversion.

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PHILIP A. HOOD, Commissioner