

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F710770

MICHAEL MAIN,  
EMPLOYEE

CLAIMANT

MCGEHEE METALS, INC.,  
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED NOVEMBER 17, 2009

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.

Respondent represented by the HONORABLE MICHAEL J. DENNIS  
and BRANDON C. ROBINSON, Attorney at Law, Pine Bluff,  
Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals an administrative law judge's opinion filed May 20, 2009. The administrative law judge found that the employer was not entitled to a credit for advance payment of compensation. The administrative law judge found that the claimant was entitled to additional benefits for loss of "functional use of his arm." After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the employer is entitled to a credit

for advance payment of compensation. We find that the claimant is not entitled to 100% disability for his left arm.

I. HISTORY

Michael Main, age 40, testified that he was employed with McGehee Metals for 18 years. The parties stipulated that the claimant sustained a compensable injury on September 19, 2005. The claimant testified that he was shot during a robbery attempt and was wounded in the left elbow, chest, colon, liver, and right arm. The parties stipulated that medical expenses had been accepted and that the compensation rate was "\$320.00/\$240.00." The claimant testified that he continued to receive his pay, \$480.00 weekly

Dr. John O. Lytle reported on November 11, 2005, "This patient is a 37-year-old man who sustained a gunshot wound to the elbow with the loss of bone integrity. He had this fixed with an external fixator. He was taken to the operating room now for removal of the fixator and curet of the holes." Dr. Lytle performed a "Removal of external fixator and curet of holes." The pre- and post-operative diagnosis was "Healing injury to the left elbow."

Susan Reid, a mental health therapist, examined the claimant on July 25, 2006 and noted, "20 years at McGee Metal when he was shot. He is receiving his payroll from the man although he did not have any Worker's Compensation."

Dr. Lytle examined the claimant on August 24, 2007 and reported that the claimant had reached maximum medical improvement. Dr. Lytle further stated:

I have recommended to Mr. Main that he have further surgery to stabilize his left elbow.... He has restricted lifting of any weight with his left arm. He has no functional use of the left arm or hand....

I have recommended effusion of the left elbow.

4. According to the 'Guides to the Evaluation of Permanent Impairment,' Fourth Edition, as published by the American Medical Association, I see his permanent impairment to the left arm to be a combination of the nerve dysfunction from the complete transection of the ulnar nerve above the elbow with injuries to the radial nerve, combined with the loss of the elbow joint from massive trauma from gunshot wound, and the loss of strength in his hand. The impairment due to the loss of motor and sensory function of the ulnar nerve above mid forearm is 50 percent to the upper extremity. This is rated according to table 15 page 54. The impairment due to the loss of the elbow joint is 70 percent to the upper extremity and 42 percent to the person as a whole according to table 18 page 58. The impairment due to the loss of strength is computed to be a 45 percent strength index loss.

According to table 34 page 65 is a 20 percent upper extremity impairment. Using the combined value table on page 324 for each of these numbers

this is equivalent to 88 percent to the upper extremity. Using table three page 20. This is then equivalent to 53 percent to the person as a whole. I have recommended to Mr. Main that he consider an arthrodesis of the elbow. I do not expect that this would alter his permanent impairment however certainly would make his daily life more functional.

The claimant agreed that his healing period ended as of August 24, 2007. The parties stipulated that the 88% impairment rating assessed by Dr. Lytle had been accepted.

The claimant signed a Form AR-C, Claim For Compensation, on September 13, 2007. The claimant contended that he was entitled to additional benefits, including additional temporary total and temporary partial, additional permanent partial, and additional medical expenses.

Susan Reid, the mental health therapist, noted on November 29, 2007, "He still continues to draw his workman's comp."

The respondent's attorney corresponded with the claimant on December 20, 2007:

This letter is just to reconfirm the offer Ed McGehee made to you earlier this year to return to employment at McGehee Metals, Inc. The McGehee's can use you in the position of administrative assistant, answering the telephone, checking weight on supply trucks on the weight scale and performing other various administrative jobs at McGehee Metals. This work that we are offering you is non-strenuous and you should easily be able

to do this in spite of the injuries you have sustained from the accident. Please let me know immediately whether you will be accepting his job. I understand you have rejected this job offer before but I just wanted to confirm this in writing. If you have any questions or concerns do not hesitate to contact me. I look forward to your prompt response to this employment offer.

The respondent's attorney wrote to the claimant on December 26, 2007:

Attached along with this letter is a copy of your final impairment rating from Dr. John Lytle for the injuries you sustained on September 19, 2005 while employed at McGehee Metals, Inc. You will note on the second page that Dr. Lytle has given you an 88% percent impairment rating to your arm.

Since the time of your accident, McGehee Metals has been paying you your full salary of \$480.00 per week, bringing the total you have been paid to date to \$57,600.00. Based on Arkansas law, you were entitled to temporary total disability payments of \$320.00 per week. Your total temporary disability amount was \$38,400.00. Since you have been receiving your full salary from McGehee Metals since September 19, 2005, you have been overpaid by \$19,200.00 in temporary disability.

Under Arkansas law, you are also entitled to permanent disability payments. You are entitled to 161.04 weeks of permanent disability at \$213.00 per week. This brings your permanent disability payment total to \$34,302.00. Based on the \$19,200.00 in overpayments, McGehee Metals now owes you \$15,102.00 in permanent partial disability.

Arkansas law only requires McGehee Metals to pay this amount to you at \$213.00 per week. Effective January 1, 2008, McGehee Metals will begin paying

you the \$213.00 per week. You are entitled to 71 weeks of disability payments at \$213.00 per week beginning January 1, 2007. You have been previously offered return to employment by your employer.

McGehee Metals also has an obligation to pay your medical bills related to this accident. To date they have paid every medical bill related to the accident, including your immobilizer. At this point Mr. McGehee would like to make an offer of settlement to you in this case.

As I stated earlier, McGehee Metals is legally obligated to pay you a remaining amount of \$15,102.00 in increments of \$213.00 per week for 71 weeks. Rather than do this, they will offer total for complete settlement of this claim.

If you accept this offer, that money will be available to you immediately, pending approval of the Worker's Compensation Commission. If you do not accept this offer, McGehee Metals will begin paying the \$213.00 per week starting January 1, 2008 for the remaining 71 weeks....

The parties stipulated that "instead of indemnity benefits, the claimant received his salary of \$480.00 weekly until the end of 2007 for a total of \$19,200.00. On January 1, 2008, the carrier initiated payment of benefits at the incorrect rate of \$213.00 for a total of \$11,076.00 paid in 2008."

The respondent's attorney corresponded with the claimant on January 2, 2008:

Thank you and your wife for coming into the office today to discuss the proposed settlement offer I

sent you on December 26, 2007. As I told you, I recommend you speak with another attorney about this offer. Beginning this week, the McGehees will reduce your current weekly paycheck to \$213.00, which will reflect the permanent disability payments you are to receive for the next 71 weeks. In addition, they will continue to pay any medical bills that we have not received that are related to this accident. The McGehees have faithfully paid your full salary and any medical bills you have provided so far. If there are any other medical bills, including prescription drugs, that are related to the September 19, 2005 accident, please forward them to me for payment. Our offer of to settle this matter remains on the table. If you want to accept this offer please let me know. If we are unable to reach a settlement agreement, the McGehees will continue to pay the \$213.00 per week for 71 weeks, plus any medical expenses that are related to the injury. I look forward to hearing from you soon.

Dr. Lytle informed the claimant's attorney on September 25, 2008, "Michael Main sustained a massive, extraordinary wound to his right arm. He has complete loss of function of the ulnar nerve and an unstable elbow joint. He can move his index finger, long finger and thumb with limited amount of grip. This is not very functional. I would say that his use of the arm is only slightly better than an amputation. You have previously reviewed the permanent impairment rating and I feel that this is accurate."

A pre-hearing order was filed on December 18, 2008. The claimant contended that the employer was not entitled to

a credit in permanent partial disability benefits for the salary paid because "there was no agreement the claimant was receiving an advanced payment of compensation. The claimant relies on Varnell v. Union Carbide, 24 Ark. App. 185, 779 S.W.2d 543 (1998). The claimant also contends he has no functional use of the injured arm and hand (see Dr. Lytle's report of August 24, 2007), so he is entitled to payment of 244 weeks x 100% impairment x \$320.00. Alternatively, he would be entitled to 244 weeks x 88% x \$240.00. The compensation rate, difference in benefits until August 24, 2007, and rating have been controverted and attorney's fees are owed."

The respondent contended that all appropriate benefits had been paid. The respondent contended that the claimant was "entitled to payment of 213 weeks of benefits x 88% x \$240.00 subject to a credit for overpayment from the date of injury to the end of 2007, when the claimant was receiving his salary, which was an advanced payment of compensation. The respondents further contend light duty was made available to the claimant beginning \_\_\_\_\_, which he declined. The incorrect compensation rate was a clerical error, not an attempt to controvert this claim."

The parties agreed to litigate the following issues: "a credit for an advanced payment of compensation; the correct impairment rating; attorney's fees. All other issues are reserved."

A hearing was held on February 20, 2009. The respondent's attorney questioned the respondent's owner, Edward McGehee:

Q. Did you have any kind of insurance on your business before Mr. McGehee's situation?

A. No....

Q. When he was hurt, did you realize you owed him some worker's compensation benefits?

A. Yeah, I knew I was going to have to pay worker's comp sooner or later.

Q. Okay. And did you pay for Mr. McGehee's (sic) medical bills?

A. Paid all his medical bills, hospital and everything.

Q. Do you have any idea how much you have paid on medical bills?

A. It's been over five hundred thousand dollars or more....That's counting the wages and everything.

Q. Okay. Alright. Now you paid Mr. McGehee, you continued paying him his salary and that was four hundred and eighty dollars a week, is that right?

A. Yes sir.

Q. Alright. Did you consider that to be a gift to Mr. McGehee?

A. No, I didn't consider it a gift, I figured I was going to have to pay it sooner or later through workman's comp.

Q. Okay, did you understand that under workman's comp, you might have to pay him less than four hundred and eighty dollars a week?

A. Well, I didn't at first, I figured he needed the money and his wife was sick too, so that's why I paid it for a long time. Until they told me different....

Q. Did you know whether or not it was more than four hundred eighty dollars a week or less than that four hundred and eighty dollars a week?

A. Less.

Q. And after you learned that it was less, did you continue to pay him four hundred and eighty dollars a week?

A. For a while I did.

Q. Why did you do that?

A. Well, his wife had cancer and I thought I'd help him a little bit....

Q. Okay, so was the difference in what you owed him and what you were paying him, was that a gift for Mr. Main?

A. No, it wasn't a gift.

Q. What was it, what did you think it was?

A. I thought I was getting ahead a little on the worker's comp....

The claimant's attorney cross-examined Mr. McGehee:

Q. Did you ever tell him that this money you were paying him was an advance payment of compensation?

A. No sir.

An administrative law judge filed an opinion on May 20, 2009. The administrative law judge found, in pertinent part:

4. The employer is not entitled to a credit for the full payment of the claimant's salary as there was no agreement regarding advance payments of compensation and the employer was trying to help the claimant's family while the claimant and his wife were recuperating.

5. The claimant has lost the functional use of his arm entitling him to payment of additional benefits, (100% x \$320.00 x 244 weeks).

The respondent appeals to the Full Commission.

## II. ADJUDICATION

### A. Credit for compensation or wages paid

Ark. Code Ann. §11-9-807(Repl. 2002) provides:

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

An administrative law judge found in the present matter, "4. The employer is not entitled to a credit for the full payment of the claimant's salary as there was no

agreement regarding advance payments of compensation and the employer was trying to help the claimant's family while the claimant and his wife were recuperating." The Full Commission does not affirm the administrative law judge's finding. A clear distinction is drawn between money received as "advanced payment of compensation" and "wages and gratuities." *Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 543 (1989). In the present matter, the claimant sustained a compensable injury on September 19, 2005. The uninsured employer, Edward McGehee, paid for all of the claimant's medical treatment following the compensable injury and continued to pay full wages. Mr. McGehee testified, "I didn't consider it a gift, I figured I was going to have to pay it sooner or later through workman's comp....I thought I was getting ahead a little on worker's comp."

Susan Reid, the claimant's mental health therapist, noted in July 2006 that the claimant was receiving monies from his employer. The claimant signed a Form AR-C on September 13, 2007 and contended that he was entitled to additional worker's compensation benefits. Ms. Reid noted in November 2007 that the claimant continued to receive

worker's compensation benefits. The claimant testified that he understood Edward McGehee's payments to be "Out of the goodness....To keep from getting sued....Cause he didn't have no workman's comp."

The claimant contends that there was no agreement between he and the employer regarding advance payments of compensation and asserts that the employer never mentioned the phrase "advance payment of compensation to him." Nevertheless, the record shows that both parties knew Edward McGehee was making voluntary advance payments of reasonably necessary medical treatment and indemnity benefits to the claimant. We therefore find that the medical treatment paid for and weekly benefits provided to the claimant were advance payments of compensation. The respondent is entitled to a setoff against previous payments made to the claimant. The administrative law judge's decision is reversed.

B. Permanent Impairment

"Permanent impairment" has been defined as any permanent functional or anatomical loss remaining after the healing period has ended. *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Any determination of

the existence or extent or physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c)(1)(B). The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) published by the American Medical Association, for the assessment of anatomical impairment. See Ark. Code Ann. §11-9-521(h); *Workers' Compensation Laws And Rules, Rule 099.34*. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. See *Avaya v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003), citing *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001). The Commission may assess its own impairment rather than rely solely on its determination of the validity of ratings assigned by physicians. *Id.*

An administrative law judge found in the present matter, "4. The claimant has lost the functional use of his arm entitling him to payment of additional benefits, (100% x \$320.00 x 244 weeks)." The Full Commission does not affirm this finding. The claimant sustained a compensable injury on September 19, 2005 and subsequently underwent surgery to

his left upper extremity. On August 24, 2007, Dr. Lytle assigned the claimant an 88% impairment rating pursuant to the 4<sup>th</sup> Edition of the Guides. Dr. Lytle noted that the claimant had restricted lifting with his left hand. Dr. Lytle noted in September 2008 that the claimant could move his index finger, long finger, and thumb with some limited grip. Dr. Lytle opined that the claimant's use of his left upper extremity was "slightly better than an amputation." The record therefore does not demonstrate that the claimant has suffered "permanent total loss of use of a member" in accordance with Ark. Code Ann. §11-9-521(e). Moreover, the claimant testified at hearing that he does have some functional use of his left arm.

Based on our *de novo* review of the entire record, the Full Commission finds that the respondent proved it was entitled to a credit for advance payment of compensation in accordance with Ark. Code Ann. §11-9-807(a) (Repl. 2002). The claimant proved that he was entitled to an 88% anatomical impairment rating to his left upper extremity as assessed by Dr. Lytle. The claimant proved that the compensable injury was the major cause of the 88% rating assessed by Dr. Lytle, pursuant to Ark. Code Ann. §11-9-

102(F) (ii) (a). The claimant did not demonstrate that he had suffered permanent total loss of use of his left upper extremity. The administrative law judge's decision is reversed.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs and dissents.

**CONCURRING & DISSENTING OPINION**

I agree with the majority regarding the permanent impairment rating. However, I disagree regarding the issue of a credit for salary payments made to the claimant. The majority cites the case of Varnell v. Union Carbide, 29 Ark. App. 185, 779 S.W. 2d 543 (1989) for the following proposition, found in Varnell: "The Looney court declared that where it is shown that both parties intended that the payment be compensation in advance, the credit is allowed against future benefits." With all due respect to the Varnell court, Looney does not say this. Looney v. Sears Roebuck, 236 Ark. 868, 371 S.W. 2d 6 (1963), which, like

Varnell, finds that the employer cannot take a credit, actually states:

When an employer continues to pay salary or wages to an injured employee during any time of injury, and such payments are in excess of workmen's compensation benefits, then when a workmen's compensation award is subsequently made the excess of the wages paid over the weekly compensation award cannot be deducted from the award. The policy of employers to pay an injured employee the prevailing wage scale while inactive during an injury period is in line with the modern concepts of employer-employee relation and is to be encouraged, but the employer cannot make such payments and later claim credit for the excess as against an award made.

Although I dispute that Looney stands for the proposition that "where it is shown that both parties intended that the payment be compensation in advance, the credit is allowed against future benefits" I would like to point out that here there is no showing that both parties actually intended for the salary paid to be advanced payment of compensation. The employer testified regarding advanced payment of compensation as follows:

Q: Did you ever tell him that this money you were paying him was an advanced payment of compensation?

A: No sir.

Despite this testimony, which clearly shows that there was no agreement between the parties regarding advanced payment of compensation, the majority states: "Nevertheless the record show that both parties knew Edward McGehee was making voluntary advance payments of reasonably necessary medical treatment and indemnity benefits to the claimant." I find that the record shows no such thing. In fact, it requires sheer conjecture and speculation, which are not allowed, to come to such a conclusion. The evidence of record actually tends to support the opposite conclusion, that the salary paid was a gratuity, as the respondent testified that he felt bad for the claimant because his wife had cancer. Or, since any conclusion as to the parties state of mind requires conjecture and speculation, I can propose that the payments were actually made to the claimant with the agreement that he would not file a workers' compensation claim against the uninsured employer, which would subject the employer to substantial fines from the AWCC. At any rate, disregarding conjecture and speculation, the evidence of record does not contain any evidence of an agreement between the parties regarding advance compensation.

I find no reason for this case to vary from the precedent set in Varnell and Looney. Substantial evidence does not support the conclusion that the parties intended for the salary payments made to be advanced payments of compensation. Following Looney requires a finding that the respondent is not entitled to a credit.

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PHILIP A. HOOD, Commissioner