

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G700777

LOUIS J. JACOBS, Employee	CLAIMANT
GERDAU MACSTEEL, INC., Employer	RESPONDENT
AMERICAN ZURICH INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED FEBRUARY 7, 2022

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by LEE J. MULDROW, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 10, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on October 20, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties on January 26, 2017.
3. The claimant sustained a compensable injury to multiple parts of the body on

June 26, 2017.

4. The claimant was earning sufficient wages to entitle him to compensation at the maximum rates.

5. The claimant reached maximum medical improvement on February 1, 2021.

6. Respondent has accepted and is paying permanent partial disability benefits based on a 30% rating to the body as a whole.

Prior to the hearing the parties agreed to stipulate that claimant is permanently totally disabled. The parties have also agreed to stipulate that Linda Lay is entitled to payment for services provided to claimant. Given the parties' stipulations, the only remaining issue for litigation involves attorney fees.

Claimant contends that his attorney is entitled to a fee on all indemnity benefits in excess of the 30% impairment rating which was accepted and initially paid at the permanent partial disability rate. In addition, Attorney Walker requests that his fee be paid in a lump sum.

Respondent contends that it has not controverted claimant's entitlement to permanent total disability benefits; therefore, an attorney fee is not appropriate. With regard to the lump sum request in the event an attorney fee is awarded, respondent contends that the request is premature because even if the claim were controverted the fee would not vest for another two years after the 30% impairment rating has been paid. If for any reason claimant did not make it two years, no fee would be owed.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of

fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on October 20, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that claimant is permanently totally disabled is also hereby accepted as fact.

3. The parties' stipulation that Linda Lay is entitled to payment for services provided to claimant is also hereby accepted as fact.

4. Respondent has controverted claimant's entitlement to permanent total disability benefits; therefore, claimant's attorney is entitled to an attorney fee on all indemnity benefits payable in excess of the 30% rating at the permanent partial disability rate.

5. Claimant's attorney is entitled to payment of his attorney fee from respondent in a lump sum.

FACTUAL BACKGROUND

Claimant suffered a compensable crush injury to various body parts while working for respondent on January 26, 2017. Claimant has undergone numerous medical treatments and surgeries. On April 28, 2021, claimant underwent a functional capacities evaluation which indicated that claimant gave a consistent and reliable effort. The evaluation determined that claimant had the ability to perform some work in the Sedentary

classification of work “but he did not perform work at a level that would allow him to work over the course of a normal workday in a competitive work environment.”

Also on April 28, 2021, claimant underwent an Impairment Evaluation which determined that claimant had a combined impairment rating of 30% to the body as a whole for his compensable injuries. Respondent accepted liability for this rating and began paying claimant benefits for that rating at the permanent partial disability rate.

Even before claimant was assigned an impairment rating, claimant’s attorney in a letter dated December 29, 2020 indicated that he was requesting a hearing on claimant’s entitlement to permanent total disability benefits. A pre-hearing conference was conducted and this claim was set for a hearing on permanent total disability on two separate occasions before being continued at claimant’s request.

Most recently, a pre-hearing conference was conducted on October 20, 2021, and a hearing was scheduled for January 10, 2022 on the issue of claimant’s entitlement to permanent total disability benefits, or, in the alternative, benefits in excess of the 30% impairment rating. Subsequent to the pre-hearing conference, respondent accepted claimant as permanently totally disabled. The issues for consideration now include an attorney fee and payment of the fee in a lump sum.

ADJUDICATION

Claimant’s attorney contends that he is entitled to a fee on all indemnity benefits payable in excess of the 30% impairment rating at the permanent partial disability rate. The primary issue is whether respondent controverted claimant’s entitlement to permanent total disability benefits.

On February 2, 2021, Attorney Walker filed a pre-hearing questionnaire contending that claimant was permanently totally disabled as a result of his compensable injury. Claimant acknowledged that an impairment rating had not been assigned at that time and contended that the Commission should determine the rating if one was not assessed by a physician prior to the hearing. In response to claimant's contentions, respondent stated in its pre-hearing questionnaire:

Respondents contend that the claim has been accepted from the outset. Claimant is continuing to receive all benefits to which he is entitled under the Act. Claimant's entitlement will include benefits associated with established impairment consistent with *AMA Guides, 4th Edition*. The parties are awaiting impairment ratings. At this point no benefits – medical or indemnity – have been controverted.

A pre-hearing conference was conducted on March 3, 2021, and a pre-hearing order entered that day indicating that the issues to be litigated were claimant's entitlement to permanent total disability benefits and an attorney fee. A hearing on those issues was set for May 24, 2021, in Fort Smith.

Claimant underwent a functional capacities evaluation and an Impairment Evaluation on April 28, 2021. The FCE indicated that claimant gave a consistent and reliable effort. It also indicated that claimant was able to perform some work within the Sedentary classification of work: "[B]ut he did not perform work at a level that would him to work over the course of a normal workday in a competitive work environment."

In addition, the Impairment Evaluation determined that claimant had a combined impairment rating of 30% to the body as a whole as a result of his compensable injuries. This rating was accepted by respondent and it began paying claimant benefits at the

permanent partial disability rate.

Although the FCE and Impairment Evaluation were performed on April 28, 2021, the reports were not immediately provided to the parties. As a result, in a letter dated May 17, 2021, claimant requested that the hearing scheduled for May 24, 2021 be postponed until the FCE report was received.

In a letter dated June 7, 2021, claimant indicated that the FCE report had been received and claimant was now requesting a hearing. That letter also stated:

Since we now have a permanent impairment rating, I am by copy requesting Mr. Muldrow to state the Respondent's position in regard to whether they accept the impairment rating that was assessed in connection with the FCE and whether they accept liability for any wage loss disability over and above the impairment rating. Otherwise, the issues are the same.

By letter dated June 8, 2021, the parties were informed that a hearing was scheduled for July 19, 2021, in accordance with the pre-hearing order of March 3, 2021. Prior to the scheduled hearing, claimant requested that the hearing be canceled due to his referral to another physician for an additional evaluation.

In a letter dated August 31, 2021, claimant requested that the hearing be rescheduled on the extent of his permanent disability. On September 7, 2021, claimant filed an Amended Pre-Hearing Questionnaire contending that he was permanently totally disabled as a result of his compensable injuries. Claimant's attorney also requested a fee on all benefits in excess of the 30% impairment rating which were paid at the permanent partial disability rate.

In response, respondent filed an Amended Pre-Hearing Questionnaire dated

October 19, 2021, listing as issues the extent of disability and attorney fees.

Respondent's contentions included the following:

Respondents contend that the claim has been accepted from the outset. The claimant is receiving all benefits to which he is entitled under the Act. Claimant was assigned 30% impairment, and that rating is not being challenged. Benefits in line with the rating are being paid.

A pre-hearing conference was conducted on October 20, 2021, and a pre-hearing order filed that same day indicated that the issues to be litigated included claimant's entitlement to permanent total disability benefits or in the alternative the extent of claimant's wage loss disability as well as a controverted attorney fee. A hearing on the claim was scheduled for January 10, 2022. After the pre-hearing conference, respondent accepted claimant as permanently totally disabled.

Controversion is a question of fact to be determined from the circumstances of each particular case. *New Hampshire Insurance Company v. Logan*, 13 Ark. App. 116, 680 S.W. 2d 720 (1984). The mere failure to pay compensation benefits, in itself, does not amount to controversion. *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W. 2d 477 (1983). However, assuming a position which requires an injured employee to retain an attorney so that the employee's rights are protected may constitute controversion. *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W. 2d 454 (1980).

Making an employer liable for attorney fees serves a legitimate social purpose such as discouraging oppressive delay and recognition of liability, deterring arbitrary or capricious denial of claims, and ensuring the ability of claimants to obtain adequate and competent legal representation. *Aluminum Company of America v. Henning*, 260 Ark.

699, 543 S.W. 2d 480 (1976). The fundamental purpose of attorney fee statutes such as A.C.A. §11-9-715 is to place the burden of litigation expenses upon the party that made it necessary. *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that respondent controverted claimant's entitlement to permanent total disability benefits and is therefore liable for payment of a controverted attorney fee on all indemnity benefits payable to claimant over and above the 30% impairment rating which was paid at the permanent partial disability rate.

At the time claimant originally raised permanent total disability as an issue he had not undergone the FCE and had not been assigned an impairment rating. However, claimant subsequently underwent the FCE which found that while he was capable of performing some sedentary work he was not capable of performing work at a level that would allow him to work over the course of a normal work day in a competitive work environment. In addition, claimant was also assigned an impairment rating equal to 30% to the body as a whole which was accepted by respondent.

Testifying at the hearing on respondent's behalf was Caitlin Lee, Health & Safety Manager for respondent. Lee testified that respondent never challenged claimant's entitlement to disability benefits.

Q What is your understanding of whether Gerdau ever asserted a challenge to Mr. Jacobs' entitlement to disability benefits?

A We have never challenged.

She also testified that respondent was requesting additional information to

evaluate claimant's request for permanent total disability benefits.

Q It is your understanding that during the spring and summer of 2021 the company was asking for information needed to evaluate its options with regard to that request?

A Yes.

Q Among other things, when the request was made initially in February of 2021, Mr. Jacobs had not yet been rated with any impairment. Is that your understanding?

A Correct.

Q That impairment rating was delivered on the 20th of April 2021 in accordance with a functional capacity evaluation. Is that your understanding?

A Yes.

However, on cross-examination, Lee admitted that subsequent to the functional capacities evaluation and the impairment rating the respondent received no new information with respect to claimant's disability.

Q So, what new information did Gerdau receive after the April 2021 functional capacities evaluation and the impairment rating that caused them to conclude that Mr. Jacobs was permanently and totally disabled?

A As far as his disability, nothing. His physical disability, nothing.

In addition, Lee acknowledged that information it received after the FCE and impairment rating had nothing to do with whether the claimant was permanently totally disabled.

Q So as of that impairment rating, once Gerdau received that impairment rating in April of 2021 and that impairment rating was known, and as he indicated what his impairment restrictions and capabilities were, Gerdau

had all the information they needed in order to know whether or not Mr. Jacobs was permanently and totally disabled; isn't that right?

A We still needed the information on the MSA, the settlement demand.

Q Well, what does settlement have to do with whether or not he is permanently and totally disabled?

A It depends on how we plan to proceed.

Q So what you were wanting is information to help you determine financially how you wanted to proceed, but that information didn't have anything to do with whether or not Mr. Jacobs was actually permanently and totally disabled; did it?

A I don't believe so.

Even after all of this information was available, claimant again requested a hearing and contended that he was permanently totally disabled in an amended pre-hearing questionnaire dated September 7, 2021. In an amended pre-hearing questionnaire dated October 19, 2021, respondent still did not accept claimant as permanently totally disabled but instead contended:

Respondents contend that the claim has been accepted from the outset: The claimant is receiving all benefits to which he is entitled under the Act. (Emphasis added.)

It was only after the most recent pre-hearing conference on October 20, 2021, and a hearing scheduled on claimant's entitlement to permanent total disability benefits that respondent finally accepted claimant as permanently totally disabled. Lee testified that this decision was made in October 2021.

Q And it's your understanding that Gerdau ultimately made a decision in October of this year to accept this claim as one involving permanent and total disability. Is that true?

A Correct.

Q That is not my question, ma'am. My question is can you testify here today under oath that Gerdau or anybody acting on behalf of Gerdau ever notified Mr. Jacobs; notified me, Eddie Walker, his attorney; or the Judge; or the Workers' Compensation Commission that Gerdau was accepting permanent and total disability?

A Not before October 21st.

Q Okay. So that would have been the first time that Gerdau would have conveyed that information; is that correct?

A To my knowledge, yes.

Q But based upon your testimony, you had everything you needed to have in order to actually decide that Mr. Jacobs was permanently and totally disabled as of when you received the FCE in April of 2021; is that correct?

A Yes.

Q But you acknowledge as a representative of Gerdau that he is permanently and totally disabled; is that right?

A Yes.

Q And he has been at least since you got the functional capacity evaluation information in April of 2021; is that correct?

A Yes.

I find that under the circumstances of this case that respondent controverted

claimant's entitlement to permanent total disability benefits. Respondent had the results of the functional capacities evaluation and impairment rating by May of 2021 and according to Lee's testimony there was no new information to obtain with respect to claimant's disability. Even at the time of the most recent pre-hearing conference in October 2021 respondent was still not accepting claimant as permanently totally disabled. Instead, according to its contentions claimant was receiving all benefits to which he was entitled under the Act. It was only after this most recent pre-hearing conference that respondent finally accepted claimant as permanently totally disabled. This was some six months after the claimant's functional capacities evaluation and Impairment Evaluation and seven months after the first pre-hearing conference in which claimant contended that he was permanently totally disabled.

While respondent may not have controverted claimant's entitlement to compensability, respondent did controvert claimant's entitlement to permanent total disability benefits. Accordingly, I find that claimant's attorney is entitled to an attorney fee on all indemnity benefits paid in excess of the 30% impairment rating at the permanent partial disability rate.

The final issue for consideration involves Attorney Walker's request to have his attorney fee paid in a lump sum. Under the provisions of the Arkansas Workers' Compensation law, a claimant's attorney is entitled to a 25% attorney fee on all indemnity benefits controverted and awarded. The respondent is required to pay one-half of the fee and claimant is required one-half of the fee out of the compensation awarded to him. A.C.A. §11-9-715(a). Lump sum payment of attorney fees is governed by A.C.A. §11-9-716 which provides:

(a) The Workers' Compensation Commission is authorized to approve lump-sum attorney's fees for legal services rendered in respect of a claim before the commission.

(b) The lump-sum attorney's fees are allowable notwithstanding that the award of compensation to the injured employee is to be paid on an installment basis.

(c) Lump-sum attorney's fees, if approved by the Commission, shall be discounted at the rate provided in §11-9-804, as that provision may be amended from time to time.

This statute was interpreted by the Arkansas Court of Appeals in *Seward v. Bud Avants Company*, 65 Ark. App. 88, 985 S.W. 2d 332 (1999):

There is nothing in Section 11-9-716 that requires the Commission to approve a lump sum payment of an entire amount of an attorney's fee or that prohibits the Commission from approving a plan by which an attorney's fee is paid partly by lump sum and partly in installments. Since the amendment to Ark. Code Ann. §11-9-715(a)(2)(B)(i) contains the specific language that the half of the fee chargeable to the injured employee or his dependents is to be paid "out of compensation payable to them," it appears to have been the intention of the legislature to enable the Commission to approve the lump-sum payment of attorney fees chargeable to the employer while providing for installment payments of the portion of the attorney's fee chargeable to the injured employee or the injured employee's dependents. Therefore, we affirm the Commission's decision to provide for the payment of the attorney's fee in that fashion, with the employer's portion to be paid in a lump sum, and the claimant's portion to be paid in installments out of the compensation payable to him.

Here, respondent contends that the request for a lump sum is premature because

if something were to happen to the claimant and the full 30% impairment rating were not yet paid, no controverted benefits would be due and owing and Attorney Walker would not be entitled to a fee above the rating. However, A.C.A. §11-9-716 clearly provides for the payment of lump sum attorney fees and as previously noted in the *Seward* decision, the Court of Appeals has acknowledged that lump sum payment of attorney's fees may be appropriate. There is no requirement that benefits actually "vest" in order for a lump sum attorney fee to be appropriate. For reasons previously discussed, claimant's attorney has earned payment of an appropriate fee in this case.

Accordingly, I find that Attorney Walker is entitled to have respondent's one-half of his attorney fee paid in a lump sum by respondent in accordance with the provisions of A.C.A. §11-9-716. With regard to claimant's one-half portion of the attorney fee, I find that respondent is to continue to withhold claimant's portion from his continuing weekly benefits.

AWARD

Respondent has controverted claimant's entitlement to permanent total disability benefits. Accordingly, claimant's attorney is entitled to an attorney fee on all unpaid indemnity benefits in excess of the 30% impairment rating paid at the permanent partial disability rate. In addition, claimant's attorney is entitled to a lump sum payment of his attorney fee from the respondent pursuant to A.C.A. §11-9-716. Claimant's portion of the attorney fee will continue to be withheld from his weekly indemnity benefits.

The respondent is liable for payment of the court reporter's fee for preparation of the hearing transcript in the amount of \$553.40.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE