

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E300751

TERRY HUMPHREY,  
EMPLOYEE

CLAIMANT

FAULKNER NURSING CENTER,  
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED SEPTEMBER 5, 2003**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Little Rock, Pulaski County, Arkansas.

The claimant was represented by MR. DONALD S. RYAN, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by MS. BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on July 15, 2003, in Little Rock, Arkansas. A prehearing order was entered in this case on June 30, 2003. There were no stipulations in the prehearing order. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties during the course of the hearing and are hereby accepted:

1. The parties stipulate to the prior findings and conclusions from previous opinions in this case.

2. The claimant sustained her injury on December 18, 1992.
3. The respondents have previously paid temporary total disability benefits and permanent partial disability benefits including wage loss disability.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's attorney seeks an accounting of monies paid to date in accordance with an Agreed Order entered into by the parties on April 16, 2002.
2. The claimant's attorney seeks a determination of the appropriate attorney's fee to the claimant's attorney regarding these payments.

By agreement of the parties, all prior opinions in this case are incorporated into the record by reference. In addition to the opinions incorporated by reference, and in addition to the hearing transcript of the July 15, 2003 hearing, the record shall also include the post-hearing brief filed by Ms. Demory on August 18, 2003 and the post-

hearing brief filed by Mr. Ryan on August 28, 2003, which I have "blue backed" to make a part of the record.

### **DISCUSSION**

#### **Background**

As discussed above, the claimant sustained a compensable injury on December 18, 1992. The parties entered into an Agreed Order on April 16, 2002 in which the respondents agreed to pay the claimant's past and future medical expenses for treatment with Dr. Richard Peek and with Dr. William Ackerman, and for the medication prescribed by these physicians.

Joint Exhibit No. 1 contains documentation indicating that the respondent carrier made payments in this regard to the claimant to reimburse her for out-of-pocket medical expenses, to Ingenix Subrogation Service, and to Healthcare Recoveries for the medical treatment at issue. During the course of the hearing, the claimant's attorney advised us that the respondents paid benefits in part totaling \$23,922.00, for which they paid Mr. Ryan an attorney's fee of \$1,196.00 (5% X \$23,922). For a separate submission of \$1,863.76 in expenses submitted by the claimant, the

respondents paid \$1,534.10 in reimbursement to the claimant, and paid Mr. Ryan an attorney's fee of \$76.71 (5% X \$1,534.10).

The respondents' attorney indicated at the hearing, and there appears to be no dispute, that under the 30%/20%/10%/formula for attorney's fees in Ark. Code Ann. § 11-9-715 prior to the amendments of Act 1281 of 2001, the claimant's attorney received fees pursuant to the 30% and 20% portions of the formula years ago, so that by the respondents' determination, the claimant's attorney's fee on the medical treatment at issue is 10% in total, with 5% payable by the respondents and 5% payable by the claimant out of indemnity compensation payable to the claimant. During the course of the hearing, the attorneys also agreed that the only payments that have been made to the claimant during the period at issue have been reimbursements for prescription medication or out-of-pocket payments that she has made for medical treatment, and that the claimant has received no indemnity benefits during the period in question. (T. 16). In addition, the claimant's attorney advised that, even if he were legally entitled to his attorney's fee being withheld from the claimant's medical payment reimbursement, he would not want the respondent

carrier to do so. (T. 17). Finally, based on Joint Exhibit No. 1 and Ms. Demory's explanation of that document at the hearing, the claimant's attorney was willing to accept as fact that the respondents have paid to date part the sum of \$23,922 + \$1,863.76 based on their obligation for medical payments in the April 16, 2002 Agreed Order. (T. 19).

### **The Law**

In his post-hearing brief, the claimant's attorney seems to argue that under the law in existence at the time of the claimant's injury sustained on December 18, 1992, the respondents should be liable for a 10% attorney's fee on the medical benefits paid toward their obligation under the April 16, 2002 Agreed Order.

My research indicates that the claimant's attorney's argument might be well taken had the claimant's injury occurred prior to July 1, 1986, the effective date of Act 10 of 1986 (2nd Ex. Sess.). For injuries that occurred prior to July 1, 1986, a respondent carrier would in fact have been liable for the entire 10% attorney's fee at issue in the present case. See Ark. Stat. Ann. § 81-1332 (Repl. 1976). However, with the amendments of Act 10 of 1986, the law began to provide, and continued to provide on the date of the claimant's injury sustained on December 18, 1992,

that an attorney's fees for legal services in a controverted claim were to be paid one-half by the employer or carrier and one-half by the injured employee. See Ark. Code Ann. § 11-9-715(a) (2) (B) (1987).

Because I find that the attorney's fee at issue in this case is subject to the amendments of Act 10 of 1986, and because there is also no dispute that the claimant has received no indemnity compensation during the period in question from which to withhold the claimant's one-half of the accrued fee, I find that the respondents are only liable for one-half of the 10% attorney's fee at issue in this case, and not the full 10% attorney's fee that the claimant's attorney's post-hearing brief seems to argue.

#### **Attorney's Fee Payments at Issue**

Although the claimant's attorney, during the course of the hearing and in his post-hearing brief, does not take issue with any of the respondent's arithmetic regarding the \$1,863.76 and \$23,922 in medical benefit payments, I have the following observations based on my check of the respondent's arithmetic. For my part, I do not dispute the \$1,863.76 figure and the 5% attorney's fee paid thereon. However, with regard to the respondents' \$23,922 figure, I repeatedly reach the sum of \$23,463.98, and not \$23,922.05,

based on Ms. Demory's explanation of Joint Exhibit 1. Therefore, by my calculations the claimant's attorney has actually been slightly overpaid the by the respondents by approximately \$22.90 (5% X (\$23,922.05 - \$23,463.98)). While I note that the respondents do not seek any reimbursement for possible overpayment of attorney's fees made on their behalf, I caution the respondents to recheck their calculations against mine before calculating the claimant's one-half attorney's fee to be withheld from any future indemnity benefits, should any additional indemnity benefits accrue in the future.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The claimant sustained her compensable injury at issue on December 18, 1992.

2. Under the statutory provisions applicable for an injury sustained on December 18, 1992, the claimant's attorney is entitled to a 10% attorney's fee on the medical benefits at issue, one-half to be paid by the respondents in addition to any compensation awarded, and one-half to be paid by the claimant out of indemnity compensable compensation payable to the claimant.

3. The claimant's attorney has failed to establish by a preponderance of the evidence that he has so far been underpaid his attorney's fee by the respondents based on payments made in accordance with the Agreed Order entered into on April 16, 2002.

4. In light of the dilatory performance of the respondent carrier in answering Mr. Ryan's request for an explanation of his attorney's fee paid to date, the respondent carrier is directed in the future to provide to Mr. Ryan, along with any checks for payment of attorney's fees, an adequate explanation so that Mr. Ryan can determine for himself the exact benefits on which the fee check is based, so that Mr. Ryan can determine whether the amount of the fee check is accurate.

IT IS SO ORDERED.

---

MARK CHURCHWELL  
Administrative Law Judge