

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F100207

SILBINO SAN NICOLAS, Employee	CLAIMANT
TOYS R US, Employer	RESPONDENT
TRAVELERS INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED AUGUST 13, 2003

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 ROBERT MONTGOMERY, Attorney, Little Rock, Arkansas.

OPINION

This case comes on for review on stipulations and briefs submitted by the parties.

This claim was previously set for a hearing on the merits for April 7, 2003. On April 2, 2003, a fax was received from claimant's attorney indicating that the parties had settled the case and requesting that the case be scheduled for a joint petition hearing as soon as the schedule would permit. Based upon that request, the joint petition hearing was scheduled for the same date as the original hearing, April 7, 2003. This hearing was scheduled for that date in order to avoid an additional one week delay until my next visit to Fort Smith. As a result, the parties agreed to have the joint petition hearing conducted with the possibility that the joint petition checks might not be available on that date.

The joint petition hearing was conducted as scheduled on April 7, 2003, and the joint petition was found to be in the claimant's best interest. As a result, an order was filed April 8, 2003 approving the joint petition.

According to stipulations submitted by the parties, claimant's attorney received checks on April 11, 2003. Unfortunately, both of the settlement checks were incorrectly made payable to claimant's attorney. As a result, claimant's attorney faxed a letter to both myself and respondent's attorney requesting that the check to the claimant be reissued.

Subsequently, on April 21, 2003, claimant's attorney faxed a letter to respondent indicating that if claimant's settlement check was not received by April 23, 2003, claimant would be requesting a 20 percent penalty. On April 24, 2003, respondent reissued a check to the claimant and placed it in the mail. Since the claimant did not receive his check by April 23, 2003, claimant's attorney filed a motion requesting a 20 percent penalty for failure to issue claimant's joint petition check. After receipt of his check claimant nevertheless indicated that he wished to pursue his request for a 20 percent penalty.

A pre-hearing conference was conducted in this case on June 11, 2003, at which time the parties agreed to submit the case on stipulations and briefs. The issues to be litigated include:

1. Whether the Commission has jurisdiction of this claim; and,
2. Whether a 20 percent penalty should be imposed on the joint petition settlement.

The parties' stipulations have been blue-backed and are hereby made a part of the record along with other relevant documents.

First, with respect to the issue of jurisdiction, I find that this Commission has jurisdiction over this claim. The joint petition order in this case filed on April 8, 2003, indicates that "Upon such payment this Commission shall lose jurisdiction of this matter." Although respondent has now paid claimant the proceeds of the joint petition order, I note that claimant's motion for a 20 percent penalty was filed prior to that payment. While a claimant is precluded from setting aside a joint petition order, a claimant is not precluded from enforcing the terms of a joint petition. *Dozier v. Department of Finance & Administration*, Full Commission Opinion filed July 3, 2003 (E309021).

Even though the Commission may have jurisdiction over this claim, I nevertheless find that a 20% penalty is not appropriate under the circumstances of this case. Claimant contends that a 20 percent penalty should be imposed pursuant to the provisions of A.C.A.

§11-9-802(c) which states:

If any installment, payable under the terms of an award, is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§11-9-711 and 11-9-712.

First, I find no indication in the statute or in the case law that this penalty provision should apply to joint petition settlements. Furthermore, even if the penalty should apply to joint petition settlements, I find that it should not apply under the facts presented here. Here, I believe it is important to note that the hearing was set on short notice for the convenience of the claimant with the possibility that the checks would not be available at the time of the hearing. If the joint petition hearing had not been conducted on April 7, 2003, the next available hearing date would have been one week later on April 14, 2003. Instead of waiting an additional week, the parties agreed to proceed to the joint petition hearing on April 7 under the assumption that the checks would be submitted after that date but still before the next available hearing date of April 14. Indeed, checks were received by claimant's attorney on April 11, 2003. Unfortunately, respondent mistakenly made both checks payable to claimant's attorney. As previously noted, new checks were issued and sent by mail to the claimant on April 24, 2003. I believe it can be argued that respondent should have issued the claimant's check sooner than April 24. However, on the other hand, I do not believe that the respondent's conduct in this case warrants the imposition of a 20 percent penalty. It must be remembered that respondent did make an attempt to issue the checks which were received on April 11, four days after the joint petition hearing. Furthermore, it would be unfair to impose the 15-day time period set forth in A.C.A. §11-9-802(c) against the respondent when the hearing was set on short notice in an attempt to accommodate the claimant.

In summary, I do not find that the conduct of the respondent in this case warrants the imposition of a 20 percent penalty pursuant to A.C.A. §11-9-802(c). Therefore, claimant's motion for a 20 percent penalty is hereby denied.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE