

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203675

BETTY SWEM

CLAIMANT

UNIVERSITY OF ARKANSAS

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 31, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale,
Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondent represented by RICHARD SMITH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 19, 2003, in Springdale, Arkansas. A pre-hearing order was previously entered in this case on December 18, 2002. One of the issues listed in this pre-hearing order was the claimant's entitlement to a change of physicians. However, this issue was disposed of by the Order of January 8, 2003. A copy of the pre-hearing order with this issue deleted was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and hereby accepted:

1. On February 26, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates were \$295.00 for total disability and \$221.00 for permanent partial disability.
3. On February 26, 2002, the claimant sustained a compensable injury to her knee.

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

1. The respondent's entitlement to repayment of temporary disability benefits.

2. Attorney's fees. 1.

In regard to these issues, the claimant denies that the respondent is entitled to repayment of their alleged overpayment.

In regard to these issues, the respondent contends that claimant was overpaid temporary total disability benefits by \$1,285.36, before the respondent was aware that she had been returned to work full time. Furthermore, claimant was notified of the overpayment by the respondent before she cashed the warrants in question. Under such circumstances, claimant should be ordered to repay Public Employee Claims Division immediately.

DISCUSSION

_____The sole issue presented for resolution at the present time is the respondent's request that this Commission order the claimant to repay directly to the respondent the amount alleged to be an overpayment of compensation. The burden rests upon the respondent to prove that an overpayment of compensation or prepayment of compensation has occurred, and the amount of this overpayment.

The respondent has proven that an overpayment or prepayment of compensation was made for the month of April of 2002. The claimant testified that she returned to work for the respondent (on a part time basis) on April 1, 2002, and worked in this limited capacity through April 14, 2002. On April 15, 2002, she returned to full duty employment and has worked in this capacity ever since. The testimony of the respondent's witnesses and the documentary evidence contained in Respondent's Exhibit No. 2, pages 33-34, indicate that the claimant was paid bi-weekly checks for temporary total disability benefits, at the weekly rate of \$295.00, for the month of April of 2002.

Ark. Code Ann. §11-9-521 provides that an employee suffering from a scheduled injury is entitled to temporary total disability benefits until they return to work or reach the end of their healing period, whichever occurs sooner. Thus, it is apparent that the claimant

would not be entitled to temporary total disability benefits for any portion of the month of April of 2002.

_____ However, the evidence presented shows that the claimant's healing period, from the effects of her compensable scheduled injury, had not ended by April 1, 2002. Thus, for the period of April 1, 2002 through April 14, 2002, the claimant could be entitled to temporary partial disability benefits, as provided by Ark. Code Ann. §11-9-520. This subdivision states:

“In cases of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid to the employee sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his or hers wage earning capacity after the injury.”

The respondent contends that it has made an overpayment of temporary total disability benefits in the amount to \$1,285.36, even after considering the amount that it believes the claimant would be entitled to for temporary partial disability benefits for the first two weeks of April of 2002. This figure appears to be excessive.

If the respondent had paid the claimant temporary total disability benefits for the entire month of April, at the appropriate weekly compensation rate, this would only equate to \$1,222.14 (four weeks and one day at \$295.00 per week). However, the Respondent's Exhibit No. 2, pages 33-34, show that the claimant was not actually paid temporary total disability benefits in this amount for the month of April of 2002. Instead, the respondent only paid the claimant two checks totaling \$1,180.00 for the month of April. A third check, totaling \$1,390.70, was also paid to the claimant. However, this would be the appropriate amount for temporary total disability benefits for the period of February 27, 2002 through March 31, 2002 (four weeks and five days at \$295.00 per week). Even if the claimant was not entitled to any temporary partial disability benefits during the month of April, the total potential overpayment would only be at most \$1,180.00.

The respondent also used an elaborate and somewhat confusing method to calculate the amount that they believed to be appropriate for temporary partial disability benefits for the first two weeks of the month of April of 2002. I have absolutely no idea why the respondent (who, in fact, is self insured) did not simply check its payroll records and obtain the exact amount the claimant was actually paid for her limited or her light duty work from April 1, 2002 through April 14, 2002. Two-thirds of the difference (if any) between this amount and the claimant's average weekly wage would yield the exact amount of the claimant's compensation for temporary partial disability.

This leads to the real dilemma in this case at the hearing. None of the respondent's witnesses had any direct knowledge of the amount the claimant was actually paid for the work she performed for the respondent during the month of April of 2002. Obviously, such information would be crucial to the resolution of the current dispute.

Ms. Upshaw (the claims manager) testified that she calculated an amount which she felt the respondent should have paid the claimant for temporary partial disability during her period of light duty (April 1 through April 14, 2002). She then apparently assumed that this amount was the one the respondent actually paid. She further assumed that the respondent paid the claimant her full salary for the remainder of April of 2002. Ms. Brook, the workers' compensation program coordinator for the respondent, apparently assumed that the respondent paid the claimant whatever she was owed for the work she performed during April of 2002.

Following the claimant's testimony that she did not receive payment for the work she performed during April of 2002, the respondent has tendered an affidavit from a Becky Shoemaker, purportedly the payroll manager for the respondent. This affidavit states that all employees, including the claimant, "are paid 'one month behind', e.g. payment made at the end of May, would be for the month of April, etc." This affidavit further indicates that attached are the claimant's payroll records for the months of March and April of 2002.

However, the payroll record purportedly for March of 2002, expressly reflects compensation for the period beginning April 1, 2002 and ending April 30, 2002. From this amount, the sum of \$1,680.12 has been subtracted for "FDSC supplemental" the period of March 4, 2002 through March 29, 2002, whatever that may be. This leaves a balance of \$236.55. Direct deposit of this amount, less standard deductions (\$153.05) was made to the claimant's account on April 30, 2002.

The payroll record, purportedly for April of 2002, expressly reflects compensation for the period beginning May 1, 2002, and continuing through May 31, 2002. From this amount, \$217.80 is again subtracted for "FDSC supplemental" for the period of April 1, 2002 through April 12, 2002. The remainder or \$1,698.87, less standard deductions, was direct deposited in the claimant's account on May 31, 2002.

In rebuttal, to the respondent's affidavit, the claimant has offered her affidavit and an affidavit of a Jalene Ramsey, purportedly an administrative assistant leave representative for the Department of Biological and Agricultural Engineering for the respondent University of Arkansas. Both of these affidavits state that the claimant was paid at the end of the month for the work performed that month.

From the evidence presented by the respondent, I can only say with any degree of certainty, that it establishes that it proves that the claimant was actually paid wages of only \$153.05 during the month of April of 2002. I cannot say with any certainty whether this amount represents compensation for the services she provided the respondent during the month of March or during the month of April of 2002. Thus, it is impossible for me to calculate with any degree of certainty the actual amount of the overpayment of compensation made to the claimant during the month of April of 2002.

As the respondent has proven by the greater weight of the evidence that an overpayment of compensation did in fact occur for temporary disability benefits for the month of April of 2002, and to ensure a fair decision to all parties concerned, I find that this

matter must be set for an additional hearing. Both the parties will be allowed an opportunity to present any and all evidence they deem relative only in regard to the specific amount of the overpayment of compensation for temporary disability benefits that occurred for the month of April of 2002.

While I would not attempt to instruct the parties on how to try their case, I would strongly suggest that someone have a witness present that has direct knowledge of the payroll procedures of the respondent and of the wages actually paid to the claimant for her services during the month of April of 2002. I would also strongly suggest that this individual or individuals bring with them appropriate documentation in the form of written policy concerning the payment and payroll procedures for all individuals employed by the respondent and the actual payroll records of the claimant for the entire year 2002.

I would also take the opportunity in this Opinion to address the respondent's request that the claimant be ordered by this Commission to immediately and directly reimburse the respondent for any overpayment of compensation that may have been made for the month of April of 2002. As pointed out by the respondent in its trial brief, this Commission has previously held that it does not have the authority to grant this form of relief and can only grant the respondent a credit against future compensation that may become owed to the claimant, Roger Osborne v. Logan County, WCC File E513263, Full Commission Opinion, August 20, 1998.

In this Opinion, the Full Commission noted the only two sections of the Act that deal with reimbursement of "advanced payments of compensation", which would include erroneous made overpayments.

Ark. Code Ann. §11-9-207(a)(7) confers upon the Commission the power and authority to:

"Determine the time for the payment of compensation and order reimbursement of employers for amount advanced."

Ark. Code Ann. §11-9-807(a) provides:

“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.”

Clearly, in Osborne, this Commission followed the well established rule that all provisions of a Legislative Act are to be interpreted in a harmonious manner that affords effect to each Section. In the present case, Ark. Code Ann. §11-9-207(a)(7) grants the Commission authority to authorize reimbursement of “advance payments of compensation”. Ark. Code Ann. §11-9-807(a) provides the only method whereby the reimbursement is to be made.

The respondent argues that the disputed payments, in this case, were not “gratuities”. I concur. Obviously, if these disputed payments were “gratuities”, then both Ark. Code Ann. §11-9-207(a)(7) and §11-9-807(a) would not be applicable and the respondent would not be entitled to even a credit against other compensation for this “gratuity”.

The respondent also argues that the disputed payments are not “advance payments of compensation”. If this were true, then both Ark. Code Ann. §11-9-207(a)(7) and §11-9-807(a) would again be inapplicable. In this event, this Commission would not even have the authority to grant the respondent a credit for such payments against future compensation as its authority to order reimbursement is expressly limited to “advance payments of compensation.”

As the Appellate Courts have pointed out on frequent occasions, this Commission is a creature of statute, and its jurisdiction and authority is confined to that expressly conferred upon it by the legislature. It does not have authority to exercise broad equitable powers, involving areas such as unjust enrichment and equitable trusts. If the respondent wishes this type of relief, it must seek it in a different forum, such as the Circuit Courts of this State.

I find that the same holds true for the respondent's argument that it acted in good faith and the claimant in bad faith. For the purposes of Ark. Code Ann. §11-9-207(a)(7) and §11-9-807(a), it makes little different whether the parties acted in good faith, bad faith, or out of ignorance. This again is an equitable argument that must be presented made in a different forum, together with such matters as the question of whether any direct repayment of erroneously paid funds would constitute a hardship (another factor that would be considered by the Circuit Court in a recovery action based upon unjust enrichment and achievable trust).

In summary, if the respondent wishes to proceed in this forum, this Commission only has jurisdiction to award the respondent a credit for any "advance payment of compensation" against compensation which may hereinafter become due and payable to the claimant. Thus, this is the only relief the respondent can obtain from this Commission.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Works' Compensation Commission has jurisdiction of this claim.
2. On February 26, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On February 26, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$295.00 for total disability and \$221.00 for permanent partial disability.
4. On February 26, 2002, the claimant sustained a compensable injury to her left knee.
5. There is no dispute over the payment for reasonably necessary medical services for the compensable injury and all such expenses have been or are being paid by the respondent.
6. The respondent has proven by the greater weight of the credible

evidence that the claimant received an advanced payment of compensation, in the form of an erroneously made overpayment of temporary disability benefits for the month of April of 2002. However, it is impossible to determine with any certainty from the evidence presented the exact amount of this overpayment.

7. Pursuant to Ark. Code Ann. §11-9-807(a) this Commission has no authority to order the claimant to directly repay the respondent for any such advance payment of compensation and can only award the respondent a credit for such an advance payment of compensation against any future compensation which may become due and payable to the claimant.
8. The respondent has controverted the claimant's entitlement to \$1,285.36 in temporary total disability benefits, by seeking repayment or a credit for such benefits previously paid.
9. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on the difference between the \$1,285.36 in temporary total disability benefits controverted and the actual amount of credit which the respondent may ultimately be granted for their erroneously made advance payment of compensation during April of 2002.

ORDER

Based upon my foregoing findings and conclusions, the parties are hereby directed to contact my Clerk and arrange an appropriate date for a second hearing on the limited issue of the exact amount of any advanced payments of compensation erroneously made by the respondent during the month of April of 2002.

The respondent is entitled to credit against any future compensation which may become due and payable to the claimant for the erroneously advanced payment of compensation made by the respondent in April of 2002. The claimant's attorney is entitled to the maximum statutory attorney's fee on the difference between the exact amount of the overpayment of compensation ultimately determined and the amount of compensation actually controverted by the respondent of \$1,285.36.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge