BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206445

JOSEPH V. TEASLEY, EMPLOYEE **CLAIMANT**

HERMANN COMPANIES, INC.,/
ANCHOR PACKAGING EMPLOYER **RESPONDENT**

COMMERCE & INDUSTRY INSURANCE COMPANY,
INSURANCE CARRIER/TPA **RESPONDENT**

OPINION AND ORDER FILED JULY 14, 2003

Matter submitted before Chief Administrative Law Judge David Greenbaum on June 5, 2003, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. John C. Barttelt, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

Comes for consideration this 10th day of July, 2003, the request of the claimant, by and through his attorney, Mr. John C. Barttelt, that the Commission award him a twenty-five percent (25%) attorney's fee from the medical bills to be paid in this case.

A prehearing telephone conference was conducted in this case on March 12, 2003, and a Prehearing Order was filed on said date. This claim has been the subject of prior proceedings which will be set out further below.

Although there are several unresolved issues which have been specifically reserved, by agreement of the parties, the sole issue presented for determination is whether the Arkansas Workers' Compensation Commission has

authority to award an attorney's fee on medical benefits under the Workers' Compensation Law as amended by Act 1281 of 2001, Ark. Code Ann. §11-9-715 (Repl. 2002).

As reflected by the Prehearing Order filed March 12, 2003, both parties agreed that the aforementioned issue could be submitted based upon a comprehensive set of stipulations, together with legal briefs, signed by both parties, and to be submitted on or before April 15, 2003, at which time the issue would be submitted for determination on the record. The parties subsequently submitted a joint stipulation of facts, as well as a joint brief on the issue of attorney's fees wherein the parties agreed that claimant's attorney was entitled to the fee requested. Because the respondents' position is radically different from its initial position on this issue, and because this administrative law judge disagrees with the parties agreed statement of law, a chronological history of the various procedural events, pleadings, and prior Orders of this Commission is warranted.

HISTORY

By letter dated September 24, 2002, claimant's attorney submitted a Commission Form AR-C, at which time he requested that the claim be assigned to an administrative law judge for a hearing. (Exhibit 1) On September 26, 2002, the Commission sent a copy of the claim form to the carrier, requesting that it investigate the claim and state its position within fifteen (15) days.

(Exhibit 2) In a letter dated October 4, 2002, respondents advised that it had investigated the claim which was being denied due to a positive drug screen. (Exhibit 3) A Prehearing Questionnaire was sent to the parties on October 10, 2002. (Exhibit 4) The claimant and respondents filed responses to the Prehearing Questionnaire on November 1 and November 6, 2002, respectively. (Exhibits 5 - 6)

By agreement of the parties, the primary issue concerned compensability. Respondents raised the drug defense, A.C.A. §11-9-102(4)(B)(iv). Upon receipt of the prehearing information filings, the parties were granted forty-five (45) days to complete discovery and schedule any necessary depositions. Thereafter, a notice was sent January 3, 2003, scheduling the claim for a prehearing conference on January 22, 2003. (Exhibit 7)

Prior to the prehearing conference, claimant's attorney, by correspondence dated January 6, 2003, and received on January 9, 2003, filed a "Notice of Attorney's Lien" purportedly placing the Commission and various medical providers on notice of his intent to charge an attorney's fee and to establish a lien for an attorney's fee for the collection of all medical bills related to the claimant's injury of June 10, 2002. (Exhibit 8)

On January 22, 2003, respondents' attorney, by letter/fax, advised that respondents had accepted liability for claimant's injuries. (Exhibit 9)

A prehearing telephone conference was conducted on January 22, 2003,

and a Prehearing Order was filed on said date. As reflected by the Prehearing Order, while compensability had been resolved, various new issues were raised at the prehearing conference including, but not limited to whether the Commission had jurisdiction over this issue and/or the parties; whether the medical treatment provided by out of state providers was reasonable and necessary; and whether the medical cost containment program established by this State or some other State applies concerning the charges of various medical providers. The parties were directed to file supplemental pleadings concerning their respective positions on these and all other relevant issues. (Exhibit 10)

On January 27, 2003, claimant's attorney filed a Motion for Hearing. The claimant requested that this Commission approve a twenty-five percent (25%) attorney's fee on the total of medical bills to be paid in this case. Claimant's attorney stated that he did not believe the Commission was required by statute to either notify the medical care providers or protect the interest of the medical care providers; however, had no objection to notice being sent by the Commission should the Commission interpret the Act as requiring this notification. The claimant also requested that the Commission issue an Order requiring respondents to withhold twenty-five percent (25%) of all medical bills paid in trust for payment of claimant's attorney's lien. Alternatively, claimant requested that the Commission order respondents to pay twenty-five percent

(25%) of the medical bills into the Commission pending determination of this issue. (Exhibit 11)

In respondents' response to claimant's Motion for Hearing, respondents raised multiple issues and made numerous contentions, including taking the position that claimant was not entitled to an award of attorney's fees under Ark. Code Ann. §11-9-715 and the lien filed in this case. (Exhibit 12)

A second prehearing conference was scheduled for February 26, 2003, (Exhibit 13) which was rescheduled, by agreement of the parties, to March 12, 2003. (Exhibit 14)

On February 24, 2003, an Agreed Order was filed, authorizing the respondent/carrier to deduct the claimant's portion of a controverted attorney's fee from the claimant's temporary total disability check. (Exhibit 15)

In a letter dated February 26, 2003, filed February 28, 2003, John V. Hanley, an attorney in Louisville, Kentucky, representing Jewish Hospital, advised that Jewish Hospital objected to the payment of an attorney's fee under the proposed lien submitted by claimant's attorney, and objected to the filing of the lien. He stated that Jewish Hospital had no contract with claimant's attorney. (Exhibit 16)

A prehearing conference was conducted on March 12, 2003, and a Prehearing Order was filed on said date. As previously pointed out, although there are several unresolved issues which have been specifically reserved, by

agreement of the parties, the sole issue presented for determination is whether the Commission has authority to award an attorney's fee on medical benefits under the Workers' Compensation Law as amended by Act 1281 of 2001. More appropriately, the issue presented is whether the Commission should exercise its authority based upon the facts in this case. The parties agreed that the issue could be submitted upon a comprehensive set of stipulations, together with legal briefs. (Exhibit 17)

Exhibit 18 is a hand-delivered, April 9, 2003, letter enclosing a proposed joint "Stipulations of Fact and Joint Brief on the Issue of Attorney's Fees." The proposed, enumerated stipulations of fact are set out below:

> 1. Claimant sustained hand injuries at approximately 6:00 a.m. on June 10, 2002.
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> 2. Immediately following the accident causing his injuries, claimant was transported to Arkansas Methodist Hospital in Paragould, Arkansas. From that facility, he was transferred on an emergency basis to Jewish Hospital in Louisville, Kentucky, where he underwent surgery at 7:00 p.m. on June 10. Because of the severity of claimant's injuries, he remained hospitalized until Juny 19, 2002.
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> 3. After Initially controverting this claim, respondents have subsequently admitted liability.
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> 4. The only issue to be resolved at this juncture concerns whether counsel for claimant is entitled to a 25% attorney's fee payable by claimant's medical service providers. Counsel for claimant has asserted a claim for a 25% fee and has filed a lien with the Commission in support thereof. One of the medical service providers (Jewish Hospital) has filed a written objection to payment of the fee claimed by counsel for claimant.

5. Claimant and respondents agree that, pursuant to Ark. Code Ann. §11-9-715(a)(4)(Repl. 2002), counsel for claimant is entitled to a 25% attorney's fee, payable by claimant's medical service providers on a pro-rata basis, with the amount of the fee to be deducted from medical benefits paid the providers by respondent carrier.

6. The record in the case consists of this document; the pleadings and lien documents filed by the parties; the February 26, 2003 letter from Mr. John Hanely [sic], counsel for the Jewish Hospital; and such other documents as the law judge may deem appropriate.

I find that proposed stipulations one (1) through four (4) above are reasonable, and they are hereby accepted as fact. I specifically disagree with proposed stipulation five (5), which is a conclusion of law reached by the claimant and respondents, which I find to be inconsistent with the clear and unambiguous language contained in the amended Act. Accordingly, for reasons set out further below, proposed stipulation five (5), as well as the "Agreed Upon Statement of Law and Joint Brief" is hereby rejected in its entirety. I feel compelled to point out that in its response to claimant's Motion for Hearing, respondents raised multiple issues which have not been addressed and which have been specifically reserved while specifically taking the position in paragraph 14 that the claimant was <u>not</u> entitled to an award of attorney's fees under A.C.A. §11-9-715 (Repl. 2002) and the lien filed in this case. (Ex. 12)

The sole purpose of the Prehearing Order issued conducted March 12, 2003, was to give the parties the opportunity to brief their conflicting positions

and to submit the legal issue on stipulations and briefs. Without explanation, respondents radically shifted its position and agreed upon the statement of law and brief apparently prepared by claimant's counsel. While the specific reason for this drastic change was not offered, a rational inference and explanation can be found. Respondents have no legal obligations whatsoever to pay attorney's fees on medical benefits under the amended law. Its interests are not impacted by its acquiescence to the claimant's proposal. The only interests affected are those of the various medical providers who are not parties to the proposed joint stipulation and brief. The respondents are the only party to have controverted the claimant's entitlement to workers' compensation benefits. The claimant's out of state medical providers did nothing except give the claimant the best expert medical care and treatment they could provide with the reasonable expectation that they would ultimately be compensated for their treatment. The medical treatment was provided without requiring pre-payment. The claim was initially disputed by the respondents herein and then, subsequently accepted as compensable. Now, the parties have jointly requested that the claimant's attorney be compensated by medical providers who have not, to date, contracted with said attorney for legal services. The joint agreement of the parties is clearly contrary to the law.

Subsequent to submission of their joint stipulations of fact and brief, the parties submitted a second Agreed Order, authorizing respondents to deduct

from claimant's physical impairment checks an amount equal to 12.5% of each check as claimant's share of attorney's fee in this case. The Agreed Order was signed and sent to the parties on June 5, 2003. (Exhibit 19)

The record in this claim consists primarily of the proposed joint stipulation of fact and joint brief previously identified as "Exhibit 18." The remainder of the pleadings, correspondence and Orders are informational and to supplement the record by showing the historical events, to date.

The sole issue presented for determination by the parties was whether the Workers' Compensation Commission had authority to award an attorney's fee on medical benefits under our law as amended by Act 1281 of 2001. It is my opinion that the Commission has the "authority" to approve and award a reasonable fee, but only if the medical providers have voluntarily contracted with the attorney for the claimant to recover disputed bills. Therefore, the real issue is whether the claimant's attorney is entitled to a fee on medical benefits in the instant case. Because no contract exists between the medical providers and claimant's attorney, it is herein concluded that he is not entitled to a fee as requested.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The proposed stipulations one (1) through four (4), aforementioned, are

reasonable and are hereby accepted as fact.

3. The claimant has failed to prove that any of the medical providers have contracted with the attorney for the claimant to recover bills for services provided, to date.

4. The claimant's attorney may not charge medical providers a fee as a cost of collection without a contract.

DISCUSSION

______Fees for legal services under our Act is provided in Ark. Code Ann. §11-9-715 (Repl. 2002). The relevant portions are set out below:

> (a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.
>
> (B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. <u>Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section.</u>
>
> (2)(A) Whenever the Commission finds that a claim against the Treasurer of State, as custodian of the Second Injury Trust Fund or as custodian of the Death and Permanent Total Disability Trust Fund, has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid from the Fund, in addition to compensation awarded, and the fees shall be allowed only on the amount of compensation controverted and awarded from the Fund.
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> (B)(i) In all other cases whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: one-half (½) by the employer or carrier in

addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

(iii) However, the Commission shall not find that a claim has been controverted if the claimant or his or her representative has withheld from the respondent during the period of time allotted for the respondent to determine its position any medical information in his or her possession which substantiates the claim.

(C)(i) Whenever the Commission finds that a claim has not been controverted but further finds that *bona fide* legal services have been rendered in respect to the claim, then the Commission shall direct the payment of the fees by the injured employee or dependents of a deceased employee out of the compensation awarded.

(ii) In determining the amount of fees when a claim is not controverted, the Commission shall use its discretion in awarding an attorney's fee not to exceed twenty-five percent (25%) and in so doing shall take into consideration the nature, length, and complexity of the services performed and the benefits resulting to the compensation beneficiaries.

(3) In any case where attorney's fees are allowed by the Commission, the limitations expressed in the first sentence herein shall apply.

(4) Medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection. (Emphasis supplied)

This is a case of first impression. While I agree with many of the statements contained in the parties' joint brief, their ultimate conclusions are simply inconsistent with the clear and unambiguous language of the statute

addressing fees for legal services. First, fees for legal services rendered in respect to workers' compensation claims shall not be valid unless approved by the Workers' Compensation Commission. Further, this Commission has the authority, or jurisdiction, to award attorney's fees on medical benefits or services under limited circumstances. The Act clearly states that attorney's fees shall not be awarded on medical benefits or services except as provided in Subdivision (a)(4). That Subdivision states:

> (4) Medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection.

It is the position of the parties that the claimant's attorney has the absolute right to "charge a reasonable fee to the medical provider as a cost of collection." There is no such absolute right under our Act. Attorney's fees on medical benefits are clearly a matter of contract. Medical providers are not obligated to contract with the claimant's attorney to recover bills for services, but, rather, may voluntarily contract with claimant's attorney. Only after a contract is entered may the claimant's attorney charge a reasonable fee as a cost of collection. It must be noted that "and" is a coordinating conjunction in Subdivision (a)(4). Coordinating conjunctions are meant to join logically comparable elements, without turning one element into a modifier of the other. *See, The Random House Handbook*, 4th Ed. The legislature did not use the

conjunction "or" which indicates an alternative, "voluntarily contract or charge a reasonable fee." Again, the conjunction "and" is used as a word to express a logical modification, consequence, antithesis, or supplementary explanation. The claimant's attorney may charge a reasonable fee only if a medical provider voluntarily contracts with the claimant's attorney to recover the bill. The medical providers are not a party to this claim. The claimant and respondents have no right to agree either to the reasonableness of the requested fee or the existence of a contract. The parties herein have jointly determined that a twenty-five percent (25%) fee is reasonable. Again, contract and reasonable fee are logically comparable elements. The second half of the sentence in Subdivision (a)(4) modifies the potential contract. Claimant's attorneys may only contract for a reasonable fee. The twenty-five percent (25%) attorney's fee asserted under our Act only applies to indemnity benefits and not to medical benefits, one-half (½) of which is the responsibility of the respondents and the other half the responsibility of the claimant out of benefits payable to him.

The Act further states that attorney's fee shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded. When respondents controvert a claim, they know the risks of such controversion, specifically, payment of one-half (½) of the attorney's fee. Medical care providers render services without benefit of knowing the risks of subsequent controversion by the respondents. Providers are given the right to

contract in such circumstances. Valid arguments can be made that medical providers provide services in anticipation of being paid upon eventual resolution of the parties to litigation. Medical providers are not parties. Medical providers have legal and ethical responsibilities to provide medical care without immediate concern as to the party responsible for the services. The medical providers may await eventual resolution, with the expectation of being paid, or they may voluntarily contract with the attorney for the claimant or the attorney of their own choice to recover disputed bills. Clearly, the term "may voluntarily contract" gives medical providers the option of contracting with the claimant's attorney. Further, the term "contract" denotes an agreement between parties. In the instant case, there is no agreement between the medical provider and the claimant's attorney. An agreement between the claimant's attorney and respondents is not binding on medical providers.

I further disagree with the parties' argument that A.C.A. §16-22-304 creates an attorney's fee lien on medical benefits. In support of their position, the parties attached letters from two (2) individuals closely associated with workers' compensation legislation, the first from the Honorable Bill H. Walmsley and the second from the Honorable Mark L. Martin.

First, it must be pointed out that the creation of an attorney's lien applies from and after the service upon the "adverse party" in a cause of action. Medical providers are not adverse parties, but, rather unwilling participants in

litigation that they did not create. As previously pointed out, the only party that has controverted benefits in this case is the respondents.

It must be further noted that in the letters attached to the parties' joint brief, at least one author acknowledged that he was not a party of the negotiating team that negotiated the change in the Amended Act. Accordingly, he would be unable to give any input on the legislative intent. Further, opinions are not relevant to the issue. As previously stated, it appears that the legislation is clear and unambiguous. In summary, the parties cannot create an obligation on a third-party without its agreement. Attorney's fees on medical benefits are a matter of contract.

Since the creation of the Workers' Compensation Act in 1949, only the parties to the litigation have been responsible for attorney's fees. Prior to Act 290 of 1986, respondents were responsible for all controverted attorney's fees. The fee schedule did not change in 1986; however, claimants became responsible for one-half (½) of the fee out of benefits payable to them. Coleman vs. Holiday Inn, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc., Arkansas Workers' Compensation Claim #E019760, (March 5, 1992). The fees were only allowed on compensation controverted and awarded. Act 1015 of 2001 substantially increased the fee schedule for attorney's fees to twenty-five percent (25%) for indemnity benefits only.

Again, claimants and respondents were equally responsible for claimants' attorney's fees. The amendment further provided that the fees only applied to indemnity benefits and that attorney's fees shall not be awarded on medical benefits except as provided by subdivision (a)(4). It can rationally be argued that the amendment increasing the attorney's fee on indemnity benefits only was the compromise reached by labor and management while still providing claimants' attorneys an opportunity to contract with medical providers to recover disputed bills. The medical providers may either voluntarily contract with the claimant's attorney or elect alternative means of collection.

Accordingly, the motion of claimant's attorney requesting a twenty-five percent (25%) attorney's fee, to be paid by the medical providers, is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM
Chief Administrative Law Judge