

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E603265

RONNY L. BRYAN, EMPLOYEE

CLAIMANT

**GEORGIA-PACIFIC CORP.,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

SEDGWICK CLAIMS MGMT., INC., TPA

RESPONDENT NO. 1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT NO. 2

OPINION FILED AUGUST 25, 2004

This matter comes before Administrative Law Judge J. Mark White on the record.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by Mr. Mark Alan Peoples, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

Pursuant to the Prehearing Order filed May 17, 2004, the parties agreed to submit consideration of this claim on a stipulated record. The record is comprised of the Prehearing Order filed May 17, 2004; the exhibits submitted by respondent no. 1 on April 8, 2004, and by the claimant on June 1, 2004; correspondence from the parties received between June 3, 2004, and July 6, 2004; the briefs submitted by respondent no. 1 and no. 2; and the payout sheet submitted by respondent no. 1 on

June 18, 2004.

The parties stipulated to the facts as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 23, 1996, the claimant sustained a compensable injury which respondent no. 1 accepted as compensable and paid benefits.
3. The claimant earned sufficient wages to be entitled to a compensation rate of \$337 for total disability benefits and \$253 for permanent partial disability benefits.
4. The claimant underwent surgery, after which he was assigned an anatomical impairment rating of 10% to the body as a whole by Dr. Fletcher.
5. Respondent no. 1 accepted and paid the 10% impairment rating from February 14, 1997, through December 25, 1997, totaling \$11,385.
6. The claimant returned to work after his first surgery and continued to be fully employed.
7. The claimant underwent a second surgery, after which he was assigned a second anatomical impairment rating of 5% to the body as a whole.
8. Respondent no. 1 accepted and paid the 5% impairment rating from January 5, 1999, through May 30, 1999, totaling \$5,692.50.
9. Respondent no. 1 further accepted wage-loss disability in the amount of 15% to the body as a whole, and paid benefits for such from October 11, 1999, to January 23, 2002, totaling \$17,077.50.
10. The claimant was found to be permanently totally disabled as of January 1, 1999, by a prior administrative law judge opinion entered November 7, 2002, and affirmed by the Full Commission on

November 19, 2003, which decision is *res judicata*.

11. Respondent no. 1 notified respondent no. 2 of this claim by the filing of a form AR-D on February 6, 2004.
12. On February 19, 2004, respondent no. 1 paid the claimant a net sum of \$25,646.63, calculated as \$40,845 for permanent total disability benefits owed, minus \$18,749.67 for the claimant's portion of attorney's fees, plus \$3,551.30 in interest.
13. On February 19, 2004, respondent no. 1 paid the claimant's attorney's fees in the amount of \$37,499.35, of which \$18,749.67 was deducted from the claimant's benefits as noted in the above stipulation.
14. From February 23, 2004, through May 6, 2004, respondent no. 1 paid continuing permanent benefits to the claimant in the amount of \$3,639.61.
15. This claim is governed by A.W.C.C. Rule 28 as it read prior to the amendments made effective January 1, 2004.

The parties agreed that the issues to be presented were whether the 10% anatomical impairment rating paid in 1997 should be included in calculating whether respondent no. 1 has reached the \$75,000 statutory limit established by Ark. Code Ann. § 11-9-502; whether respondent no. 1 or respondent no. 2 is responsible for payment to the claimant of permanent benefits in excess of \$75,000 incurred prior to 90 days after notice of the claim was given to respondent no. 2 per Rule 28; the extent of the remaining liability of respondent no. 1 and respondent no. 2 to the claimant, if any; and whether respondent no. 1 is entitled to reimbursement from respondent no. 2 for amounts paid beyond the statutory limit of Ark. Code Ann. §

11-9-502.

The claimant contends that there remain unpaid benefits totaling \$12,932.48 which he is entitled to and should be ordered paid; and that he is entitled to be paid permanent disability benefits at the rate of \$337 per week, and that as of April 19, 2004, he was still being paid at the incorrect rate of \$253 per week.

Respondent no. 1, Georgia-Pacific Corp., contends that its liability for permanent benefits is capped at \$75,000 by Ark. Code Ann. § 11-9-502; that any and all permanent benefits to which the claimant is entitled in excess of this amount are the responsibility of respondent no. 2, the Death & Permanent Total Disability Trust Fund; that it is entitled to reimbursement from the Trust Fund for all payments made to the claimant for permanent benefits in excess of \$75,000; and that if Rule 28 requires any payment of permanent benefits in excess of \$75,000, it is invalid and beyond the Commission's authority in that it conflicts with Ark. Code Ann. § 11-9-502.

Respondent no. 2, the Death & Permanent Total Disability Trust Fund, contends that respondent no. 1, Georgia-Pacific, is still responsible for payment of \$7,745.39 in permanent total disability benefits to the claimant in order to satisfy its entire obligation for said benefits; that the pay records of Georgia-Pacific reflect total payment of \$67,254.61 in permanent total disability indemnity benefits have been

paid to the claimant as of May 6, 2004; that Georgia-Pacific should not be allowed to credit benefits paid to the claimant which represent the medically assigned anatomical impairment rating of 10% to the body as a whole, as claimant returned to work following the assignment of this impairment rating and continued to be fully employed until March, 1998; that Georgia-Pacific has paid benefits to the claimant since 1999 at the wrong compensation rate, that is, at the permanent partial rate rather than the total disability rate; that Georgia-Pacific should be granted credit towards the \$75,000 limit only for payment of the following benefits: (a) those representing the 5% anatomical impairment rating assigned as a result of the claimant's second surgery, amounting to \$5,692.50; (b) those representing the 15% wage-loss benefits accepted by Georgia-Pacific, amounting to \$17,077.50; (c) those representing the claimant's portion of attorney's fees, totaling \$18,749.67; (d) the payment of \$25,646.63 made February 19, 2004; and (e) weekly benefit payments made after February, 19, 2004; that no portion of the interest on the award can be, nor should it be, credited toward Georgia-Pacific's statutory obligation for weekly benefits; and that Georgia-Pacific should be ordered to continue paying benefits to claimant until the statutory obligation has been met.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include briefs, medical reports, documents and other matters properly before the Commission, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The decision of the Court of Appeals in *Death & Perm. Total Disab. Fund v. Whirlpool*, 39 Ark. App. 62, 837 S.W.2d 293 (1992), insofar as it may be construed to allow the counting of permanent partial disability payments towards the \$75,000 threshold established by Ark. Code Ann. § 11-9-502(b), was overruled by the Supreme Court in *Nelson v. Timberline Int'l, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998).
4. Georgia Pacific may not take a credit towards the \$75,000 Trust Fund threshold of Ark. Code Ann. § 11-9-502(b) for permanent partial disability benefits paid prior to the claimant's becoming permanently and totally disabled.

5. As of May 6, 2004, Georgia Pacific's remaining liability to the claimant was \$7,745.39.
6. Georgia Pacific is entitled to no reimbursement from the Trust Fund.

DISCUSSION

I. History

On February 23, 1996, the claimant sustained a compensable injury to his back while employed by respondent no. 1, Georgia-Pacific Corporation (hereinafter "Georgia Pacific"). He underwent his first back surgery and then returned to work. Some time later, he had a second back surgery but did not return to work. The Full Commission subsequently issued an Opinion finding that as of January 1, 1999, the claimant was permanently and totally disabled. That Opinion is now final and is *res judicata* to the present matter.

After his first back surgery, the claimant was assigned an impairment rating of 10% to the body as a whole, which rating Georgia Pacific accepted and paid from February 14, 1997, through December 25, 1997, totaling \$11,385. After the second back surgery, the claimant was assigned another impairment rating, this time of 5% to the body as a whole. Georgia Pacific again accepted and paid the rating, from January 5, 1999, through May 30, 1999, totaling \$5,692.50. Georgia Pacific

controverted, though, the claimant's entitlement to permanent total disability benefits. It should be noted that the 10% impairment rating was paid before the claimant became permanently and totally disabled, while the second rating was paid after – just a few days after the date on which the claimant became permanently totally disabled, January 1, 1999. In addition to the 5% rating, Georgia Pacific also accepted wage loss benefits of 15%, paid from October 11, 1999, to January 23, 2002, totaling \$17,077.50.

The Commission's decision finding the claimant to be permanently totally disabled was filed November 19, 2003. In response, Georgia Pacific apparently recharacterized the 5% impairment rating and 15% wage loss paid from 1999 through 2002 as permanent total disability benefits. Georgia Pacific then paid an additional \$40,845, plus interest, to make up the balance of the permanent total disability benefits incurred but not paid prior to the Commission's Opinion. The claimant's attorney's fees were deducted from this amount.

Georgia Pacific gave notice of the claimant's permanent total disability status to the Death & Permanent Total Disability Trust Fund (hereinafter "Trust Fund") by the filing of a form AR-D on February 6, 2004, as required by A.W.C.C. Rule 28. On that form, Georgia Pacific asserted that it had already surpassed the \$75,000 threshold for Trust Fund liability established by Ark. Code Ann. § 11-9-502(b). It

reached this conclusion by counting towards that \$75,000 threshold all payments made for permanent benefits – including the 10% rating paid prior to the time the claimant became permanently totally disabled. In his letter accompanying the Form AR-D, Georgia Pacific’s attorney asserted that the Trust Fund’s liability would arise on February 23, 2004 – the date by which Georgia Pacific would have paid out \$75,000, by their calculations as outlined above.

The Trust Fund disputed Georgia Pacific’s calculations, raising two specific objections. First, the Trust Fund asserted that it was liable for no benefits until at least 90 days had passed from the giving of notice via the AR-D, citing Rule 28. The Trust Fund contended that Georgia Pacific was liable for payment of benefits during those 90 days, even if the total benefits paid exceeded \$75,000.

Second, the Trust Fund contended that any payments made by Georgia Pacific for permanent partial disability benefits prior to the claimant becoming permanently totally disabled, could not be counted towards the \$75,000 threshold. Given this objection, the Trust Fund calculated that as of May 6, 2004, Georgia Pacific had paid only \$67,254.61 towards the \$75,000 threshold.

Georgia Pacific continued making payments to the claimant through June, 2004, but filed a request for a hearing asking that the Commission order the Trust Fund to reimburse it for all funds paid above and beyond \$75,000.

II. Adjudication

When a claimant is permanently totally disabled, his employer or its insurance carrier is required to pay the first \$75,000 of weekly benefits for death or permanent total disability; all benefits in excess of this \$75,000 threshold are to be paid by the Death and Permanent Total Disability Trust Fund. ARK. CODE ANN. § 11-9-502(b). The employer or carrier is required to give notice to the Trust Fund at least 90 days prior to the completion of payments of the first \$75,000; failure to give notice constitutes a waiver of Trust Fund liability until such time as the notice requirement is met. A.W.C.C. Rule 28 (April 1, 1989). Though Rule 28 was amended effective January 1 of this year, the parties agreed that the prior version of Rule 28 was controlling in the present matter.

Georgia Pacific contends that in determining whether it reached the \$75,000 threshold, it should be given credit for the \$11,385 it paid to the claimant on the 10% impairment rating assigned two years before the claimant became permanently totally disabled. Georgia-Pacific cites no statutory authority in support of its contention, only the holding of the Court of Appeals in *Death & Perm. Total Disab. Fund v. Whirlpool*, 39 Ark. App. 62, 837 S.W.2d 293 (1992). The Trust Fund contends that *Whirlpool* was overruled by *Nelson v. Timberline Int'l, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998). I conclude that Georgia Pacific's reliance on *Whirlpool, supra*, is

misplaced because the reasoning employed by the *Whirlpool* Court is no longer valid.

The *Whirlpool* Court held as follows:

Finally, the appellant contends that permanent partial disability cannot be credited against the employer's obligation under Ark. Code Ann. 11-9-502 (b)(1) because that statute permits credit only for benefits for "death or permanent total disability." (Emphasis supplied). However, we think that the applicable provision regarding benefits which may be credited is found in Ark. Stat. Ann. 81-1313 (f)(1), which permits the weekly benefits paid for the prior injury to be credited in determining whether the employer's statutory limit of liability has been met. The "weekly benefits" referred to in the statute do not include temporary disability payments, and are limited to benefits for permanent disability. See *Sparks Regional Med. Center v. Death and Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987). Given that only permanent disability benefits may be credited, we must hold that 81-1313 (f)(1) permits credit for permanent partial disability payments.

Death & Perm. Total Disab. Fund v. Whirlpool, supra.

Let us set aside the fact that *Whirlpool* is not directly on point to the instant case, in that the section cited in *Whirlpool* – Ark. Stat. Ann. § 81-1313 (f)(1) – by its terms applies to *second* injuries sustained with the same employer, while the instant case concerns only a *single* injury. Even ignoring this difficulty, the reasoning of the Court can no longer stand. When the Arkansas Code Annotated was codified in

1987 to replace the Arkansas Statutes Annotated, Ark. Stat. Ann. § 81-1313 was erroneously omitted from the Code. The *Whirlpool* Court held that even though the statute was omitted from the Code, the statute was still the controlling law, citing Ark. Code Ann. § 1-2-103(b). The Court then concluded that permanent partial disability benefits could be counted towards the threshold, citing Ark. Stat. Ann. § 81-1313(f)(1). The Supreme Court, however, ruled in *Timberline, supra*, that Ark. Stat. Ann. § 81-1313 (f)(1) was implicitly repealed by Act 290 of 1981. The statute relied upon by the *Whirlpool* Court in its 1992 decision was actually repealed in 1981.

Though the Supreme Court did not explicitly state its intent to overrule *Whirlpool*, it is clear that its holding implicitly overrules this particular finding of *Whirlpool*. The *Whirlpool* decision is premised on a statute that is now held to have been repealed. The *Whirlpool* Court cited Ark. Stat. Ann. § 81-1313 (f)(1) as the only justification for counting permanent partial disability benefits towards the \$75,000 threshold; if that statute has been repealed – which it has, per *Timberline* – then there is no remaining statutory justification for counting permanent partial disability benefits towards the \$75,000 threshold. I conclude that the holding of *Whirlpool* cited by Georgia Pacific has indeed been overruled by *Timberline*. I note that the Full Commission implicitly reached the same conclusion in a somewhat similar matter. *Birtcher v. Ark. Highway and Transportation Dep't.*, A.W.C.C. E108137 (Oct. 1, 1998).

Georgia Pacific has cited no other authority for its position, but even so it would appear prudent to review the controlling statutory language. In doing so, I am mindful of the fact that Act 796 of 1993 requires the Commission and the courts to strictly construe the provisions of the Workers' Compensation Act. ARK. CODE ANN. § 11-9-704(c)(3). Strict construction is narrow construction, requiring that nothing be taken as intended that is not clearly expressed and that the plain meaning of the language be employed. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003). Neither the Commission nor the courts may broaden or narrow the scope of the Workers' Compensation Act; such authority is reserved solely to the Legislature. ARK. CODE ANN. § 11-9-1001.

The relevant statutory language provides:

(b)(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars (\$75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.

(2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars (\$75,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.

ARK. CODE ANN. § 11-9-502.

Georgia Pacific's contention hinges on the definition of the phrase "weekly benefits." Section (b)(1) clearly identifies what benefits the Legislature intended to be considered: "benefits for death or permanent total disability." Nothing in the statute gives reason to think this phrase encompasses permanent partial disability benefits; to conclude otherwise would broaden the scope of the statute beyond its plain meaning. By including the phrase "benefits for death or permanent total disability," the Legislature has plainly expressed its intent that the only benefits to be counted towards the \$75,000 threshold are "benefits for death or permanent total disability." It is well settled that a statute "must be construed so that no word is left void or superfluous and in such a way that meaning and effect is given to every word therein." *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330, 47 S.W.3d 227 (2001). To hold that "weekly benefits" as used in (b)(1) encompasses permanent partial disability benefits would require me to ignore the phrase "benefits for death or permanent total disability." This I may not do.

Therefore, given the plain statement of the Legislature's intent in (b)(1), Georgia Pacific effectively contends that "weekly benefits" has a different meaning in (b)(1) than in (b)(2). Admittedly, the phrase "weekly benefits" is not modified by the phrase "for death or permanent total disability" in (b)(2) as it is in (b)(1). But these two sections are two sides of the same coin, in that they both describe the exact

same threshold; they cannot be reasonably divided into two separate and disparate meanings. Given the Legislature's use of the phrase "benefits for death or permanent total disability" in (b)(1), the only reasonable interpretation of "weekly benefits" in (b)(2) is that it is a reference back to (b)(1), and that it too means only benefits for death or permanent total disability. I conclude that there is no statutory or precedential authority to allow Georgia Pacific credit towards the \$75,000 Trust Fund threshold for permanent partial disability benefits paid prior to the claimant's becoming permanently totally disabled.

The Full Commission held that the claimant became permanently totally disabled as of January 1, 1999. The parties have stipulated that from January 1, 1999, through May 6, 2004, Georgia-Pacific paid permanent total disability benefits to the claimant in the amount of \$67,254.61. Specifically, Georgia Pacific paid:

1. \$5,692.50 from January 5 through May 30, 1999;
2. \$17,077.50 from October 11, 1999, through January 23, 2002;
3. \$40,845 on February 19, 2004 (from which attorney's fees were deducted); and
4. \$3,639.61 from February 23 through May 6, 2004.

The Trust Fund's liability arises only upon the payment of \$75,000 in weekly benefits. Therefore, I find by a preponderance of the evidence that as of May 6, 2004,

Georgia Pacific's remaining liability to the claimant was \$7,745.39.

Because I so find, it follows *a priori* that Georgia Pacific has not paid permanent benefits in excess of \$75,000 prior to 90 days after notice was given to the Trust Fund. Therefore, the remaining issues identified by the parties are moot and need not be considered further. Because Georgia Pacific had not paid \$75,000 in death or permanent total disability benefits prior to 90 days after notice was given to the Trust Fund, I specifically conclude that Georgia Pacific is entitled to no reimbursement from the Trust Fund.

Finally, I note that the parties agree that Georgia Pacific paid the claimant at the wrong compensation rate for a time. Nonetheless, the parties did not ask or agree to make underpayment of benefits an issue. Therefore, I do not consider the underpayment in establishing Georgia Pacific's liability.

AWARD

As of May 6, 2004, Georgia Pacific's remaining liability to the claimant was \$7,745.39. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge