

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113089

RUSTY CRAIG		CLAIMANT
BEATY LOGGING UNINSURED	NO. 1	RESPONDENT
BEAN LUMBER COMPANY, SELF INSURED	NO. 2	RESPONDENT

OPINION FILED DECEMBER 6, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by ROBERT BLATT, Attorney, Fort Smith, Arkansas.

Respondents represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 26, 2004, in Fort Smith, Arkansas. The sole purpose of this hearing was to decide whether the respondents are liable for the penalty provided by Ark. Code Ann. §11-9-802(c) on any installments of benefits awarded under a Full Commission Opinion dated June 4, 2004. Due to the limited scope of this hearing, no pre-hearing order was entered.

In regard to this issue, the claimant contends that the respondents owe this penalty on certain installments of the compensation awarded. The respondents deny that they owe this penalty on any of the compensation awarded.

DISCUSSION

_____ On June 4, 2004, the Full Commission entered an Opinion that awarded the claimant additional permanent partial disability benefits for permanent "functional disability" (loss of wage earning capacity) in the amount of 25% to the body as a whole. This Opinion further directed that all accrued compensation was to be paid in a lump sum without discount. The appeal time on this Opinion ran on or about July 7, 2004. At that time, the Full Commission's Opinion become final.

It is well recognized that any accrued benefits, awarded under an Opinion, become due on the date the Opinion becomes final. If these accrued benefits are not paid within 15 days of the

date the Opinion becomes final, the penalty provided by Ark. Code Ann. § 11-9-802 would attach.

However, in the present case, the respondents were still paying permanent partial disability benefits for the claimant's permanent physical impairment (25% to the body as a whole) at the time the Commission's Opinion was entered. The respondent continued to pay these benefits through July 6, 2004. Thus, the benefits for the additional 25% permanent partial disability, which was awarded by the Commission for loss of wage earning capacity, did not begin to accrue until July 7, 2004. Coincidentally, this was approximately the same date that the Commission's Opinion became final.

Ark. Code Ann. § 11-9-802(a) provides that compensation is to be paid in two week installments. Therefore, the first installment of the additional permanent partial disability benefits, for loss of wage earning capacity, become due on July 20, 2004 (July 7 through July 13 representing 7 days and July 13 through July 20 representing 7 days). Under subsection (c), this installment of compensation must actually have been paid to the claimant (i.e. received by him by August 4, 2004) 15 days from July 13, 2004, which would have been the 15th day following July 20, 2004.

The burden rests upon the claimant to prove that he did not actually receive payment within that allotted time. To meet this burden, the claimant has offered his own testimony and correspondence from the claims manager of the respondent's TPA, Mr. George Goode.

The claimant could not identify the exact date upon which he received this payment. However, he testified that he received this payment "a little over a month" following his receipt of the last payment of compensation for permanent physical impairment.

From Mr. Goode's letter, it appears that it is the respondent's regular procedure to "issue" checks only after the compensation for that period has actually accrued (rather than to issue them on or before the date that the benefits became due). The three week period of additional compensation, which was awarded by the Commission would have accrued on July 26, 2004. However, Mr. Goode's letter indicates that the check for this period was not "issued" until July 28, 2004. The next two week installment would accrue on August 10, 2004, but the check would not

be “issued” until August 12, 2004.

Thus, the claimant most likely did not receive his check for the last installment of compensation for his permanent impairment until sometime after July 6, 2004. If he did not receive his next check until a little over a month later, this would have been clearly after August 4, 2004. I find the claimant’s testimony concerning his receipt of this check to be credible.

This does not mean that I have any doubts of the veracity of Mr. Goode. While I am somewhat puzzled as to why the respondent waited for three weeks of compensation to accrue, I believe that a check was “issued” on July 28, 2004 for this period (as stated by Mr. Goode in his letter of August 9, 2004). However, his letter does not indicate when this check was mailed and clearly does not indicate when it was actually received by the claimant. The respondent clearly waited until August 9, 2004, before mailing the claimant’s attorney the fees awarded him under the same Full Commission’s Opinion. There is no reason that the respondent would be any more prompt in regard to the compensation awarded to the claimant under this Opinion.

One would also expect that, by the time of the hearing in this case (if not substantially prior thereto), the respondent would have received the return of the check they “issued” to the claimant for the payment of this first installment. This return would show the date upon which this check was actually in the claimant’s possession and negotiated by him. However, the respondent has not seen fit to refute the claimant’s testimony by offering this check. While the claimant clearly bears the burden of proof in establishing the late payment of first installment of compensation, he has met this burden by his credible testimony, which in no way has been refuted by the respondent.

After consideration of all the evidence presented, it is my opinion that the respondents failed to pay the first two week installment of compensation, awarded by the full Commission in its Opinion of June 4, 2004, within 15 days after it became due. Thus, the respondent is also liable for the 20% penalty, provided by Ark. Code Ann. § 11-9-802(c), on this two week installment of compensation of \$308.00 (i.e. \$61.60). In addition, the claimant’s attorney would be entitled to a fee on the controverted penalty or \$15.40. One-half of this fee is the obligation of the respondent,

in addition to his penalty. The remaining one-half of this fee is the obligation of the claimant and is to be taken out of this penalty.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 16, 2001, the relationship of employee-statutory self insured employer-third party administrator existed between the claimant, Bean Lumber Company and Compensation Managers, Inc.
3. On November 16, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$171.00 for total disability and \$154.00 for permanent partial disability.
4. On November 16, 2001, the claimant sustained various compensable injuries to his head, neck, back, and arm.
5. On June 4, 2004, the Full Commission issued an Opinion awarding the claimant various benefits, including additional permanent partial disability benefits for permanent "functional" disability (loss of wage earning capacity) in the amount of 25% to the body as a whole. This Opinion also provided that all "accrued" benefits were immediately payable in a lump sum without discount. This Opinion became final on or about July 7, 2004.
6. The additional permanent partial disability benefits awarded by the Full Commission, in its Opinion of July 4, 2004, began to accrue on July 7, 2004. The first two week period of these additional permanent partial disability benefits accrued and became due on July 20, 2004.
7. The claimant has proven by the greater weight of the credible evidence that the payment of the first two week installment of this compensation was not actually made by the respondent within 15 days after it becomes due. Pursuant to Ark. Code Ann. §11-9-802(c), the respondent is liable for a 20% penalty on this first two

week installment of compensation. This penalty totals \$61.60.

8. The respondent has controverted the claimant's entitlement to the penalty provided by Ark. Code Ann. §11-9-802(c).
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted penalty herein awarded, which would total \$15.40.

ORDER

The respondent is liable to the claimant for the 20% penalty, provided by Ark. Code Ann. §11-9-802(c) on the first two week installment of compensation awarded under the Full Commission Opinion of June 4, 2004. This penalty totals \$61.60.

The respondent shall be liable to the claimant's attorney for the maximum statutory attorney's fee on this controverted penalty. One-half of this fee, or \$7.70 is the obligation of the respondent in addition to the penalty. The remaining one-half of this fee, or \$7.70 is to be withheld by the respondent from this penalty.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge