

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311610

PABLO GONZALEZ (DEC'D), EMPLOYEE	CLAIMANT
D. H. FOREST LOGGING, LLC, EMPLOYER	RESPONDENT NO. 1
SOUTHEASTERN CLAIMS SERVICES, TPA	RESPONDENT NO. 1
DEATH & PERM. TOTAL DIS. TRUST FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 28, 2004

Hearing before Administrative Law Judge J. Mark White on August 11, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 11, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on July 7, 2004, and a Prehearing Order was entered that same day. A copy of the July 7, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the

Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including October 28, 2003; that on October 28, 2003, the claimant sustained a compensable fatal injury; that respondents accepted the October 28, 2003, injury as compensable; and that the claimant is survived by his wife and five dependent children, all of whom are residents of Mexico. At the hearing, the parties further stipulated that the claimant earned an average weekly wage of \$650, entitling his estate to a compensation rate of \$433; and that the claimant's dependents are as follows: his widow, Ramira Sanchez, age 46; Issac Gonzalez Tinajaro, born October 21, 1987; Victorio Gonzalez Tinajaro, born January 11, 1989; Faustino Gonzalez Tinajaro, born September 18, 1991; Carolina Gonzalez Tinajaro, born February 19, 1994; and Fidelina Gonzalez Tinajaro, born October 31, 1995.

The parties agreed that the issues to be presented were whether the respondent-carrier should be permitted to pay the claimant's heirs a lump-sum benefit pursuant to Ark. Code Ann. § 11-9-111(b); and controversion and attorney's fees.

The claimant contends that Ark. Code Ann. § 11-9-111(b) is discretionary, not

mandatory, and the Commission should not deprive the claimant's widow and minor children of half their future benefits; that Ark. Code Ann. § 11-9-111(b) is unconstitutional as a violation of the equal protection rights under both the Arkansas and United States constitutions; that this motion may apply only to future benefits and not past benefits, and that no benefits have been paid to date; and that the claimant is entitled to attorney's fees based on the benefits controverted herein.

Respondents No. 1 contend that they should be permitted to pay the claimant's dependents \$37,500 in one lump sum pursuant to Ark. Code Ann. § 11-9-111(b); and that the Death and Permanent Total Disability Trust Fund should initiate benefits when the carrier's maximum limit would have been paid out, or approximately 3.93 years from the date of death.

Respondent No. 2 contends that it will never pay benefits if the respondent-carrier is allowed to pay a lump-sum benefit of only \$37,500, because the Fund's liability arises only when the carrier has paid at least \$75,000 of death benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, 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. Ark. Code Ann. § 11-9-111(b) does not allow a respondent to discharge its obligation to a deceased claimant's dependents by payment of one-half of the \$75,000 benefit limit established by Ark. Code Ann. § 11-9-502(b).
4. The respondents' motion that they be allowed to discharge their obligation to the claimant's dependents by a lump-sum payment of \$37,500 is denied.
5. Respondent No. 1 has controverted the claimant's dependents' entitlement to indemnity benefits of \$37,500.
6. Respondent No. 2, the Death & Permanent Total Disability Trust Fund, has controverted no benefits herein.

DISCUSSION

The claimant lost his life in a work accident on October 28, 2003. The respondents accepted the injury and death as compensable and paid funeral benefits. However, the respondents encountered difficulties in paying death benefits to the dependents, for the claimant was a native of Mexico and his dependents are all residents of Mexico. Respondents ask that they be allowed to discharge their obligation to these dependents by a lump-sum payment of \$37,500 – one-half of the maximum benefit the carrier owes as limited by Ark. Code Ann. § 11-9-502(b). Death benefits in excess of \$75,000 are the liability of the Death & Permanent Total Disability Trust Fund. ARK. CODE ANN. § 11-9-502(b)(2).

The respondents cite Ark. Code Ann. § 11-9-111 as the statutory authority for this request. It provides:

(a) Compensation to alien nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that alien nonresident dependents in any foreign country shall be limited to the surviving wife or children or, if there is no surviving wife or children, to the surviving father or mother whom the employee has supported, either wholly or in part, for the period of one (1) year prior to the date of the injury.

(b) Upon its own motion or upon application of an interested party, the Workers' Compensation Commission may order the payment of all future compensation to be paid in one (1) lump sum, which

shall be equal to one-half (½) of the face value of all future installments of compensation.

ARK. CODE ANN. § 11-9-111(b).

Arkansas law is not unique in commuting and limiting the workers' compensation benefits available to nonresident alien dependents. Some states bar nonresident aliens from benefits altogether, while other states allow for the limitation or commutation of such benefits. 5 Larson, *Worker's Compensation Law* § 97.07[1]. These statutory provisions are premised on "the awkward problem of proof and continuing administration that is unavoidably present in these cases." *Id.* At least two states have held these provisions to be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See *DeAyala v. Florida Farm Bureau*, 543 So.2d 204 (Fla. 1989); *Jurado v. Popejoy Const. Co.*, 853 P.2d 669 (Kan. 1993). Other states have upheld the provisions in the face of similar challenges. See *Pedrazza v. Sid Fleming Constr., Inc.*, 607 P.2d 597 (N.M. 1980); *Jalifi v. Industrial Comm'n*, 644 P.2d 1319 (Ariz. Ct. App. 1982); *Alvarez Martinez v. Industrial Comm'n*, 720 P.2d 416 (Utah 1986); *Barge-Wagener Constr. Co. v. Morales*, 429 S.E.2d 671 (Ga. 1993); *Jarabe v. Industrial Comm'n*, 666 N.E.2d 1 (Ill. 1996). The distinction between these two conflicting lines of cases lies not in the particulars of the limitation, bar or commutation imposed by law – e.g., whether the bar is absolute, or a particular monetary figure, or a percentage. Rather, the

distinction lies in whether the state views the rights of the dependents as derivative from the deceased claimant's rights, or separate and apart from the claimant's rights. If the former, the claimant as a *resident* alien is within the jurisdiction of the Equal Protection Clause, *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382 (1982), and the dependents are entitled to the same constitutional rights as the claimant. See *Jurado v. Popejoy Const. Co.*, *supra*. If the latter, the dependents as *non-resident* aliens may not claim the same constitutional rights, for the Equal Protection Clause is territorial and applies only to those persons within the territorial jurisdiction of the United States. *Jalifi v. Industrial Comm'n*, *supra* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064 (1886), and *Johnson v. Eisentrager*, 339 U.S. 763, 70 S.Ct. 936 (1950)).

As we approach Arkansas' specific law, it should first be noted that Arkansas' statute is, by its plain terms, discretionary – the Commission “may” order the payment of a lump sum. In making this observation, I am mindful of the well-established rule of statutory interpretation that “may” should be construed as “shall” when the context of the statute so requires, or where the thing that “may” be performed is the essence of the thing authorized by statute. *Campbell v. City of Cherokee Village West*, 333 Ark. 310, 969 S.W.2d 179 (1998); *McElroy v. Grisham*, 306 Ark. 4, 810 S.W.2d 933 (1991). Nonetheless, the Commission is required 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). I conclude that strict construction bars my construing “may” as “shall” in the statute herein. *But cf. Schueller v. Schueller*, No. CA03-486 (Ark. App. June 2, 2004) (Court applied “may” v. “shall” analysis to different statute despite strict construction, but ultimately construed the statute in question as discretionary). I also note that a parallel provision in prior law provided that the Commission “shall” commute all future installments at the carrier’s request, suggesting that the current law was intentionally modified to give the Commission discretion in this matter. Act 319 of 1939, § 15.

With that said, the respondents’ motion must be denied, for the statute does not allow what the respondents seek. The respondents seek an order allowing them to satisfy their total obligation to the claimant’s dependants by a lump-sum payment of \$37,500 – an amount equal to one-half of the respondents’ \$75,000 maximum statutory obligation for death benefits. But this is not what § 11-9-111(b) allows; it instead allows the payment of a lump sum equal to “one-half (½) of the face value of all future installments of compensation.” ARK. CODE ANN. § 11-9-111(b). Section 11-9-111 says nothing whatsoever in regards to allowing a lump-sum payment of

one-half of the carrier's statutory obligation, nor does it limit the phrase "future installments of compensation" to mean only those installments owed by the carrier itself. Because much of the liability for death benefits rests with the Death & Permanent Total Disability Trust Fund, the carrier's \$75,000 statutory obligation cannot be equated with "the face value of all future installments of compensation."

This point becomes all the more clear when one realizes that at the time § 11-9-111 was written, the Trust Fund did not yet exist – it was created in 1973, some 35 years later. Act 221 of 1973, § 1. At the time § 11-9-111 was written, compensation payable to a claimant's dependents was limited to a cumulative total of \$8,000. Init. Meas. 4 of 1948, § 10(b). There is nothing in the law to suggest that when the Legislature created the Trust Fund in 1973, it also intended to modify § 11-9-111 by excluding Trust Fund payments from the phrase "face value of all future installments of compensation." Given the requirements of strict construction, I must take "all future installments" to mean just what it says, and not "some future installments" or "the carrier's future installments."

Death benefits herein are owed both to the claimant's widow and to a number of dependent children, but an evaluation of the widow's benefits alone will suffice to demonstrate the problem with the respondents' request. A widow is entitled to collect death benefits, until her death or remarriage, in the amount of 35%

of the claimant's average weekly wage. ARK. CODE ANN. § 11-9-527(c)(1)(A)(i). Given the parties' stipulation to an average weekly wage of \$650, the widow herein is entitled to weekly benefits of \$228. The parties have stipulated that the widow is 46 years old; thus, her remaining life expectancy as measured by Ark. Code Ann. § 11-9-804(b) is 33.71 years. I realize that the life expectancy chart contained within § 11-9-804(b) is intended "for the purpose of calculating the present value of lump-sum settlements to injured employees." Nonetheless, the lump-sum requested by the respondents herein is of a similar nature, and I see no other method by which the "face value of all future installments of compensation" may be calculated.

Therefore, given the stipulations above, the face value of all future installments of compensation is calculated as:

$$(33.71 \text{ years}) \times (52 \text{ weeks}) \times \$228 = \$399,665.76$$

Ark. Code Ann. § 11-9-111(b) allows for the payment of one-half of "the face value of all future installments of compensation" when the dependent is a non-resident alien. One-half of this amount as calculated above – that is, one-half of "all future installments of compensation" – is \$199,832.88, an amount far in excess of the \$37,500 which the respondents seek to pay herein. It appears that the only remedy available to respondents under Ark. Code Ann. § 11-9-111(b) is to ask for a lump-sum payment of \$75,000 towards this total amount, with the Death & Permanent

Total Disability Trust Fund being liable for the remainder of the lump sum. This the respondents have not done.

It is true that statutes must be interpreted so that they are not left void or meaningless, *American Standard Travelers v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002), and my interpretation of § 11-9-111 herein does not render it void or meaningless. A carrier could take advantage of this statute, and see a reduction in its ultimate obligation, in cases where the face value of remaining installments is less than \$150,000. Such would be the case if the widow were older, or if the weekly benefit rate were lower. For example, a 50-year old widow of a claimant who earned only \$220 per week would be entitled to total benefits of \$120,960.84; a carrier in such a situation could discharge its obligation by a payment of \$60,480.42 per Ark. Code Ann. § 11-9-111(b), saving the carrier nearly \$15,000.

Finally, even if the statute were to be construed as allowing what the respondents request, I would still deny the motion.

The statute identifies no standard or criteria to determine when this discretion should be exercised to limit a non-resident alien dependant's benefits. Neither the courts nor the Commission have ever articulated such a standard, nor have they interpreted any portion of this statute. I have been unable to locate any standard or criteria articulated by a court for any similar statute in another state.

Counsel for respondent no. 2 noted at the hearing that another section of the Workers' Compensation Act allows lump-sum payments to any party, whether nonresident alien or otherwise, if "it is for the best interest of the parties entitled to compensation." ARK. CODE ANN. § 11-9-804(a)(1). It is suggested that the same standard could be applied to § 11-9-111(b).

The policy and purpose of the Workers' Compensation Act is "to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment." ARK. CODE ANN. § 11-9-101(b). However, the Commission has been mandated by the Legislature to give neither party the benefit of the doubt in evidentiary matters. ARK. CODE ANN. § 11-9-704(c)(4). Prior to the passage of Act 796 of 1993, the courts liberally construed the Workers' Compensation Act, resolving statutory ambiguities and conflicting interpretations in favor of the claimant. *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 22 (1993). Now the Commission and the courts are required to strictly construe the Act. ARK. CODE ANN. § 11-9-704(c)(3). Therefore, given these requirements of balance and neutrality, I am reluctant to resolve the question herein by looking only to the interests of the claimant's dependents, in the absence of a specific statutory directive.

The most appropriate test, then, would appear to be a balancing test – to

balance the respective interests of the claimant and of the respondents, granting a lump-sum payment under § 11-9-111(b) only if the interests of the respondent favoring a limited payment outweigh the interests of the dependents in receiving full benefits over time. Though the respondents herein encountered much difficulty in identifying the claimant's dependents, the respondent-carrier's adjuster acknowledged in her testimony that she is now forwarding the benefit checks to the claimant's attorney. Given that the parties have found a way around the difficulties in paying benefits to the non-resident alien dependents, I cannot find that the respondents' interests outweigh the dependent's interests.

Controversion

Attorney's fees may be awarded "on the amount of compensation for indemnity benefits controverted and awarded." ARK. CODE ANN. § 11-9-715(a)(2)(B). The object of the attorney's fee statute is to place the burden and expense of litigation upon the party which made it necessary. *Cleek v. Great S. Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). Whether a claim has been controverted is a question of fact. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998).

The claimant herein died on October 28, 2003. The testimony of the respondent-carrier's adjuster establishes that the first payment of benefits to the

claimant's dependents was issued July 14, 2004. The adjuster testified that she initially had difficulty contacting the dependents, for there is only one telephone in the village where the dependents live, and none of the dependents speak English. The adjuster admitted that the claimant's attorney first contacted her in March or April, 2004. However, she also testified that she was not given a valid mailing address for the dependents until June 2, 2004. When the claimant's attorney provided this address, he asked that the payment be made in Mexican currency. The adjuster did not know how to do so. Later in June, the adjuster and the claimant's attorney agreed that the checks would be sent directly to the attorney. While it is true that some nine months passed from the claimant's death to the first payment of dependent benefits, it is also true that within a month of agreeing how and where the checks could be delivered, the respondents made payment. Given the difficulties inherent in trying to get a sizeable check to the non-resident alien dependents herein, I am unwilling to find that the respondents initially controverted the dependents' entitlement to benefits by their nine-month delay in payment.

But, by asking that the Commission limit the dependents' benefits to a lump-sum payment of one-half the statutory maximum of \$75,000, the respondents have plainly controverted the dependents' entitlement to the remaining \$37,500, in that they have made this litigation necessary. Therefore, I find that the respondents have

controverted the dependents' benefits in the amount of \$37,500. The claimant's attorney is entitled to the statutory attorney's fees on this amount.

CONCLUSION

In short, Ark. Code Ann. § 11-9-111(b) allows a respondent to satisfy its obligation to the claimant's dependents by payment of one-half of "the face value of all future installments of compensation," *not* the payment of one-half of the respondent-carrier's remaining obligation. Therefore, the respondents' motion that they be allowed to discharge their obligation by a lump-sum payment of \$37,500 must be, and it hereby is, denied and dismissed.

Because I have denied the respondents' motion, the claimant's constitutional challenge to the statute is moot and need not be addressed. *See Stone v. Aztec Paving and Heavy Constr., Inc.*, A.W.C.C. E807346 (March 2, 2000). The claimant's attorney, Mr. Steven McNeely, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted by the respondents – benefits totaling \$37,500, as discussed above – pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge