

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER E108889

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| BILLIE J. RAMSEY, EMPLOYEE | CLAIMANT |
| AEROQUIP CORPORATION, EMPLOYER | RESPONDENT |
| SPECIALTY RISK SERVICES, CARRIER | RESPONDENT |

OPINION FILED JULY 1, 2004

A hearing was conducted on April 14, 2004, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Odell Pollard, Attorney at Law, Searcy, Arkansas.

Respondent was represented by Melissa Ross, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on April 14, 2004, in Little Rock, Arkansas. Although Administrative Law Judge Don N. Curdie conducted this hearing, he left the Arkansas Workers' Compensation Commission before an opinion could be prepared. At the hearing, both parties agreed on the record that another administrative law judge could review the transcript and exhibits in order to prepare an opinion.

A Prehearing Order was filed in this case on December 2, 2003. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated. The following stipulations were submitted by the parties, either in the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. All previous transcripts and exhibits from previous hearings are incorporated herein.

2. All previous stipulations previously entered into are adopted by reference.
3. All previous awards and Opinions are adopted herein.

During a telephone conference held June 30, 2004, the parties agreed to the following additional stipulation, which is hereby accepted:

4. Claimant earned wages entitling her to temporary total disability benefits at the rate of \$210.72 per week.

By the terms of the Prehearing Order, the parties agreed that the following issues would be litigated at the hearing:

1. Was there an over-payment of attorney's fees to Claimant? Are Respondents entitled to a credit?

2. Is Claimant entitled to an attorney's fee on medical benefits paid by Respondents since 1993? (Respondents assert that Claimant is not entitled to the amount alleged and at the percentage claimed.)

3. Is the Claimant entitled to a 5% or 10% attorney's fee on the medical benefits paid?

4. Is Claimant entitled to an attorney's fee on the controverted attorney's fee requested herein?

Claimant's attorney contends that any overpayment of his fee is offset by Respondents' failure to pay him a fee on Claimant's earlier medical benefits, so that no credit for overpayment is due. Claimant's attorney argues that he is entitled to an attorney's fee on medical benefits paid by Respondents after the date the Death and Permanent Total Disability Trust Fund (hereinafter "Trust Fund") assumed responsibility for paying disability benefits; he disclaims interest in a fee on medical benefits paid by

Respondents prior to the Trust Fund's involvement. Finally, Claimant's attorney seeks a fee for having to pursue this request.

Respondents assert that there has been an overpayment of attorney's fees, for which they are entitled to a credit. If an attorney's fee is due on medical benefits paid to the Claimant, Respondents assert that Claimant's attorney is only entitled to two years worth of fees, pursuant to Ark. Code Ann. § 11-9-715(e) (Michie 1987).

THE RECORD

During the course of preparing this opinion, it became obvious that some items not in the record should be considered as evidence. Therefore, a phone conference was conducted on June 30, 2004; participants included Mr. Pollard (Claimant's attorney), Ms. Ross (Respondents' attorney), and myself. Neither attorney objected to the following documents being included in the record, and they will accordingly be "blue-backed" and considered herein:

1. Mr. Pollard's December 17, 1993 letter to Administrative Law Judge Frank Newell;
2. Administrative Law Judge Newell's December 22, 1993 letter to Mr. Pollard and A. Gene Williams, Attorney at Law (Respondents' prior counsel);
3. Mr. Williams' December 27, 1993 letter to Administrative Law Judge Newell;
4. Mr. Pollard's December 28, 1993 letter to Administrative Law Judge Newell;
5. Administrative Law Judge Newell's January 4, 1994 letter to Mr. Pollard and Mr. Williams;
6. Mr. Pollard's January 24, 1994 letter to Administrative Law Judge Newell;
7. Ms. Ross' May 5, 2004 letter to Chief Administrative Law Judge David

Greenbaum, with the affidavit of Debbie Firebaugh attached; and

8. Mr. Pollard's May 8, 2004 letter to Administrative Law Judge D. Franklin Arey, III, with accounts receivable statements attached.

In addition, the December 9, 1993 Order and Opinion will be included in the record. This is permitted under the parties' stipulation that all previous awards and Opinions are adopted herein.

DISCUSSION

A. OVERPAYMENT OF ATTORNEY'S FEES

An Order and Opinion filed December 9, 1993 awarded Claimant an additional 5% permanent physical impairment to the body as a whole and benefits for permanent and total disability. The Administrative Law Judge approved a stipulation that Claimant earned wages entitling her to benefits at a weekly temporary total disability compensation rate of \$173.50. Concerning attorney's fees, the Order and Opinion states: "Respondent carrier and claimant shall pay to claimant's attorney, Mr. Odell Pollard, the maximum attorney's fee on this award, the fee to be apportioned as provided at Ark. Code. Ann. § 11-9-715 (Michie 1987)."

Shortly after the Order and Opinion was filed, the attorneys for the parties agreed that Claimant's temporary total disability compensation rate was actually \$210.72 per week. This agreement, called to the attention of the Administrative Law Judge, is memorialized in a series of letters dated December 17, 1993; December 22, 1993; December 27, 1993; December 28, 1993; January 4, 1994; and January 24, 1994. The parties stipulated to this \$210.72 rate during the June 30, 2004 conference call

mentioned above.

On November 7, 2003, Respondents agreed to continue paying attorney's fees even though the Trust Fund had assumed responsibility for paying Claimant's benefits. Respondents raised the possibility that they had overpaid Claimant's attorney and noted that, if warranted by further investigation, Respondents would be seeking a credit based upon an overpayment of attorney's fees.

Respondents' attorney filed a letter brief dated April 13, 2004, addressing various issues before the Commission. Concerning the alleged overpayment of attorney's fees, the letter brief states:

Attorney's fees were paid to claimant at the rate of \$1,354.00 per year. The claimant's TTD rate is \$210.72, resulting in an annual payment of \$10,957.44. The 10% attorney's fee on that amount is \$1,095.74.

...

Respondents' one half liability for Mr. Pollard's 10% attorney's fee of \$1,095.74 is \$547.87. However, the Fund took over on March 2, 1999, paying \$682.00 every six months. Therefore, the total fee owed for Mr. Pollard for benefits paid through December 9, 2003, is \$9,861.69, one-half of which Respondents are liable for or \$4,930.85. The total fee actually paid was \$12,186.00, leaving a credit to the Respondents in the amount of \$7,255.15.

At the hearing on April 14, 2004, Claimant's attorney addressed the overpayment issue. He argued that no attorney's fees had been paid by Respondents on the earlier medical benefits paid to Claimant; therefore, if there was an overpayment of attorney's fees, Respondents' credit should be offset against the unpaid attorney's fees on medical benefits. Claimant's attorney did not offer proof concerning the amount of medical benefits paid to Claimant prior to July 9, 2001. He concluded: "So if I was entitled to five percent of the amount paid out for medical expenses, then that would equal what they're claiming that they overpaid me."

Claimant's attorney also explained his fee arrangement with Claimant and the percentage he was seeking from Respondents. Since Claimant had already paid her half of his fee, he only expected Respondents pay their half of his fee. Claimant's attorney's position was consistent with his March 4, 1994 letter to Respondents' then-counsel, which stated that Claimant "has already paid me for her part of the fee."

Respondents countered that medical benefits had not been controverted, and that they had been paying "the full fee as opposed to the statutory fee." Respondents' attorney asserted that Claimant's attorney had been paid \$12,186.00 in attorney's fees and offered to obtain a printout of all attorney fee checks tendered. Administrative Law Judge Curdie agreed that such a printout should be made a part of the record and directed Respondents' attorney to supply a printout of attorney's fees paid to the court reporter as Respondents' Exhibit Two.

Respondents were not able to supply the court reporter with a printout of attorney's fees paid prior to the completion of the transcript; instead, on May 5, 2004, Respondents submitted the affidavit of Debbie Firebaugh, the adjuster for this file. Ms. Firebaugh explained that the printout of all benefits paid is in hard copy format only and is hundreds of pages long. The last numbered paragraph of the affidavit states:

9. The total amount of attorney's fees paid to Mr. Pollard in this matter is \$12,186.00. That calculation is based on payments of \$682.00 every six (6) months, or \$1,354.00 per year, for the years 1994 through 2002 (nine (9) years).

Claimant's attorney responded to this affidavit in a letter dated May 8, 2004. Attaching copies of his accounts receivable statements, he claimed to have received a total of \$10,210.00 in attorney's fees from Respondents from March 11, 1994 until

February 20, 2002. He noted that he had been retired from the practice of law for the past four years.

In order to determine whether an overpayment exists, two figures are necessary: the amount *actually paid* to Claimant's attorney and the amount that *should have been paid*. If the amount *actually paid* exceeds the amount that *should have been paid*, then the difference would represent an overpayment for which Respondents should be credited against future payment of attorney's fees. Compare Breakfield v. In & Out, Full Workers' Compensation Commission Opinion filed January 3, 2002 (E615663) (there was no dispute that respondents deserved credit for an overpayment of benefits and attorney's fees). The parties are expected to present all evidence at the initial hearing on a claim. See Ark. Code Ann. § 11-9-705(c)(1)(B). Speculation and conjecture cannot substitute for credible evidence. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 277, 72 S.W.3d 560, ___ (2002).

I find that Respondents failed to prove the amount *actually paid* to Claimant's attorney. The affidavit of Debbie Firebaugh is not credible, for a couple of reasons. First, it is not internally consistent: while it states that Claimant's attorney was paid a total \$12,186.00, it is not possible to reach that figure using the numbers given in paragraphs 5, 6, and 7. While the figures are not too far apart, the fact that there is a difference does not inspire confidence in the affidavit. Second, the affidavit is not consistent with Respondents' April 13, 2004 letter brief. Paragraph 9 of the affidavit states that Claimant's attorney received "\$682.00 every six (6) months, or \$1,354.00 per year"; the letter brief states that "[a]ttorney's fees were paid to claimant at the rate of \$1,354.00 per year." If \$682.00 is paid twice a year (once every six months), that

equals \$1,364.00, not \$1,354.00. Other than this affidavit, Respondents offer only comments or arguments of counsel, and as a general proposition that cannot be taken as evidence. See Ross v. Moore, 30 Ark. App. 207, 213, 785 S.W.2d 243, ___ (1990). Any attempt to ascertain the amount *actually paid* on this proof would require assumptions or speculation, but that would not constitute credible evidence. See Smith-Blair, Inc., 77 Ark. App. at 277, 72 S.W.3d at ___.

Claimant's attorney claimed receipt of \$10,210.00 from Respondents and submitted accounts receivable statements in support, but I very respectfully find that this evidence is not credible. At the April 14, 2004 hearing Claimant's attorney candidly stated: "Since I've been retired for four or five years and this is the only remaining piece of legal business I have, my record keeping in the last five years has not been all that good."

Because it is not possible to determine the amount of attorney's fees *actually paid* to Claimant's attorney, it is not possible to determine if Respondents are entitled to a credit for an overpayment. The proof is either not credible, or it would require speculation and conjecture to form the basis of an award.

B. FEES ON MEDICAL BENEFITS

Claimant's attorney seeks payment of an attorney's fee based upon medical benefits paid to Claimant. His memorandum brief dated October 11, 2003, cites authority for the proposition that, when liability is controverted, an attorney's fee should be paid on medical benefits awarded. Claimant's attorney noted that Respondents had paid \$18,056.60 in medical benefits since the Trust Fund commenced paying Claimant

disability benefits.

Under cover of letter dated January 28, 2004, Respondents supplied a printout detailing medical benefits paid. However, the printout only itemized items issued from July 9, 2001 until December 15, 2003. No payments prior to July 9, 2001, were itemized in the printout.

Respondents' attorney's letter brief of April 13, 2004, briefly addressed this claim for attorney's fees based upon medical benefits paid. Respondents cited the then-applicable version of the statute of limitations, Ark. Code Ann. § 11-9-715(e) (Michie 1987). Respondents concluded that, "[E]ven assuming that the attorney's fees on medicals paid is applicable, the very most Claimants [sic] counsel is entitled to is two years from the date of the opinion on December 9, 2003 [sic]."

At the April 14, 2004, hearing, Claimant's attorney distinguished between medical benefits paid prior to the Trust Fund's payment of disability benefits, and those medical benefits paid since the Trust Fund became involved. Claimant's attorney acknowledged that he could not demonstrate the amount of earlier medical expenses paid. Nonetheless, he stated that he did not want payment for these earlier medical expenses, since they should be an offset against any credit Respondents might receive for overpayment of attorney's fees. He summarized his argument as follows: "So I'm not claiming five percent of the medical expenses that were paid prior to the time the Trust Fund starting paying. I'm simply asking for five percent of the medical expenses that have been paid since the Trust Fund took over paying benefits to the

Claimant.”¹ Claimant’s attorney did not specify in his argument when medical expenses began to be incurred by Claimant.

Respondents countered that medical benefits were not controverted. Otherwise, Respondents rested on their April 13, 2004 letter brief.

The parties are expected to present all evidence at the initial hearing on a claim. See Ark. Code Ann. § 11-9-705(c)(1)(B). Speculation and conjecture cannot substitute for credible evidence. Smith-Blair, Inc., 77 Ark. App. at 277, 72 S.W.3d at ___. The then-applicable statute, Ark. Code Ann. § 11-9-715(e) (Michie 1987), provides that fees with respect to medical expenses controverted by the employer or carrier shall be payable only in connection with such controverted expenses incurred during a two-year period beginning with the first date on which such expenses were incurred.

I find that Claimant’s attorney’s request for fees on medical benefits must be denied because there is no proof Respondents ever controverted these benefits. With regard to medical expenses, fees are payable “only in connection with ... controverted expenses.” Ark. Code Ann. § 11-9-715(e) (Michie 1987). The December 9, 1993 Order and Opinion does not discuss medical benefits; it awards indemnity benefits and an attorney’s fee, but not medical benefits. This suggests that, indeed, medical benefits were not controverted. Since there is no proof medical benefits were ever controverted by Respondents, no fee is due on those benefits.

Further, I find that Claimant’s attorney’s request for fees on medical benefits paid to the Claimant must fail for lack of proof. Assuming for the sake of argument that

¹ Judy Jolley’s July 22, 2003 letter states that the Trust Fund assumed liability for payments to Claimant on March 2, 1999.

medical benefits had been controverted, fees on these medical benefits would only be payable for a two-year period “beginning with the first date on which such expenses were incurred.” Ark. Code. Ann. § 11-9-715(e) (Michie 1987). The record does not indicate “the first date on which such expenses were incurred.” The Order and Opinion filed December 9, 1993 notes that Claimant sustained a compensable back injury on April 17, 1991, but there is no indication that medical expenses were first incurred on that date. Doctors’ reports from the November 1993 hearing are included in the record, but it requires speculation to assume the first dated report represents the first time medical expenses were incurred.

Claimant’s attorney’s request for a fee on medical benefits paid must be denied. There is no proof Respondents ever controverted these benefits; even assuming they had, there is no proof concerning the date for the first time medical expenses were incurred by Claimant.

C. PERCENTAGE OF FEE ON MEDICAL BENEFITS

One of the issues originally raised concerned what percentage to use in calculating an attorney’s fee on the medical benefits paid to Claimant. At the April 14, 2004 hearing, Claimant’s attorney stated that he was only seeking 5% of the medical benefits as his attorney’s fee. Given the disposition of the claim for an attorney’s fee on medical benefits, this issue is moot.

D. ATTORNEY’S FEE ON THE CONTROVERTED FEE REQUEST

Claimant’s attorney seeks an attorney’s fee based upon Respondents’ controversion of his fee request. The memorandum brief submitted by Claimant’s

attorney, dated October 11, 2003, claims an additional fee, but fails to cite authority for such an award. At the hearing, Claimant's attorney noted that he had devoted "from start to finish between forty and fifty hours" on attempting to collect an additional attorney's fee.

Respondents argued in their pretrial letter brief that Claimant's attorney was not entitled to an additional attorney's fee, since they had not controverted his entitlement to attorney's fees. They noted that, in fact, attorney's fees had been overpaid. Respondents renewed this argument at the hearing on April 14, 2004.

I find that Claimant's attorney is not entitled to an attorney's fee for bringing his request. Attorney's fees are payable based on compensation awarded to a claimant. Compare Ark. Code Ann. § 11-9-715 (Michie 1987) with Ark. Code Ann. § 11-9-715 (Repl. 2002). "Compensation" is not defined to include attorney's fees. Compare Ark. Code Ann. § 11-9-102(9) (Michie 1987) with Ark. Code Ann. § 11-9-102(5) (Repl. 2002). Claimant's attorney is not seeking compensation for Claimant - he seeks attorney's fees for himself - but the statutes do not mention attorney's fees as the basis for an award of still more attorney's fees. Further, nothing is awarded against the Respondents by this opinion. See Schalski v. Family Cleaners, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). Without an award against the Respondents, they are not liable for an attorney's fee. Id.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations are reasonable and are approved.
2. Respondents did not offer credible proof of an overpayment of attorney's fees to Claimant's attorney. The affidavit of Debbie Firebaugh is internally inconsistent and

conflicts with Respondents' letter brief of April 13, 2004.

3. Claimant's attorney did not prove his entitlement to a fee on medical benefits paid to Claimant. There is no proof Respondents controverted these benefits.

4. Claimant's attorney is not entitled to an award of fees for bringing his request.

ORDER

Based upon the foregoing, the parties' claims are denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml