

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F100487

JOSEPH THOMAS, EMPLOYEE	CLAIMANT
LEGACY INSURANCE SERVICES, EMPLOYER	RESPONDENT #1
LUMBERMENS MUTUAL CASUALTY, CARRIER	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED OCTOBER 25, 2004

A hearing was conducted on July 28, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

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

Respondent #1 was represented by David C. Jones, Attorney at Law, Little Rock, Arkansas.

Respondent #2 was represented by Judy Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 28, 2004, the above-captioned claim came on for a hearing at Little Rock, Arkansas. Counsel presented arguments at the hearing; no witnesses testified. Following a prehearing conference, a Prehearing Order was filed on April 13, 2004.

The parties agreed to eight stipulations. Two stipulations are set forth as they appear in the Prehearing Order; two stipulations originated in the Prehearing Order, but were amended by the parties at the hearing; four stipulations were added and agreed to at the hearing. Having confirmed the parties' agreement to these stipulations, the following stipulations are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.
2. Claimant is entitled to the maximum compensation rates; his temporary total disability rate is \$394.00, and his permanent partial disability rate is \$296.00.
3. Claimant sustained a compensable injury on November 14, 2000.
4. Claimant reached maximum medical improvement and the end of his healing period on December 10, 2002.
5. Claimant received a 29% permanent anatomical impairment rating.
6. Claimant's permanent anatomical impairment rating is being paid; the total ultimately paid will be \$38,628.00 over a period of 130.5 weeks.
7. Claimant is permanently and totally disabled.
8. Respondent #1 controverted Claimant's entitlement to permanent and total disability benefits.

At the July 28, 2004 hearing, the parties agreed that the first two issues listed in the Prehearing Order no longer require determination. After some discussion, the parties agreed that the remaining issues are as follows:

1. Whether the actuarial valuation study dated June 30, 2003, offered by Respondent #2 is admissible into evidence.
2. Whether Respondent #1 must first pay Claimant's permanent anatomical impairment rating benefits in full, and then begin paying the first \$75,000.00 of benefits for permanent and total disability; or whether the permanent anatomical impairment rating benefits paid to Claimant can be credited against the first \$75,000.00 of permanent and total disability benefits Respondent #1 must pay, thereby reducing the balance of the \$75,000.00 due.

3. Whether Claimant is entitled to an attorney's fee.

As to the admissibility of the actuarial valuation study, Respondent #2 contends that its contents are necessary for the Commission's consideration of the credit issue. Claimant objects on the basis of relevance and undue prejudice; Respondent #1 joins Claimant in these objections.

With regard to crediting Claimant's permanent anatomical impairment rating benefits against permanent and total disability benefits due, Respondent #1 argues that such a credit is appropriate under the controlling case. Respondent #2 contends that this case no longer controls, and that a credit is not appropriate. Claimant supports Respondent #1 on this issue.

With regard to the issue of an attorney's fee, Claimant contends that a fee is due from Respondent #1 (as to permanent and total disability benefits) and Respondent #2. Respondent #1 stipulates that Claimant is permanently and totally disabled, and that it previously controverted Claimant's entitlement to these benefits. Respondent #2 contends that it has not controverted any issue concerning Claimant's entitlement to benefits, so that it is not liable for an attorney's fee to Claimant.

DISCUSSION

A. Admissibility of Actuarial Valuation Study

At the hearing, Respondent #2 proffered an actuarial valuation study dated June 30, 2003. Citing Ark. Code Ann. § 11-9-101(b), Respondent #2 argues that one purpose for enacting the Workers' Compensation Law was to return the workers' compensation system to a state of economic viability. As stated in its reply brief, Respondent #2 argues that "[a]

proper determination as to whether Respondent [#]1 is entitled to credit for permanent partial anatomical benefits cannot be made without some consideration of the impact of the Commission's holding on the overall viability of the Trust Fund and ultimately the Trust Fund's beneficiaries."

Claimant responds that the financial solvency of Respondent #2 is not relevant to the other issues raised at the hearing. Claimant also contends that the study should be excluded because of its prejudicial nature. Respondent #1 joined Claimant in these objections at the hearing. Subsequently, Respondent #1 noted in its brief that the actuarial valuation study itself states that its sole purpose is to assist the Commission in evaluating the fund's status and funding requirements.

Respondent #2 cites two cases in support of its argument that consideration of its economic viability is appropriate: Second Injury Fund v. McCarver, 17 Ark. App. 101, 704 S.W.2d 639 (1986) and Second Injury Fund v. Riceland Foods, Inc., 17 Ark. App. 104, 704 S.W.2d 635 (1986). These cases have been overruled on other grounds. Nelson v. Timberline Int'l, Inc., 332 Ark. 165, 176-78, 964 S.W.2d 357, ___ (1998). On the other hand, in Stucco Plus, Inc. v. Rose, 327 Ark. 314, 938 S.W.2d 556 (1997), the Arkansas Supreme Court stated that "[t]he Commission's reliance on what it called the public policy of protecting the solvency of the [Second Injury] Fund is misplaced." Id. at 321, 938 S.W.2d at ___. However, as Respondent #2 notes in its reply brief, the reasons supporting the Arkansas Supreme Court's statement in Stucco Plus are not applicable in this case.

I find that the actuarial valuation study offered by Respondent #2 is not relevant and therefore not admissible. See Ark. R. Evid. 401 and 402. The substantive issue in this case turns on the interpretation of relevant cases. I am not aware of any rule that makes

the solvency of a party consequential to the interpretation of appellate opinions, and no such authority has been cited. Thus, the actuarial valuation study will not be considered in determining the next issue discussed below.

B. Credit Against Permanent and Total Disability Benefits

Respondent #1 will ultimately pay Claimant permanent anatomical impairment benefits in the total amount of \$38,628.00. Ark. Code Ann. § 11-9-502(b)(1) provides that “[t]he first seventy-five thousand dollars (\$75,000.00) of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier....” In this case, Respondent #1 seeks credit for the permanent anatomical impairment rating benefits ultimately paid against the \$75,000.00 in permanent and total disability benefits, thereby reducing the balance of the permanent and total disability benefits due. Respondent #2 objects, arguing that Respondent #1 must first pay Claimant’s permanent anatomical impairment rating in full, and then begin paying the first \$75,000.00 of benefits for permanent and total disability. Respondent #2 argues that claimants are entitled to benefits for both physical harm and the loss of functional capacity (or wage-loss), so that Respondent #1 should not receive a credit for one against the other.

The Arkansas Court of Appeals addressed this issue in Death & Permanent Total Disability Trust Fund v. Whirlpool Corp., 39 Ark. App. 62, 837 S.W.2d 293 (1992). In that case, an employee sustained two successive permanent injuries during his employment. Whirlpool paid permanent partial disability benefits after the first injury; when the employee was found to be permanently and totally disabled after the second injury, Whirlpool sought credit for its prior permanent partial disability payments against its permanent and total disability obligation. The court affirmed a Commission decision that Whirlpool was entitled

to credit for the permanent partial disability benefits paid after the first injury. Id. at 64, 68, 837 S.W.2d at ____.

I find that this matter is governed by the Death & Permanent Total Disability Trust Fund v. Whirlpool Corp. decision, so that Respondent #1 is entitled to a credit for permanent anatomical impairment rating benefits ultimately paid against the first \$75,000.00 of permanent and total disability benefits due. Respondent #1 is paying weekly benefits upon Claimant's permanent anatomical impairment rating. In light of the Whirlpool holding, Respondent #1 is entitled to credit for these payments against its permanent and total disability benefits obligation.

I acknowledge Respondent #2's arguments based upon Nelson, 332 Ark. 165, 964 S.W.2d 357. That case undercut much of the basis for the Whirlpool holding: it deemed a statute repealed, and overruled a prior decision, which had both been relied upon by the Whirlpool court. However, Nelson did not specifically overrule Whirlpool; further, Nelson addresses the "same employer" defense, not the credit issue at hand. Because Whirlpool remains controlling authority, I am compelled to apply and follow it in this case regardless of its infirmities. See Riley v. Johnson, 239 Ark. 37, 386 S.W.2d 942 (1965) (after commending a trial judge for following an appellate decision, the Arkansas Supreme Court then overruled that decision because it "made no reference to, and apparently overlooked" a relevant statutory requirement).

I also acknowledge the Full Commission's opinion in Birtcher v. Arkansas Highway and Transportation Department, Full Workers' Compensation Commission Opinion filed October 1, 1998 (E108137). In Birtcher, a respondent asserted that it was entitled to a credit for permanent partial disability compensation paid against the statutory limit of

\$75,000.00 due for permanent and total disability. Noting that the Nelson decision deemed the statute supporting this argument to have been repealed, the Commission found that the statute's repeal "renders moot [the respondent's] claim for a credit..." However, it should also be noted that the Commission did not address the continuing applicability of the Whirlpool decision.

To summarize, for the foregoing reasons I find that Respondent #1 may credit the permanent anatomical impairment rating benefits it pays to Claimant against its obligation to pay \$75,000.00 of permanent and total disability benefits, so as to reduce the balance of the permanent and total disability benefits due under Ark. Code Ann. § 11-9-502(b)(1). This finding is based upon the continuing applicability of the Arkansas Court of Appeals decision in Death & Permanent Total Disability Trust Fund v. Whirlpool Corp., 39 Ark. App. 62, 837 S.W.2d 293 (1992). Unless Whirlpool is overruled, or until the legislature provides further statutory instruction, Whirlpool controls this issue.

C. Entitlement to an Attorney's Fee

Since Claimant's injury occurred prior to July 1, 2001, his attorney's fee request is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. See Estridge v. Waste Management, Full Workers' Compensation Commission Opinion filed July 12, 2004 (E500479); compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). Attorney's fees shall only be allowed on the amount of compensation controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii) (Repl. 1996). The real object of this statute is to place the burden of litigation expenses upon the party which made it necessary. Cleek v. Great Southern Metals, 335 Ark. 342, 345, 981 S.W.2d 529, ___ (1998).

1. Controversion of Permanent and Total Disability

At the hearing, Respondent #1 stipulated that it had controverted Claimant's entitlement to permanent and total disability benefits; in addition, the parties stipulated that Claimant is permanently and totally disabled. Therefore, I find that Claimant is entitled to the maximum statutory attorney's fee allowed pursuant to Ark. Code Ann. § 11-9-715 (Repl. 1996) on those permanent and total disability benefits payable to Claimant, over and above Respondent #1's credit for permanent anatomical impairment rating benefits paid.

2. Request against Respondent #2

I find that Claimant is not entitled to an award of attorney's fees against Respondent #2. The issues raised by Respondent #2 do not affect Claimant's right to compensation or the amount that he will be paid. Rather, these issues involve a dispute between Respondent #1 and Respondent #2 concerning the amount Respondent #1 will ultimately pay. Respondent #2 simply has not controverted Claimant's right to benefits; therefore, Claimant is not entitled to an attorney's fee as against Respondent #2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant is entitled to the maximum compensation rates; his temporary total disability rate is \$394.00, and his permanent partial disability rate is \$296.00.
4. Claimant sustained a compensable injury on November 14, 2000.
5. Claimant reached maximum medical improvement and the end of his healing period on December 10, 2002.
6. Claimant received a 29% permanent anatomical impairment rating.

7. Claimant's permanent anatomical impairment rating is being paid; the total ultimately paid will be \$38,628.00 over a period of 130.5 weeks.

8. Claimant is permanently and totally disabled.

9. Respondent #1 controverted Claimant's entitlement to permanent and total disability benefits.

10. The actuarial valuation study dated June 30, 2003, proffered by Respondent #2, is not admissible because it is not relevant to the substantive issue in this case.

11. Respondent #1 is entitled to a credit for the amount of permanent anatomical impairment rating benefits ultimately paid to Claimant, against the first \$75,000.00 of permanent and total disability benefits Respondent #1 must pay, thereby reducing the balance of the \$75,000.00 due from Respondent #1. This finding is compelled by the continuing applicability of Death & Permanent Total Disability Trust Fund v. Whirlpool Corp., 39 Ark. App. 62, 837 S.W.2d 293 (1992).

12. Respondent #1 controverted Claimant's entitlement to permanent and total disability benefits. Therefore, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 1996), Claimant is entitled to the maximum statutory attorney's fee allowed on those permanent and total disability benefits payable to Claimant, over and above Respondent #1's credit for permanent anatomical impairment rating benefits paid.

13. Claimant is not presently entitled to an award of attorney's fees against Respondent #2, because Respondent #2 has not controverted Claimant's right to benefits.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits as specified herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent #1 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996) and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml