

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO E815115

MORRIS W. EASTER, EMPLOYEE	CLAIMANT
CORPORATE PERSONNEL SERVICES & TEMPS, INC., EMPLOYER	RESPONDENT
AMERICAN INTERSTATE, CARRIER	RESPONDENT

OPINION FILED MARCH 10, 2005

Hearing conducted before the Honorable Dale Douthit, Administrative Law Judge, in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Floyd M. Thomas, Jr., Attorney at Law, El Dorado, Arkansas.

Respondent was represented by Mr. Norwood Phillips, Attorney at Law, El Dorado, Arkansas.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in El Dorado, AR on December 14, 2004. A prehearing telephone conference was held in this claim on October 27, 2004, with a Prehearing Conference Order filed that same date.

At the hearing the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order, subject to additional stipulations, contentions and issues agreed at the hearing. A copy of the Prehearing Order was introduced into evidence as Commission Exhibit #1, and made a part of the record without objection.

It was agreed the Arkansas Workers' Compensation Commission has jurisdiction of this claim. That this claim is the subject of an Opinion and Order filed by Administrative Law Judge C. Michael White on January 14, 2004, which awarded the claimant wage-loss disability benefits

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in the amount of twenty-five percent (25%), and that the Opinion and Order filed January 14, 2004, was not appealed and is now a final order of the Commission. At the hearing, the parties further agreed that the Award was paid on April 12, 2004. Toward the beginning of the hearing the parties stipulated the respondents received the January 14, 2004 ALJ's opinion on January 21, 2004; however, before the hearing ended the parties agreed to amend that stipulation to reflect the respondent received the January 14, 2004 ALJ's Opinion on January 22, 2004. (T. Pg. 22, Lns 3-7). The parties further stipulated to the contents of JX1 and JX2 that were introduced into the record on December 14, 2004.

The parties agreed the issues to be presented at the full hearing would be limited to the following:

- 1) Whether a twenty percent (20%) penalty for late payment under A.C.A. §11-9-802 should be assessed on the respondents with interest and attorney fees.
- 2) Estoppel.

The claimant contended the Administrative Law Judge's opinion dated January 14, 2004, was received by the claimant on January 22, 2004; that the appeal time ran thirty (30) days later, and that the award was payable fifteen (15) days after the appeal time ran. The claimant contends the respondents did not timely pay the award and as such is entitled to a twenty percent (20%) penalty pursuant to A.C.A. §11-9-802, and that pursuant to A.C.A. §11-9-809, is entitled to interest at the judgment rate from January 14, 2004, plus attorney fees.

The respondents contended the claimant is not entitled to a penalty for late payment of the award because the claimant waived any penalty and is estopped by his attorney's conduct.

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From a review of the record as a whole, and having had an opportunity to hear the testimony and observe the witnesses demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The respondents have proven by a preponderance of the evidence their defense of estoppel.
4. That the claimant's attorney's action estopped any award pursuant to A.C.A. §11-9-802 and therefore no penalty will be assessed.

DISCUSSION

It is undisputed, based upon the record, that the respondents did not timely pay the award pursuant to the January 14, 2004 ALJ Opinion. The award was due on March 9, 2004, and was not paid until April 12, 2004. On its face it appears the twenty percent (20%) penalty must be imposed; however, the respondent raised the affirmative defense of estoppel based upon the alleged actions by the claimant's attorneys.

The respondents' attorney, Mr. Brian Ratcliff, testified he telephoned the claimant's attorney, Mr. Matthew Shepherd, on February 19, 2004, to advise him the respondents were not going to appeal the January 14, 2004 ALJ Award and made a settlement offer at that time. (T. Pg. 11, Lns. 18-21). Mr. Ratcliff further testified Mr. Shepherd indicated he would "get back with me regarding my settlement offer." (T. Pg. 11, Lns. 23-24) Mr. Ratcliff testified he again asked

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Mr. Shepherd about the status of his settlement offer on March 2, 2004, and Mr. Shepherd indicated he would get back to him. (T. Pg. 12, Lns 2-14). Mr. Ratcliff testified he never heard from Mr. Shepherd, and on March 8, 2004 called Mr. Shepherd to tell him he would pay the award or Joint Petition offer. (T. Pg. 13, Lns. 1-2). Mr. Ratcliff testified Mr. Shepherd said “well, don’t pay it. Let me talk to him and I’ll get back to you.” (T. Pg. 13, Lns. 2-4).

Mr. Matthew Shepherd testified to the following regarding his conversations with Brian Ratcliff prior to March 9, 2004:

A. My understanding was that he was ready to pay to resolve this matter. I didn’t - I mean, I’m just having to speak from my recollection and memory but I didn’t perceive and didn’t take this to mean that he was asking me for any type of waiver of interest or could he have a longer period of time or anything like that. He just told me he was ready to pay and get it over with, we are offering \$15,000 and a full fee just to get rid - I had written his words, get rid of it or get it over with once and for all. (T. Pg. 36, Lns. 7-16).

This examiner questioned Mr. Shepherd in detail about whether he indicated to Mr. Ratcliff to hold off on paying the award.

Q. You understand that in his letter he says we stand ready to pay the award if claimant is not interested in a joint petition. Do you think he may have said something along those same lines in your previous conversations prior to March 9? Would that be something that you can recall or that you can dispute.

A. I recall him saying that he was ready to pay, to get this over with. Now, I mean,

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that's my recollection.

Mr. Shepherd testified he understood the two remedies available on March 8, 2004, to the respondents; they could either pay the award, or enter into a joint petition settlement. (T. Pg. 35, Lns. 21-25) Mr. Shepherd also acknowledged that prior to March 9, 2004, he advised Mr. Ratcliff he would talk to Mr. Floyd Thomas and the client and "would get back with him." (T. Pg. 35, Lns. 21-22).

Mr. Shepherd did not recall telling Mr. Ratcliff to hold off on paying the award prior to March 9, 2004. (T. Pg. 36, Lns 17-20).

This examiner feels Mr. Shepherd's testimony regarding the two scenarios he discussed with Mr. Ratcliff prior to March 9, 2004 on page 36, lines 15-16, to be the key factor in this case, "**I HAD WRITTEN HIS WORDS, GET RID OF IT OR GET IT OVER WITH ONCE AND FOR ALL.**"

This "either or" language indicates Mr. Shepherd discussed two options with Mr. Ratcliff and then told Mr. Ratcliff he would get back with him. Even though Mr. Shepherd may not have intended that his conduct be acted upon, this examiner feels Mr. Ratcliff had the right to believe Mr. Shepherd's statements indicated for him to hold off on paying anything until Mr. Shepherd got back with him. This examiner finds the record is clear in that it does not reflect Mr. Shepherd ever got back with Mr. Ratcliff.

The burden is on the respondents to prove the affirmative defense and as such must be addressed. In order to prevail, the respondents must satisfy all four elements of estoppel, which were set out in *Southern Hospitality v. Britain*, 54 Ark. App 318, 925 SW 2d 810

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(1996).

- 1) The party to be estopped must know the facts.
- 2) He or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has the right to believe the other party so intended.
- 3) The party asserting the estoppel must be ignorant of the true fact.
- 4) The party asserting the estoppel must rely upon the other party's conduct to his or her injury.

I find the evidence in this claim does support the application of the doctrine of estoppel for several reasons. This is an unusual situation in that the only witnesses are attorneys, who are officers of the court, and whose credibility I do not doubt. However, the respondents' attorney seemed to have a better recollection of the events. The claimant's attorney was somewhat vague about his recollection at times (T. Pg. 36, Lns. 23-25 Pg. 37, Lns. 1-6) during his testimony. The respondents proved to this examiner that they knew the facts, that they had the right to believe they were to hold off on paying either the award or J. P. offer until they heard back from Mr. Shepherd, that they were ignorant of the true fact (i.e. whether claimant wanted the award or J. P. offer), and that they relied on Mr. Shepherds statements to their detriment.

AWARD

I find that the respondents have proven their affirmative defense of estoppel by a preponderance of the evidence, therefore, the claimant's request for twenty percent (20%) penalty pursuant to A.C.A. §11-9-802 is respectfully denied and dismissed.

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DALE DOUTHIT
Administrative Law Judge

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