

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304740

ALICE FAY FORD, EMPLOYEE	CLAIMANT
SANYO MANUFACTURING CORPORATION, EMPLOYER	RESPONDENT
GREAT AMERICAN INSURANCE COMPANY OF NEW YORK, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 18, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on July 15, 2005, at Forrest City, St. Francis County, Arkansas.

Claimant, appearing *pro se*.

Respondents represented by Mr. Robert J. Donovan, Attorney-at-Law, Marianna, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 15, 2005, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on June 8, 2005, at which time a hearing was scheduled on the issues set out below. At the hearing, the parties announced that the stipulations and issues were properly set out in the Prehearing Order. In addition, this claim has an unusual procedural history which will be described in detail. A copy of the Prehearing Order was introduced without objection as "Commission's Exhibit #1."

It was stipulated that the employment relationship existed at all relevant times, including March 31, 2003, and April 2, 2003, through the present; that the claimant

sustained compensable injuries to her right upper extremity on said dates; that she earned sufficient wages to entitle her to compensation rates of \$283.00 per week for temporary total disability and \$212.00 per week for permanent partial disability; that respondents paid appropriate, temporary total disability during the claimant's time off work, specifically, beginning August 18, 2003, and continuing through February 22, 2004, at which time the claimant returned to work for the employer herein; that the claimant's healing period ended March 1, 2004, at which time she was assessed a thirty percent (30%) impairment to the right upper extremity; and that respondents paid various impairment benefits which were to be documented and explained at the scheduled hearing.

By agreement of the parties, the issues presented for determination included:

- 1) Whether the claimant was entitled to penalties for late payment of installments.
- 2) Whether the claimant was entitled to interest on late payments.

Claimant contended, in summary, that after her release to return to work, and the assessment of permanent impairment by the primary treating physician, she received initial payments toward her impairment rating; that she contacted the claims adjuster for the insurance company and inquired about the payments, at which time the carrier suspended payments while attempting to negotiate a final settlement of her claim; that she did not receive the balance of her benefits until after two (2) proposed settlements were denied, which was not until late April or May, 2005; that respondents should be assessed a thirty-six percent (36%) penalty for late

payment of installments, as well as interest on any late payments.

The respondent, by and through its attorney, contended that respondent did not willfully and intentionally fail to pay any benefits and that a thirty-six percent (36%) penalty was not warranted in the instant claim.

The claimant testified in her own behalf. In addition, the claimant offered cancelled checks of all payments received following the end of claimant's healing period which was stipulated as March 1, 2004. (Cl. Ex. 1-5) Although respondent identified Tonya Hawthorne as a witness who was to testify concerning payments made, as well as the reasons for any late payments, Ms. Hawthorne did not appear at the scheduled hearing. All prior pleadings, specifically, Joint Petitions previously filed, as well as the Joint Petition Orders of Dismissal are incorporated by reference and made a part of the record herein. The record consists solely of the transcript of the July 15, 2005, hearing, together with the referenced Joint Petitions and Joint Petition Orders.

From a review of the record as a whole, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §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 and contained in the June 8, 2005, Prehearing Order are hereby accepted as fact.

3. The claimant has shown, by a preponderance of the credible evidence, that respondents have failed and/or refused to make timely installment of compensation, entitling the claimant to a late payment penalty of eighteen percent (18%) pursuant to A.C.A. §11-9-802(b).
4. The claimant is not entitled to late payment interest in addition to the penalty awarded herein.

#### DISCUSSION

It is undisputed that the claimant sustained compensable injuries to her right, upper extremity which arose out of and during the course of her employment with Sanyo Manufacturing Corporation. Respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt, reasonably necessary medical treatment. The claimant apparently continued working until on or about August 18, 2003, at which time the claimant was required to undergo surgery on her right elbow related to her compensable injuries. Respondents then paid temporary total disability during the claimant's time off work, specifically, beginning August 18, 2003, and continuing through February 22, 2004, at which time the claimant returned to work for the employer herein. On March 1, 2004, the claimant's primary treating physician assessed a thirty percent (30%) impairment to the right, upper extremity. The claimant testified, and the record confirms, that in late April, 2004, the claimant received her first permanent impairment check in the amount of \$1,043.00. (Cl. Ex. 1)

The claimant testified that after receiving her first check, she contacted Tonya

Hawthorne, a claims representative, to ascertain the nature of the payment which was identified as "ppd" for the period between March 1, 2004, through April 18, 2004. At that time, the claimant and Ms. Hawthorne began discussing a negotiated settlement which the claimant apparently agreed to accept. The record reflects that the claimant received two (2) additional checks, one in the amount of \$1,192.00 for permanent partial disability benefits from April 19, 2004, through June 13, 2004, as well as a check in the amount of \$149.00, inappropriately designated as temporary total disability for the period beginning June 14, 2004, through June 20, 2004. (Cl. Ex.2 & 3)

The record reflects that the respondents suspended all payments of permanent disability after issuing the \$149.00 check on June 14, 2004. Eventually, a Joint Petition settlement was filed with the Commission on or about November 14, 2004. A Joint Petition hearing was conducted before Administrative Law Judge Andrew Blood on December 22, 2004, at Marion, Arkansas. The proposed settlement was denied because it was determined that the claimant's average weekly wages, at the time of her compensable injury, was \$425.00, entitling her to compensation rates of \$283.00 per week for temporary total disability and \$212.00 per week for permanent partial disability. Respondents apparently paid benefits at the erroneous rates of \$199.00 per week for temporary total disability and \$149.00 per week for permanent partial disability. Judge Blood correctly assessed that the thirty percent (30%) permanent physical impairment rating entitled the claimant to 73.2 weeks of benefits at the rate of \$212.00 per week or total payment of

\$15,518.40.

On March 5, 2005, the carrier issued a check in the amount of \$2,662.00, purportedly representing the difference between the appropriate compensation rate and the rates previously paid for both temporary total disability and permanent partial disability. (Cl. Ex. 4)

The parties then submitted a second proposed Joint Petition for settlement of the claim on or about March 25, 2005. A Joint Petition hearing was conducted on April 14, 2005. Because of confusing testimony concerning benefits previously paid, and without documentation reflecting the benefits previously paid, the second Joint Petition was also denied because the Petition appeared to contain erroneous statements concerning benefits previously paid. Following the denial of the second proposed Joint Petition, respondents issued a check in the amount of \$12,126.40, representing the balance of the claimant's impairment rating. (Cl. Ex. 5)

Ark. Code Ann. §11-9-802 directs that all compensation shall be paid in two (2) week installments unless directed otherwise by the Commission. It is set out in its entirety below:

(a) The first installment of compensation shall become due on the fifteenth day after the employer has notice of the injury or death, as provided in §11-9-701, on which date all compensation then accrued shall be paid. Thereafter, compensation shall be paid every two (2) weeks except where the Workers' Compensation Commission directs that installment payments be made at other periods.

(b) If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the

employer under §11-9-803 or unless such nonpayment is excused by the Commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§11-9-711 and 11-9-712.

(d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount.

(e) In the event that the Commission finds the failure to pay any benefits is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant. (Emphasis supplied)

Ark. Code Ann. §11-9-809 provides that interest is only payable pursuant to an Award as reflected below:

Compensation shall bear interest at the legal rate from the day an award is made by either an Administrative Law Judge or the Full Workers' Compensation Commission on all accrued and unpaid compensation.

The claimant has requested that she be awarded both penalties and interest for late payment of compensation.

First, addressing the claimant's request for interest, the Act only provides for interest pursuant to an Award by the Commission. Since no Award has ever been made, interest is not appropriate.

Furthermore, despite the claimant's request for a thirty-six percent (36%) penalty, I do not find that the respondents' failure to pay accrued installments was willful and intentional. Rather, the respondents inappropriately suspended all payments of permanent disability benefits while attempting to negotiate a final

settlement. Unfortunately, the respondents' key witness, Tonya Hawthorne, failed to appear at the hearing to offer any explanation concerning the reasons for the substantial delay in paying accrued compensation. Arguments can be made that all payments of compensation were untimely made and subject to a penalty. During the hearing, inquiries were specifically made concerning the penalty requested. The claimant advised that she was only requesting a penalty on the final installment of \$12,126.40. In find that the request is appropriate. Accordingly, I hereby make the following:

AWARD

Respondent, Great American Insurance Company of New York, is hereby directed and ordered to pay, to the claimant, a late payment penalty of \$2,182.68, representing an eighteen percent (18%) penalty on the final installment pursuant to A.C.A. §11-9-802(b).

This Award shall bear interest at the legal rate, if unpaid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge