

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105828

BILLY OSBORNE	CLAIMANT
BEKAERT CORPORATION	NO. 1 RESPONDENT
LIBERTY MUTUAL FIRE INS. CO. INSURANCE CARRIER	NO. 1 RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	NO. 2 RESPONDENT

OPINION FILED APRIL 6, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

Respondent No. 2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A pre-hearing conference was held in this claim on August 12, 2004, at which time stipulations and issues were set forth by the parties. Later correspondence added additional stipulations which eliminated several of the issues.

By agreement of the parties, this case was submitted to the Commission for decision based on submitted documentary evidence as well as briefs of the parties.

By agreement of all the parties the following stipulations were submitted to the Commission for its consideration;

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On May 22, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to his left leg and hip on May 22, 2001.

4. Medical expenses have been paid.

5. Temporary total disability has been paid from May 23, 2001, to date.

6. The claimant is permanently and totally disabled as a result of his compensable injuries.

7. The claimant's healing period ended on May 22, 2002.

8. That the claimant is entitled to the maximum compensation rate for the year 2001 which would entitle him to \$410.00 per week for total disability.

By agreement of the parties, the issues to be litigated are limited to the following;

1. The constitutionality of Ark. Code Ann. §11-9-522(f)(1).

2. Whether the claimant's permanent anatomical impairment rating paid by Respondents No. 1 can be credited against the first \$75,000.00 of permanent and total disability benefits.

3. Whether the claimant's attorney is entitled to attorney's fees.

The documentary evidence submitted in this matter consists of a packet of exhibits attached to the claimant's brief marked collectively as Claimant's Exhibit No. 1. Respondents No. 1 attached a packet of documentary evidence to his reply brief and these documents are collectively marked Respondents No. 1's Exhibit

No. 1. Respondent No. 2 submitted documentary evidence marked Respondent No. 2's Exhibit No. 1. All these exhibits were admitted without objection.

All three parties submitted briefs and Respondents No. 1 submitted a reply brief which will be included as argument in this matter.

DISCUSSION

It has been stipulated by the parties that the claimant sustained a compensable injury on May 22, 2001, resulting in the claimant having his left leg amputated above the knee. The claimant was 61 years old at the time of his compensable injury. Respondents No. 1 paid temporary total disability to the end of the claimant's healing period on May 22, 2002. The claimant was given a 45 percent impairment to the body as a whole which Respondents No. 1 have accepted and initiated payment in May 2002. The claimant's attorney sent a letter to the Commission on June 7, 2002, along with an AR-C requesting that this matter be set for a hearing on the issue of the claimant's entitlement to permanent disability benefits in excess of his impairment rating contending that he is permanent and totally disabled. On July 1, 2002, Respondents No. 1's attorney entered his appearance and indicated that they would need to take the claimant's deposition in order to evaluate whether the claimant may be entitled to permanent total disability benefits and said deposition was taken on August 21, 2002. By letter dated March 2, 2004, Respondents No. 1 acknowledged that they have accepted that the claimant is

permanently and totally disabled and have paid total disability benefits since May 22, 2002. It was further acknowledged that there was a dispute as to the appropriate rate of compensation for the claimant. The issue of the appropriate compensation rate for the claimant was eventually resolved by the parties.

The Death and Permanent Total Disability Trust Fund was made a party to this matter and after discovery, the Fund contends that Respondent No. 1 is obligated to pay the claimant his permanent anatomical impairment rating and this payment of impairment should not be credited against its \$75,000.00 obligation pursuant to Ark. Code Ann. §11-9-502. Ark. Code Ann. §11-9-502(b)(1) sets forth that;

The first \$75,000.00 of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.

In this case, the claimant's left leg was amputated and as a result of this scheduled injury was assessed an anatomical impairment rating. Ark. Code Ann. §11-9-501(d)(2)(A) provides that;

The permanent partial disability rate for amputation or permanent total loss of use of a member shall be the same as the employee's total disability rate...

It has been stipulated that the claimant's healing period ended on May 22, 2002. Respondents No. 1 asserts that they began paying the claimant his total disability benefits subsequent to the end of his healing period pursuant to Arkansas law. The claimant filed an ARC with the Commission on June 10, 2002, contending that he was entitled to additional benefits in that he was permanently and

totally disabled and requested a hearing. Respondents No. 1, by letter to the Commission dated July 1, 2002, set forth that they would need to take the claimant's deposition to evaluate whether the claimant may be entitled to permanent total disability benefits. The claimant's deposition was, in fact, taken by the parties on August 21, 2002. Respondents No. 1 filed a response to pre-hearing questionnaire with the Commission in March 2004 stipulating that the claimant was permanently and totally disabled as a result of his compensable injury.

Respondents No. 1 began paying the claimant total disability benefits at the end of his healing period as directed by Arkansas law because of his amputated leg and would have continued paying these benefits until his impairment rating had been paid in full. Respondent No. 2 has argued at length the difference between permanent partial benefits and permanent total benefits. The Court of Appeals in Dooley v. Automated Conveyor Systems, Inc., 84 Ark. App. 412, 127 S.W. 3d 486 (2004) when citing American Standard Travelers v. Post, 78 Ark. App. 79, 77 S.W. 3d 554 (2002) set out the standard to be used in construing the workers' Compensation Statutes;

[W]e recognize that the basic rule of statutory construction to which all other interpretive guides must yield is to give effect to the intent of the legislature. Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W. 2d 190 (1998). Arkansas Code Annotated Section 11-9-704(c)(3) (Repl. 1996) states that we are to construe the workers' compensation statutes strictly. Strict construction requires that nothing be taken as intended that is not clearly expressed. Edens v. Superior Marble & Glass, 346 Ark. 487, 58

s.w. 3d 369 (2001). The doctrine of strict construction is to use the plain meaning of the language employed. Wheeler Const. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). Where the language of a statute is unambiguous, we determine legislative intent from the ordinary meaning of the language used. Leathers v. Cotton, 332 Ark. 49, 52, 961 S.W. 2d 32, 34 (1998). IN considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. Id. The statute should be construed so that no word is left void, superfluous, or insignificant; and meaning and effect must be given to every word in the statute if possible. Locke v. Cook, 245 Ark. 787, 434 S.W. 2d 598 (1968).

Clearly, all permanent benefits are to be counted toward the \$75,000.00 limit. Therefore, Respondents No. 1 should be given credit for their payment of permanent benefits which they have paid subsequent to the end of the claimant's healing period until they reach the \$75,000.00 maximum.

The constitutionality of Ark. Code Ann. §11-9-522(f)(1) has been challenged. This statute provides;

Permanent total disability benefits shall be paid during the period of permanent disability until the employee reaches the age of 65; provided, with respect to permanent total disability resulting from injuries which occur after age 60, regardless of the age of the employee, permanent total disability benefits are payable for a period of 260 weeks.

The claimant contends that there is no rational basis for the statute limiting the benefits based on the age of an injured employee. In Golden v. Westark Community College, 333 Ark. 41, 969 S.W. 2d 154 (1998) the Supreme Court found that the previous Ark. Code Ann. §11-9-522(f) to be unconstitutional. The Court, in its

opinion, established the standard of review and burden of proof when assessing the constitutionality of Ark. Code Ann. §11-9-522(f). A statute is presumed to be constitutional and the burden of proving it otherwise is on the party challenging its constitutionality. Golden, 333 Ark. 41, 969 S.W. 2d 154. It is well settled that an act by the legislature is entitled to a presumption of constitutionality. Arkansas Trucking Association v. Gray, 288 Ark. 488, 707 S.W. 2d 759 (1986). On review the Court must presume that a statute is constitutional, and the party challenging the statute has the burden of proving otherwise. All doubts are resolved in favor of constitutionality. Misskelly v. State, 323 Ark. 449, 915 S.W. 2d 702 (1996). The Arkansas Supreme Court has written that;

The question of the wisdom or expediency of a statute is for the legislature alone. The mere fact that a statute may seem unreasonable or unwise does not justify a Court in annulling it, as Courts do not set to supervise legislation. Courts do not make the law; they merely construe, apply and interpret it.

Southwest Bell Telephone Company and Wheeler v. Roberts, 246 Ark. 864, 440 S.W. 2d 208, (1969). Based on this record and argument of all parties, I find that the claimant has failed to rebut the presumption of the constitutionality of Ark. Code Ann. §11-9-522(f)(1).

Based on the record presented in this matter, I find that Respondents' No. 1 controverted whether this claimant is permanently and totally disabled. It is recognized that by the time the respondents filed their pre-hearing questionnaire in March

2004 they had accepted and stipulated that this claimant is permanently and totally disabled as a result of his compensable injury. It is also recognized that Respondents No. 1 have paid total disability benefits to this claimant since the end of his healing period but this was done in accordance with Ark. Code Ann. §11-9-501(d)(2)(A), because the claimant had his leg amputated. The claimant filed an AR-C with the Commission on June 10, 2002, contending that he was permanently and totally disabled and requested a hearing. Respondents No. 1, in a letter to the Commission dated July 1, 2002, sets forth that they will need to take the claimant's deposition to evaluate whether the claimant may be entitled to permanent total disability benefits. The claimant's deposition was taken by the parties on August 21, 2002, and it was not until the respondents filed their pre-hearing questionnaire in March 2004 that they stipulated that the claimant was permanently and totally disabled as a result of his compensable injury. Respondents No. 1 are entitled to a reasonable length of time to investigate issues and take a position on those issues. However, from August 2002 until March 2004 is, in my opinion, an unreasonable length of time to make a determination as to a party's contentions. It should also be noted that Respondents No. 1 had access to the claimant's medical records and treatment program for his compensable injury from the date of his injury on May 22, 2001, up to the end of his healing period on May 22, 2002. I find, therefore, that Respondents No. 1 did controvert the claimant's contention that he is permanently and totally disabled and that the

claimant's attorney is entitled to the maximum statutory attorney's fee on the claimant's total disability benefits after his anatomical rating is paid out.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On May 22, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained compensable injuries to his left leg and hip on May 22, 2001.

4. Medical expenses have been paid.

5. Temporary total disability has been paid from May 23, 2001, to date.

6. The claimant is permanently and totally disabled as a result of his compensable injuries.

7. The claimant's healing period ended on May 22, 2002.

8. That the claimant is entitled to the maximum compensation rate for the year 2001 which would entitle him to \$410.00 per week for total disability.

9. I find that Ark. Code Ann. §11-9-522(f)(1) is not unconstitutional. See discussion above.

10. I find that Respondents No. 1 should be given credit for the payment of the claimant's permanent anatomical impairment against the first \$75,000.00 of permanent and total disability benefits. See discussion above.

11. Respondents No. 1 have controverted the claimant's status of being permanently and totally disabled. See discussion above.

12. That the claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to rebut the presumption of the constitutionality of Ark. Code Ann. §11-9-522(f)(1).

Respondents No. 1 are entitled to a credit for the payment of the claimant's permanent anatomical impairment rating against the first \$75,000.00 of permanent and total disability benefits.

Respondents No. 1 controverted the status of the claimant being permanently and totally disabled.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE