

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. D405821**

<b>JAMES D. SHORT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>EL DORADO PUBLIC SCHOOLS, EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>PUBLIC EMPLOYEE CLAIMS DIV., CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>DEATH &amp; PERM. TOT. DISABILITY TRUST FUND</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED MARCH 17, 2005**

Hearing before Administrative Law Judge J. Mark White on January 27, 2005, in El Dorado, Union County, Arkansas.

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

Respondents No. 1 represented by Mr. Richard S. Smith, Jr., Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On January 27, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on November 8, 2004, and a Prehearing Order was entered that same day. A copy of the November 8, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly

set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including November 9, 1983; that on November 9, 1983, the claimant sustained a compensable injury which rendered him permanently totally disabled; that respondents accepted the November 9, 1983, injury as compensable and paid benefits through June 12, 1985; that the claimant recovered a net of \$218,750.80 from a third-party settlement, entitling the respondents to a credit of \$141,279.39 against future benefits; that the settlement was approved by the Commission in an Order dated November 18, 1985, which Order is *res judicata* to the present claim; and that the claimant earned wages sufficient to entitle him to a compensation rate of \$154. At the hearing, the parties further stipulated that the third-party settlement credit was extinguished no later than June 9, 2003; that respondent no. 1 would have reached its \$75,000 statutory maximum as of March 21, 1995; that the claimant filed his most recent Form AR-C claim for compensation on July 28, 2003; and that the Trust Fund had *de facto* notice of this claim no later than October 2, 2002.

The parties agreed that the issues to be presented were whether the respondent Public Employee Claims Division is liable to the claimant for additional

permanent total disability benefits; the extent of liability of the Death & Permanent Total Disability Trust Fund; whether this claim is barred by the statute of limitations; and controversion and attorney's fees.

The claimant contends that he is permanently totally disabled; and that the Order of November 18, 1995, is *res judicata* to all issues between the parties and that he is entitled to be paid \$154 per week from the date that the credit was extinguished.

Respondents No. 1 contend that this claim is barred by limitations, specifically Ark. Code Ann. § 11-9-702(b); that the claimant has not provided any proof that he is entitled to medical and indemnity benefits which would exceed the amount of PECD's future credit; that, in any case, respondents have paid permanent disability benefits in excess of \$75,000, and may be entitled to reimbursement from the Death & Permanent Total Disability Trust Fund; that Rule 28 did not exist at the time of the injury in this case nor at the time of the entry of the Order on September 11, 1985, and therefore its requirements would not be binding in this case; that because of the particular circumstances of this case, i.e. respondents' liability being charged against a large future credit in a third-party settlement, respondents did not have the normal procedural cues to put the Trust Fund on notice; and that even if Rule 28 applies, it is unreasonable to interpret it to suggest that the Trust Fund is

permanently excused from liability for the period of time between the exhaustion of the future credit and the filing of the Form AR-D, and the more reasonable interpretation is simply that respondents were obligated to continue payments until the matter was resolved, but that PECD could then be reimbursed. At the end of the hearing, respondents further contended that Rule 28 is invalid for conflicting with statute insofar as it may be interpreted to require payment of more than \$75,000 by respondents.

The Death & Permanent Total Disability Trust Fund contends that Commission Rule 28 (effective April 1, 1989) required that the Trust Fund be placed on notice, to include a filing of an A-30 (as of March 15, 1993, an AR-D), within 90 days of the completion of payment of the first \$75,000; that failure to do so constituted a waiver of a claim against the Trust Fund until the notice requirements were met; that the employer/carrier was prohibited from ceasing payments prior to compliance with the notice requirements; that since respondents did not comply with Rule 28 by filing an AR-D form until October 19, 2004, the Trust Fund cannot be held liable for payment of permanent total disability benefits until January 17, 2005, pursuant to *Coplin v. S & S Construction, Inc.* A.W.C.C. E205334 (June 18, 2001); that Rule 28 existed when the \$75,000 was paid out in 1995, and since it is procedural in nature, it would apply retroactively; in the alternative, if Rule 28 is

found not to apply, that seven years passed from the time the Fund should have taken over and when it received notice, and respondent no. 1 and the claimant are precluded from receiving benefits from the Trust Fund by reason of the statute of limitations and equitable theories of laches and waiver.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The present claim is a claim for enforcement of a prior order, and as such is not barred by the statute of limitations on claims for additional benefits.
4. Any statute of limitations was tolled through the life of the subrogation credit until it was extinguished.

5. The claimant has proven by a preponderance of the evidence that the subrogation credit was extinguished on June 9, 2003.
6. The claimant filed his most recent claim for compensation on July 28, 2003.
7. This claim is not barred by the statute of limitations imposed by § 11-9-702.
8. This claim is not barred by the statute of limitations imposed by § 16-56-114.
9. A.W.C.C. Rule 28, as adopted on April 1, 1989, is controlling in this matter.
10. The Commission received the respondents' Form AR-D on October 19, 2004.
11. The respondent Public Employee Claims Division is liable to the claimant for permanent total disability benefits from June 9, 2003, until January 17, 2005.
12. The Death & Permanent Total Disability Trust Fund is liable to the claimant for permanent total disability benefits after January 17, 2005.
13. Respondent No. 1 is entitled to no reimbursement from the Trust Fund.
14. The plain language of Ark. Code Ann. § 11-9-502 does not bar, nor is it contradicted by, Rule 28's presumption that failure to give notice is a waiver of the limits established by statute.
15. Rule 28 is valid in that it is consistent with Ark. Code Ann. § 11-9-502.
16. Respondent No. 1 has controverted all benefits sought herein.
17. Respondent No. 2, the Death & Permanent Total Disability Trust Fund, is liable for no attorney's fees herein.

## DISCUSSION

### I. History

The claimant sustained a compensable injury on November 9, 1983, in a motor vehicle accident. He brought suit against the third-party tortfeasor and in 1985 settled for \$350,000, with a net award to the claimant of \$232,283.75 after costs of collection. From that amount, the claimant reimbursed the respondents \$13,532.95 for medical expenses and disability benefits paid by them. After a hearing before the Commission, an Administrative Law Judge entered an Order on September 11, 1985, finding that the claimant was permanently and totally disabled and granting the parties "all credits and all obligations imposed by the Arkansas Workers' Compensation Act with respect to the subrogation sums recovered and all credits that may be due in the future." Counsel for both parties agreed in the hearing that the respondents remained entitled to a credit of \$141,312.89. Counsel also agreed that the respondents would have continued liability for medical benefits once the credit had been extinguished.

In October, 2002, aware that the credit would soon extinguish, counsel for the claimant contacted the Death & Permanent Total Disability Trust Fund inquiring as to when disability benefits would be resumed. The parties stipulated herein that the credit was extinguished no later than June 9, 2003, yet both the respondents and the

Trust Fund have refused and continue to refuse to resume the claimant's benefits for permanent total disability.

### **Statute of Limitations**

The respondent-carrier first contends that this claim is barred by the statute of limitations. Arkansas law limits the time in which a claim for additional compensation may be filed. The relevant statute states in pertinent part:

In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of injury, whichever is greater.

ARK. CODE ANN. § 11-9-702 (b)(1). A timely-filed claim for additional benefits will toll the statute of limitations until the claim is decided. *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

The claimant argues that this present matter is not a claim for additional benefits, but rather an action to enforce a judgment. I agree. An Order was entered by the Commission in 1985 finding the claimant to be permanently totally disabled. That Order is now final and is *res judicata* to the present matter. None of the parties contend that the claimant's disability status has changed, and the claimant is entitled to payment of benefits "during the continuance of the total disability." ARK. CODE

ANN. § 11-9-519 (a). The respondent-carrier and the Trust Fund refuse to comply with the terms of the 1985 Order, therefore the present claim is one seeking enforcement of the Order. I conclude that the present claim is a claim for enforcement of a prior order, and as such is not barred by § 11-9-702. *Cf. Lazelere v. Stratton*, 35 Ark. App. 174, 816 S.W.2d 614 (1991) (holding that limitations of § 11-9-702 will not bar action to enforce judgment timely obtained from Commission).

Even if this claim could properly be classified as one for additional benefits, I would conclude that the limitation imposed by § 11-9-702 was tolled through the life of the credit. Had the respondent-carrier paid actual weekly disability benefits to the claimant, the statute would be tolled by the “payment of compensation.” ARK. CODE ANN. § 11-9-702 (b)(1). I conclude that for purposes of the statute of limitations, a subrogation credit should be accounted as “payment of compensation” for the life of the credit. Any other conclusion is contrary to the purpose of the Workers’ Compensation Act “to pay timely temporary and permanent disability benefits to all legitimately injured workers.” ARK. CODE ANN. § 11-9-101 (b). Any other conclusion is also manifestly unfair and unjust. Were the statute to begin running one year after the actual payment of compensation, it would have run in 1986 – some 16 years before the claimant had any reason to think the respondents would eventually refuse to fulfill their obligation.

The respondents and the Trust Fund agreed in the hearing that the statute was tolled through the life of the credit. The respondent-carrier argues, however, that the credit was actually extinguished some years before June 9, 2003, in that it was extinguished by the claimant's payment of medical benefits for which the respondents would have otherwise been liable. However, no party has introduced any evidence whatsoever to establish what payments were made by the claimant or his insurers, when such payments were made, or the amount of such payments. Without such evidence, it would require speculation to reach the respondents' conclusion – that the credit was extinguished earlier by the payment of unknown medical expenses. Speculation and conjecture cannot substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Given the evidence before me, and the lack of any specific evidence of specific expenditures for medical care, I find that the claimant has proven by a preponderance of the evidence that the credit was extinguished on June 9, 2003. The parties stipulated that the present AR-C claim for compensation was filed a month later, on July 28, 2003, well within the one-year limitation period. I conclude that this claim is not barred by the statute of limitations imposed by § 11-9-702.

I should note that most actions to enforce a judgment or decree are subject to a general ten-year statute of limitations. ARK. CODE ANN. § 16-56-114. The

Supreme Court has on at least one occasion applied this limitation in a workers' compensation context. *See, Dodson v. Taylor*, 346 Ark. 443, 57 S.W.2d 710 (2001) (action to enforce foreign workers' compensation judgment held subject to ten-year limit of § 16-56-114, not two-year limit of § 11-9-702). Nonetheless, any payments made on a judgment will toll the statute, forming a new ten-year period from which the statute will run. *Koontz v. LaDow*, 133 Ark. 523 (1918). The respondents herein effectively made payments on the judgment by way of the credit, tolling the statute until the extinguishing of the credit. Thus, this claim is not barred by § 16-56-114.

### **Rule 28 and the Liability of the Trust Fund**

The respondent-carrier argues in the alternative that the Trust Fund is liable for any benefits owed, as the respondent-carrier has already paid benefits (by means of the subrogation credit) exceeding its maximum liability of \$75,000 as established by Ark. Code Ann. § 11-9-502 (b). The Trust Fund denies this liability, citing the Commission's rules.

As of the time when the respondent-carrier would have reached the \$75,000 cap, the Commission's Rule 28 provided as follows:

- (a) A party desiring to raise the issue of liability of the Death and Permanent Total Disability Trust Fund shall name the Trust Fund as a party by notifying the Special Funds Administrator of the Workers' Compensation

Commission and all other parties no later than 90 days prior to the completion of payment of the first \$50,000 or \$75,000 (depending on the applicable limit) in weekly benefits pursuant to 11-9-502(b) of the Act in writing by a form of mail requiring a signed receipt. The Notice shall include a current Form A-30 [now known as Form AR-D] to be filed with the Workers' Compensation Commission.

(b) Failure to give notice as set out above shall constitute a waiver of a claim of Death and Permanent Total Disability Trust Fund liability until such time as the Notice requirements in (a) above are met. In no event shall the employer or its carrier cease payments for death or permanent total disability prior to compliance with the Notice requirement above.

A.W.C.C. Rule 28 (April 1, 1989). Though Rule 28 was substantially amended on January 1, 2004, it still provides that failure to give 90 days notice constitutes a waiver of Trust Fund liability. A.W.C.C. Rule 28 (Jan. 1, 2004).

The respondent-carrier contends that Rule 28 does not apply herein since it did not exist at the time of the claimant's injury. I find this to be irrelevant, in that Rule 28 did exist, as the parties acknowledge, by the time the respondent-carrier would have reached its \$75,000 limit. Since Rule 28 placed no liability or obligation upon the respondent-carrier prior to 90 days before the limit was reached, it cannot be considered a retroactive application of the rule to apply it herein. I conclude that the Commission's Rule 28, as adopted on April 1, 1989, is controlling in this matter. The record reflects, and I therefore find, that the Commission received the

respondent-carrier's Form AR-D on October 19, 2004, as shown by the file-mark date stamped on the back of the October 15, 2004, cover letter submitting the AR-D. I conclude that the respondent Public Employee Claims Division is liable for permanent total disability benefits from the extinguishing of the credit, June 9, 2003, until 90 days after October 19, 2004, the date of receipt of notice by the Trust Fund, or January 17, 2005. I further conclude that the Trust Fund is liable for permanent total disability benefits thereafter.

The respondent-carrier argues that even though the Form AR-D was not filed until October 2004, the Trust Fund had constructive notice of this claim as early as 2002. However, the Full Commission has previously held that constructive notice will not satisfy the notice requirements of Rule 28, nor will it exempt a carrier from liability for benefits owed prior to 90 days after notice. *Coplin v. S & S Construction, Inc.* A.W.C.C. E205334 (June 18, 2001).

The respondent-carrier argues that it is entitled to reimbursement by the Trust Fund for any amount paid or owed over \$75,000. The respondent-carrier cites no authority for this proposition, nor am I able to identify any statutory authority under which I can award reimbursement. Moreover, I note that in a similar case the Full Commission declined to award reimbursement. *Coplin v. S & S Construction, Inc., supra*. I conclude the respondents herein are entitled to no reimbursement.

The respondent-carrier argues that because of the “particular circumstances” of this claim, namely it’s “liability being charged against a large future credit in a third-party settlement,” it is not reasonable to apply Rule 28 so as to require further benefit payments from the respondent-carrier. I do not find this argument persuasive. I recognize that deviation from the Commission’s rules may be permitted where “compliance is impossible or impracticable.” A.W.C.C. Rule 23 (March 1, 1982). Nonetheless, I cannot reasonably conclude that requiring the respondent-carrier to fulfill its obligations herein is “impossible or impracticable.” Likewise, I cannot conclude that application of Rule 28 herein is unreasonable. Upon the promulgation of Rule 28, the respondent-carrier had reason to examine its files and identify any claims in which the \$75,000 limit would soon be reached, whether by credit or otherwise. If the respondent-carrier had filed a Form AR-D at any time before 90 days prior to June 9, 2003, it would have avoided any further indemnity liability on this claim. The parties agree the Trust Fund was aware of this specific claim in 2002, and it appears that the respondent-carrier was notified of it shortly thereafter – well before the waiver period of Rule 28 began. The respondent-carrier’s negligence in failing to comply with Rule 28 does not justify deviation from Rule 28's requirements.

Finally, the respondent-carrier argues that if Rule 28 is interpreted so as to

require it to pay in excess of \$75,000 in permanent benefits, then Rule 28 is invalid in that it contradicts the limits established by statute, at Ark. Code Ann. § 11-9-502 (b). It is admitted that the plain text of § 11-9-502 limits the respondent-carrier's liability to \$75,000. Act 796 of 1993 requires the Commission and the courts to strictly construe the provisions of the Workers' Compensation Act. ARK. CODE ANN. § 11-9-704(c)(3). Strict construction is narrow construction, requiring that nothing be taken as intended that is not clearly expressed and that the plain meaning of the language be employed. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003). Even so, statutes that are strictly construed must still "be construed in their entirety, harmonizing each subsection where possible." *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998). Moreover, statutes must be construed in the context of legislative intent. *Id.* Intent can be ascertained from a variety of sources, including the "consequences of interpretation." *Id.*

As noted above, the purpose of the Workers' Compensation Act is "to pay timely temporary and permanent disability benefits to all legitimately injured workers." ARK. CODE ANN. § 11-9-101 (b). The purpose of Rule 28 specifically is to protect injured workers and to ensure they receive without interruption the benefits to which they are entitled. *Coplin v. S & S Construction, Inc., supra*. The purpose and effect of Rule 28, specifically its waiver of liability for lack of notice, is clearly in line

with the statutory purpose of the Workers' Compensation Act, in that it works to ensure a claimant receives uninterrupted benefits even where a carrier fails to fulfill its legal obligation to notify the Trust Fund of a potential claim. Moreover, the statutory purpose is furthered by giving the Trust Fund adequate advance notice of all claims so that the Trust Fund can ensure sufficient funds are available to pay the claim in a timely manner. I conclude that the plain language of § 11-9-502 does not bar, nor is it contradicted by, Rule 28's presumption that failure to give notice is a waiver of the limits established by statute. I therefore conclude that Rule 28 has been validly applied herein.

### **Attorney's Fees**

The Workers' Compensation Act as it applies to attorney's fees has been amended since the claimant sustained his accident, but the amendments apply only to injuries sustained after the effective date of the amendments. 1986 Ark. Acts. 10, 2<sup>nd</sup> Ext. Sess., § 12; 1987 Ark. Acts 1015, § 16; 2001 Ark. Acts 1280, § 5. Therefore, the attorney's fee statute in force at the time of the claimant's injury is the appropriate statute to apply, and it provides:

In all other cases, whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid by the employer or carrier in addition to

compensation awarded, and such fees shall be allowed only on the amount of compensation controverted and awarded.

ARK. STAT. ANN. § 81-1332 (Supp. 1985).

Notably, no provision is made for an award of attorney's fees against the Trust Fund. Therefore, I conclude that the Trust Fund is liable for no attorney's fees herein, even though the Trust Fund has plainly controverted the claimant's right to compensation. The respondent-carrier Public Employee Claims Division is liable for all attorney's fees assessed herein.

## AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to continued permanent total disability benefits, to be paid by the respondent Public Employee Claims Division from June 9, 2003, through January 17, 2005, and to be paid by the Death & Permanent Total Disability Trust Fund from January 18, 2005, thereafter through the continuance of the claimant's permanent total disability. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Floyd Thomas, is hereby awarded the maximum statutory attorney's fee on that portion of the Award controverted by Respondent No. 1, pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 1986. The entire fee is to be paid solely by Respondent No. 1.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge