

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F107306

DEENA SPENCER, EMPLOYEE

CLAIMANT

**WESTERN SIZZLIN,
EMPLOYER**

RESPONDENT

**AMERICAN CASUALTY COMPANY
OF READING, PA,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 28, 2005

Submitted on the record before Administrative Law Judge Cynthia Estes Rogers.

Claimant represented by Mr. Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

Respondents represented by Mr. Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

_____This case was submitted on the record to determine whether respondents are entitled to be reimbursed for alleged overpayments of benefits to the claimant.

The parties have stipulated that, pursuant to Administrative Law Judge Don Curdie's opinion in this case, issued on October 8, 2003, and made part of the record herein, claimant was awarded benefits of certain additional periods of temporary total disability (TTD), as well as permanent partial disability, unpaid medical mileage, and, based upon an 18 percent impairment rating accepted by respondents, an 18 percent penalty imposed against respondents for the periods of TTD and mileage

controverted. The parties further stipulated that claimant's compensation rate for TTD was \$338.00 and her permanent partial disability rate is \$254.00.

_____ Respondents now contend that there have been overpayments of benefits made to the claimant, and that she therefore owes a sum of \$8,107.80 back to the respondents. Respondents request that an order be entered requiring claimant to reimburse respondents for the overpayment and that said order should, further, state, pursuant to Ark. Code Ann § 11-9-706(b), that if the order for refund is not paid within forty-five days that upon application of respondents, a hearing will be held to determine whether claimant is in contempt of the Commission and should be fined an amount not to exceed \$10,000.00.

Claimant contends that any overpayment of workers' compensation benefits by respondents should be applied to her future medical expenses.

STATEMENT OF THE CASE

The parties have submitted this matter for a decision on some stipulated facts, exhibits, and briefs outlining their respective positions, as well as Administrative Law Judge Don Curdie's opinion of October 8, 2003.

Claimant was indisputably issued an impairment rating on September 26, 2002, which was accepted by respondents. Respondents have attached exhibits to their brief, outlining the payments made to claimant since she was issued the impairment rating. Respondents assert that those payments total \$16,474.56.

The parties have stipulated that claimant's compensation rate for TTD was \$338.00 and her permanent partial disability rate is \$254.00, and that she received a rating of 18 percent to the upper extremity for her hand and wrist injury, which would entitle her to 18 percent times 183 weeks for a total of 32.94 weeks. Respondents assert that this number of weeks multiplied by the permanent partial disability rate calculates to \$8,366.76 and that this is the amount claimant should have been paid. Respondents contend that deducting the permanent partial disability of \$8,366.76 from the actual amounts of payments, which was \$16,474.56, results in an overpayment of \$8,107.80. Claimant submitted no evidence to refute this alleged overpayment. Respondents request that claimant be ordered to reimburse this overpaid amount to respondents.

FINDINGS OF FACT

1. Respondents have proven by the greater weight of the evidence presented that claimant was overpaid by \$8,107.80;
2. Respondents are entitled to credit for the amount of overpayment against any future benefits or medical expenses incurred by claimant as a result of her compensable injury;
3. Claimant is not required to repay respondents for overpayment.

DISCUSSION

Arkansas workers' compensation law is clear that a claimant cannot be ordered to repay any alleged overpayment. Respondents must recoup the alleged overpayment by way of a credit against future benefits. Arkansas Code Annotated § 11-9-207(a) provides that, in addition to its other powers and duties, the Workers' Compensation Commission is given full power and authority:

(7) To determine the time for the payment of compensation and order the reimbursement of employers for amounts advanced[.]

Ark. Code Ann. § 11-9-807 provides:

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

However, in a Full Commission case recently issued, *Swem v. University of Arkansas*, Full Workers' Compensation Commission, Opinion filed November 2, 2004, (W.C.C. F203675), the Full Commission opined that the administrative law judge in that matter correctly cited *Osborne v. Logan County*, Workers' Compensation Commission E513263 (Aug. 20, 1998), which essentially held that, if a respondent-carrier overpaid workers' compensation benefits, the respondent could be reimbursed only "out of any unpaid installment or installments of compensation due."

The respondent *cannot* be directly reimbursed by the claimant. The Commission's holding in *Osborne* was based on Ark. Code Ann. § 11-9-807.

The respondents in *Swem* asked the Commission to reverse its holding in *Osborne* and to order the claimant to directly reimburse Public Employee Claims for the overpayment. The Full Commission declined to do so, holding as follows:

We cannot do so. It is indeed correct that Ark. Code Ann. § 11-9-207 empowers the Commission to order reimbursement of employers for amounts advanced. However, the mechanism for doing so is found in Ark. Code Ann. § 11-9-807. The employer is reimbursed “out of any unpaid installment or installments of compensation due.” If in the course of time the instant claimant becomes entitled to additional temporary total disability compensation as a result of her February 2002 compensable injury, then the respondent-employer can withhold temporary total disability as its “reimbursement” until the account is settled.

The *Swem* case is controlling; and, as such, respondents in the instant case are entitled only to credit for the amount of overpayment as their “reimbursement.”

AWARD

Respondents are entitled only to credit for the amount of overpayment, \$8,107.80, against any future benefits or medical expenses incurred by claimant as a result of her compensable injury.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge