

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202289

GLORIA TAYLOR

CLAIMANT

CV'S

RESPONDENT

BENCHMARK INSURANCE,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 8, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by KEN OLSEN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 21, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on April 21, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On January 27, 2002, the relationship of employee-employer-carrier-TPA existed between the claimant, CV's Family Foods, and Benchmark Insurance Company.
2. On January 27, 2002, the appropriate weekly compensation rates were \$308.00 for total disability and \$231.00 for permanent partial disability benefits.
3. On January 27, 2002, the claimant sustained a compensable

injury to her lumbar spine.

4. The Opinion of the Full Commission was affirmed by the Arkansas Court of Appeals on November 17, 2004, has become final and res judicata of all issues raised and addressed therein.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the respondents are subject to the penalty provided by Ark. Code Ann. §11-9-802(c) on all accrued benefits awarded to the claimant in the prior Opinion.
2. whether the respondents are subject to the penalty provision of Ark. Code Ann. §11-9-802(e) on the accrued benefits awarded.
3. whether the respondents are subject to the contempt provisions of Ark. Code Ann. §11-9-706(b).
4. The claimant's entitlement to additional temporary total disability benefits from March 26, 2005 through a date yet to be determined.
5. whether the respondents are subject to the penalty provisions by Ark. Code Ann. §11-9-802(b), (c), or (e) or any temporary total benefits accruing after March 26, 2005.
6. The claimant's entitlement to the surgery previously recommended by Dr. Chakales.
7. Controversion and attorney's fees.

In regard to these issues, the claimant contends:

- (a) The claimant contends that the Court of Appeals November 17, 2004 Opinion became final when it was not appealed to the Arkansas Supreme Court within 17 days of the issuance of the Opinion. Benefits then became due and the respondents had 15 days from that date within which to timely pay the award. However, payment of the award was not issued until December 20, 2004; therefore, a late payment penalty is due pursuant to Ark. Code Ann. §11-9-802(c). Also, a fee on that late payment penalty is due.
- (b) The claimant contends that the Administrative Law Judge's Opinion that was rendered in this case specifically held that medical services provided and recommended by or at least at the direction of Dr. Harold Chakales constitute reasonably necessary medical services and that the payment for these services is the sole liability of the respondent employer and its carrier, Benchmark Insurance Company. The Judge's Opinion was affirmed by the Full Commission and the Full Commission's Opinion was affirmed by the Court of Appeals; yet the respondent carrier refuses to authorize treatment by Dr. Chakales notwithstanding the fact that Dr. Chakales had already recommended surgery regarding the claimant's lumbar spine prior to the hearing that was held in this case.
- (c) The issue of the claimant's entitlement to surgery regarding her lumbar spine has already been litigated and a final order approving the recommended treatment is in effect yet the respondents are willfully and intentionally disobeying a lawful order of the Administrative Law Judge and the Commission and should be found in contempt of the Commission and assessed a fine not to exceed \$10,000.00 pursuant to Ark. Code Ann. §11-9-706(b).
- (d) The claimant contends that if it is necessary for the Commission to again order the respondents to pay temporary total disability benefits, the respondents have controverted this claim a second time and should have to pay an additional attorney's fee in regard to that controversion as well as in regard to them requiring a hearing regarding a medical treatment issue that is already res judicata.

There appears to be no pre-hearing questionnaire filed on behalf of the respondents. Thus, the respondents' contentions in regard to these issues are somewhat unclear. However, the

respondents' actions essentially speak for themselves.

#### DISCUSSION

\_\_\_\_\_A hearing had previously been held in this claim on January 7, 2003. It is apparent from the pre-hearing questionnaires of the parties and the pre-hearing order, which was filed in regard to the January 7, 2003 hearing, that two of the issues to be litigated and resolved at the January 17, 2003 hearing were the claimant's entitlement to the medical services provided and recommended to her for her lower back or lumbar difficulties by Dr. Harold Chakales and the liability of respondents CV's Family Foods and Benchmark Insurance Company for the expense of these medical services. Both the claimant and the respondents were provided the opportunity to present any and all evidence they desired on these issues. Another set of issues raised and addressed in the pre-hearing questionnaires and the pre-hearing order was the claimant's entitlement to temporary total disability benefits for her low back or lumbar difficulties and the appropriate party to be liable for such benefits. Again, both the claimant and the respondents were afforded the opportunity to present any and all evidence they deemed to be necessary and relevant in regard to these issues.

Following this hearing, an Opinion was issued on March 27, 2003. This Opinion held, among other things, that the medical services provided and recommended to the claimant for her compensable low back or lumbar spine injury by Dr. Chakales represented "reasonably necessary medical services" under Ark. Code Ann. §11-9-508. This Opinion further held that the respondents,

CV's Family Foods and Benchmark Insurance Company were liable for the expense of these medical services, subject to the medical fee schedule established by this Commission. This Opinion also held that the claimant had proven her entitlement to temporary total disability benefits for her compensable low back or lumbar spine injury for the period beginning February 18, 2002 and continuing through a future date, yet to be determined. Respondents CV's Family Foods and Benchmark Insurance Company was found liable to the claimant for these temporary total disability benefits.

The respondents CV's Family Foods and Benchmark Insurance Company appealed the foregoing sections of the Opinion to the Full Commission. On December 3, 2003, the Full Commission affirmed and adopted, as its own, the initial Opinion of March 27, 2003. The respondents CV's Family Foods and Benchmark Insurance Company subsequently appealed the Full Commission's Opinion to the Arkansas Court of Appeals. In a "non designated" Opinion, the Arkansas Court of Appeals affirmed the Full Commission's Opinion in all respects, on November 17, 2004. The Court of Appeals' mandate, in this case, was handed down on December 7, 2004.

By check, dated December 30, 2004, Benchmark Insurance Company tendered to the claimant payment of the accrued temporary total disability benefits that were payable under the Opinion of March 27, 2003. The respondents withheld, from these benefits one-half of the attorney's fee for the claimant's attorney. The claimant testified that she actually received this check some time after December 30, 2004.

The record does not disclose when the respondents actually paid the awarded accrued medical expenses, which were for services already provided the claimant by Dr. Chakales. However, it is obvious from the record that the respondents have continued to refuse to provide the claimant with the surgical treatment for her compensable low back or lumbar injury that has consistently been recommended by Dr. Harold Chakales since prior to the previous hearing.

In February or March of 2005, the respondents requested the claimant to see a physician of their choosing. The claimant advised the respondents that she was electing to stay with Dr. Chakales and refused the respondents' request. No action appears to have been taken by the respondents to seek any Order from this Commission, requiring the claimant to undergo an evaluation by a physician of the respondents' choosing. Instead, the respondents elected, on their own, to "suspend" the continued payment of any compensation, effective March 26, 2005. Their only reason given for this action was the claimant's refusal to undergo what the respondents term an IME or independent medical evaluation. (However, there is nothing "independent" about this evaluation. Rather, it is simply an evaluation by a medical expert of the respondents' selection).

\_\_\_\_\_The first issue to be addressed is applicability of the penalty provisions of Ark. Code Ann. §11-9-802(c) on the temporary total disability benefits that were awarded in the prior Opinion of March 27, 2003, and that had accrued through the date that this

Opinion ultimately becoming “final.” Ark. Code Ann. §11-9-802(c) states:

“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.”

This subsection provides for no consideration of any excuses for the respondents’ failure to pay the benefits awarded within the time period prescribed.

As previously noted, the Court of Appeals entered its Opinion affirming that of the Commission, on November 17, 2004. Under the Arkansas Rules of Appellate procedure, the respondents had 18 calendar days to file either a Petition for Reconsideration or a Petition for Review by the Arkansas Supreme Court. Eighteen (18) calendar days from November 17, 2004 would be December 5, 2004. As this was a Sunday, the respondents had until Monday, December 6, 2004, to file a Petition for Reconsideration or a Petition for Review by the Arkansas Supreme Court. Obviously, this was not done, as the Court of Appeals entered its mandate on December 7, 2004. On that date, all accrued benefits payable under the Opinion became “due.” The respondents then had 15 days from December 7, 2004, in which to make payment of these benefits. Fifteen (15) days from December 7, 2004 would have been December 22, 2004. Clearly, the evidence presented shows that the respondents did not even attempt to pay these accrued benefits until December 30, 2004,

and actual receipt of these benefits by the claimant was not had until sometime later.

Therefore, it is obvious that the respondents did not pay these benefits within 15 days after they had become due. The penalty provided by Ark. Code Ann. §11-9-802(c) would automatically attach to these benefits, and the respondents would be liable to the claimant for an additional payment of 20% of these temporary total disability benefits in addition to these benefits.

The next issue is the question of whether the respondents' failure to timely pay any of the benefits awarded by the prior opinion would subject them to the penalty provided by Ark. Code Ann. §11-9-802(e). This subsection states:

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

It is important to note that this subsection, unlike subsections (b) and (c), is not limited to “installments” of compensation, but applies to any “benefit” provided by the Act.

After consideration of all the evidence presented, I do not find that the respondents' failure to pay the accrued temporary total disability benefits, in a timely manner, was a “willful and intentional” refusal. Although the respondents have offered no explanation for the delay in the payment of these benefits, payment was made prior to any formal demand or litigation. Thus, it would appear that the respondents' tardiness in making this payment was not willful or intentional, but merely negligent. The more

appropriate penalty for the respondents' conduct, in this regard, is that provided by Ark. Code Ann. §11-9-802(c).

However, there remains the matter of the respondents' refusal to provide the claimant with the medical treatment recommended for the claimant's compensable lumbar injury by Dr. Chakales (i.e. surgery). This "benefit" was expressly awarded in the prior opinion. As previously noted, all parties were put on notice that the claimant's entitlement to this particular recommended treatment modality was an issue that was to be litigated and resolved by the prior hearing. All parties, including the respondents, were afforded ample opportunity to present whatever evidence they desired in regard to this issue. Ultimately, this issue was resolved in the claimant's favor in the opinion of March 27, 2003, and this was a specific benefit awarded to the claimant in this opinion. When this opinion ultimately became final, the questions of whether this specific treatment modality represented reasonably necessary medical services for the claimant's compensable lumbar injury and the respondents' liability for the expenses incurred for these services, became the law of this case. As a result, the respondents are now barred from relitigating this issue at the present time or at any time in the future. However, the respondents have continued through the present time to willfully and intentionally refuse to provide the claimant with this awarded benefit.

Therefore, I find that the respondents' willful and intentional refusal to pay this medical benefit which has been

expressly awarded to the claimant, subjects the respondents to the penalty provided by Ark. Code Ann. §11-9-802(e) on this medical benefit. I further find that the maximum penalty provided or 36% of the "benefit" is appropriate under the facts of this case. As directed by this subsection, this penalty is payable to the claimant.

Next, is the matter of temporary total disability benefits for the period beginning March 26, 2005, and continuing through a date yet to be determined. Once the respondents had brought current the temporary total disability benefits that were awarded by the prior opinion (by their check dated December 30, 2004), the respondents continued to pay temporary total disability benefits through March 25, 2005. However, on that date the respondents' willfully and intentionally terminated the payment of these benefits. Ostensibly, the respondents' reason for this action was that the claimant refused to see a physician of their choosing.

The respondents were well aware that the prior Opinion had awarded the claimant temporary total disability benefits from February 18, 2002 "through a date yet to be determined." It was also apparent from the prior opinion that this award of indefinitely continuing temporary total disability benefits was based upon the fact that further extensive medical treatment (surgery) was appropriate and necessary for the claimant's compensable lumbar injury and that the claimant would not be physically capable of returning to regular gainful employment until at least after the completion of this necessary treatment. The

respondents were also well aware that the claimant had not received this necessary treatment at the time they terminated her temporary total disability benefits, on March 25, 2005, as they had continued to steadfastly refuse to provide the claimant with this awarded medical benefit. Further, it was apparent to the respondents from the subsequent reports and records of Dr. Chakales that it remained his opinion that the claimant required surgical intervention and would continue to be extremely limited in her physical abilities until at least after the successful completion of the recommended surgery.

Based upon the evidence presented, there is absolutely no reasonable basis for the respondents, or any one else, to believe that the claimant no longer continued within her healing period from the effects of her compensable lumbar injury or no longer continued to be rendered totally disabled as a result of the effects of this compensable lumbar injury after March 25, 2005. There is no provision in the Act that would excuse the respondents from paying temporary total disability benefits to which the claimant would otherwise be entitled simply because she refused the respondents' request to see a physician of the respondents' selection.

Ark. Code Ann. §11-9-511(a) gives this Commission the authority to direct or order the claimant to undergo an evaluation or treatment by a physician of the Commission's choosing. Subdivision (d) provides that compensation maybe suspended where the claimant refuses to undergo an evaluation that has been ordered

or directed by this Commission. Subdivision (c) provides that, at the discretion of this Commission, a physician, chosen by this respondents, may "participate" in any evaluation ordered by this Commission.

\_\_\_\_\_ Thus, the respondents have no absolute right under the Act to require a claimant to be evaluated or treated by a new physician of the respondents choosing. The evidence presented clearly shows that the respondents failed to obtain and, in fact, did not even seek an order from this Commission directing the claimant to undergo an evaluation by a physician of the Commission's or of the respondents' choosing. Thus, the claimant's refusal to submit to the examination requested by the respondents would not represent a refusal to obey a valid order of this Commission and would not constitute valid grounds to suspend the payment of any benefits or compensation to which the claimant would otherwise be entitled.

Clearly, the respondents can cease paying any benefits at any time. However, when the respondents do so, they do so at their own peril.

In the present case, the claimant had a valid award of temporary total disability benefits to some future date when her healing period had ended or when she was no longer rendered totally disabled by the effects of her compensable lumbar injury. It is obvious that neither of these circumstances had occurred by the time the respondents terminated the claimant's temporary total disability benefits on March 25, 2005. The evidence shows no reasonable basis for the respondents' demand that the claimant be

seen by a physician of their choosing or for the respondents' termination of temporary total disability benefits when the claimant refused to comply. As previously noted, the claimant had, throughout this entire time and through the present date, been under active medical treatment for her compensable lumbar injury by Dr. Chakales. Throughout this time, the respondents have refused to provide the appropriate medical services necessary to stabilize the claimant's compensable injury and hopefully allow her to return to regular gainful employment. There is simply no reasonable basis to even assume that the previously awarded period of temporary disability had ended and the respondents' actions appear to be merely a continuing attempt to relitigate issues already determined and to delay the payment of benefits already awarded.

\_\_\_\_\_After consideration of all the evidence presented, it is my opinion that the continued temporary total disability benefits, on and after March 26, 2005, represent installments of compensation "payable under the terms of an award" (i.e. the Opinion of March 27, 2003 as affirmed by the Full Commission on December 3, 2003, and as affirmed by the Arkansas Court of Appeals on November 17, 2004). Thus, any of these installments of compensation that have not been paid within 15 days after the installment became due would be subject to the 20% penalty provided by Ark. Code Ann. §11-9-802(c). I find the respondents, CV's Family Foods and Benchmark Insurance Company liable to the claimant for this additional penalty.

The only remaining matter is whether the respondents should be held subject to the contempt provisions provided by Ark. Code Ann. §11-9-706(b). The conduct necessary to result in the imposition of the contempt sanctions provided by Ark. Code Ann. §11-9-706, are significantly more disruptive and undesirable than that necessary to impose the sanctions or penalty provisions of Ark. Code Ann. §11-9-802. In order to impose the strictest sanctions provided by Ark. Code Ann. §11-9-802, the respondents must willfully and intentionally refuse to pay benefits. However, in order to impose the sanctions provided by Ark. Code Ann. §11-9-706(b), the respondents must willfully and intentionally refuse to obey a final valid Order of this Commission. Although the evidence shows that the respondents are dangerously close to such prohibited conduct (in regard to the award of the medical services recommended by Dr. Chakales), I am still not convinced that the respondents realize that their liability for these services has already been finally determined and is no longer a matter for dispute or litigation. In regard to the other benefits (where the respondents have been dilatory in payment or have ceased to make payment), I am also not convinced that the respondents knowingly and willfully intended by this conduct to disobey a valid final Order and Award of this Commission. Thus, at the present time, I decline to impose the contempt sanctions provided by Ark. Code Ann. §11-9-706(b).

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 27, 2002, the relationship of employee-employer-carrier existed between the claimant, CV's Family Foods, and Benchmark Insurance Company.
3. On January 27, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$308.00 for total disability and \$231.00 for permanent partial disability.
4. On January 27, 2002, the claimant sustained a compensable injury to her lumbar spine.
5. The Opinion entered on March 27, 2003, which was subsequently affirmed and adopted by the Full Commission in an Opinion dated December 3, 2003 and was subsequently affirmed by the Arkansas Court of Appeals in an Opinion dated November 17, 2004, has become final and is res judicata of all issues raised and addressed therein.
6. The claimant's entitlement to the medical services provided her for her compensable lumbar injury by and at the direction of Dr. Harold Chakales and the medical services recommended to her for her compensable lumbar injury by Dr. Harold Chakales, in the form of surgical intervention, was specifically raised and resolved in the claimant's favor in the Opinion of March 27, 2003. The prior opinion of March 27, 2003, is res judicata in regard to this issue and this matter cannot be relitigated or collaterally attacked at the present time.
7. The respondents have willfully and intentionally failed

to pay or accept liability for the expenses necessary to obtain the recommended surgical treatment of her compensable lumbar injury. As a result, they have willfully and intentionally failed to pay a medical "benefit" awarded by a valid final order of this Commission and are subject to the penalty provided by Ark. Code Ann. §11-9-802(e) on this benefit. The appropriate penalty for this failure is the maximum thirty-six percent (36%) of the amount of the benefit involved. Pursuant to the provisions of the appropriate subdivision, this penalty is payable to the claimant.

8. The respondents have failed to pay within fifteen (15) days after it became due the installments of temporary total disability, which were payable under the prior opinion of March 27, 2003 and that had accrued by the date of the Court of Appeals mandate on December 7, 2004. Therefore, all of these accrued installments of compensation would be subject to the 20 percent (20%) penalty provided by Ark. Code Ann. §11-9-802(c). The respondents are liable to the claimant for this penalty, which is in addition to such installments of compensation.
9. The evidence clearly shows that the claimant continued within her healing period from the effects of her compensable lumbar injury and continued to be rendered totally disabled from regular gainful employment as a

result of the effects of this injury from March 25, 2005 through a date yet to be determined. These bi-weekly installments of compensation represent installments of compensation payable under the prior Opinion and Award of March 27, 2003. Therefore, any of these installments of compensation which have not been paid within fifteen (15) days after the installments became due are subject to the twenty percent (20%) penalty provided by Ark. Code Ann. §11-9-802(c). The respondents would be liable to the claimant for this twenty percent (20%) penalty, which is in addition to such installments of compensation.

10. The evidence presented fails to show that the respondents have willfully and intentionally disobeyed a valid final Order of this Commission. Therefore, the contempt provisions of Ark. Code Ann. §11-9-706(b) would not be applicable, at the present time.
11. The respondents have previously denied the occurrence of any compensable injury to the claimant's lumbar spine and effectively controverted any claim for benefits attributable to such an injury in its entirety. The respondents also specifically controvert, at this time, the claimant's entitlement to any of the penalties provided by Ark. Code Ann. §11-9-802, the claimant's entitlement to continuing temporary total disability benefits on and after March 26, 2005, and attempt to again controvert the claimant's entitlement to the

medical services recommended by Dr. Harold Chakales for the claimant's compensable lumbar injury in the form of surgical intervention.

12. A reasonable fee for the claimant's attorney would include the maximum statutory attorney's fee on all of the controverted penalties herein assessed.

ORDER

The respondents shall pay to the claimant the twenty percent (20%) penalty provided by Ark. Code Ann. §11-9-802(c) on all temporary total disability benefits accruing during the period beginning February 18, 2002, and continuing through December 7, 2004, and beginning again on March 26, 2005, and continuing until such benefits are brought current.

The respondents shall pay to the claimant the maximum thirty-six percent (36%) penalty provided by Ark. Code Ann. §11-9-802(e) on the previously awarded medical expenses or benefits to be incurred for the recommended surgical intervention by Dr. Chakales.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fees on the foregoing penalties. One-half of this fee is the obligation of the respondents in addition to these penalties. The remaining one-half of this fee is to be withheld by the respondents from these penalties.

The respondents are again directed to provide the claimant with the medical services previously awarded in the Opinion of March 27, 2003, which includes the surgical intervention recommended by Dr. Chakales. Should the respondents persist in

their refusal to provide such services, they may well be in contempt of this Commission and subject to the provisions of Ark. Code Ann. §11-9-706(b).

The respondents are again directed to pay the claimant temporary total disability benefits until a date to be determined.

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.

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MICHAEL L. ELLIG  
Administrative Law Judge