

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211445

LENDEL THOMAS (DEC'D),
EMPLOYEE

CLAIMANT

HARRISON PUBLIC SCHOOLS,
EMPLOYER

RESPONDENT

ARKANSAS SCHOOL BOARDS
ASSOCIATION WC TRUST,
CARRIER

RESPONDENT

OPINION FILED AUGUST 17, 2005

Decision rendered on a documentary record before
ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL.

The claimant was represented by HONORABLE JAY TOLLEY and by
HONORABLE EVELYN BROOKS, Attorneys at Law, Fayetteville,
Arkansas.

The respondents were represented by HONORABLE BETTY DEMORY,
Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

1. The Record.

This matter comes on for additional findings regarding
an Order filed by ALJ C. Michael White on September 14,
2004. By agreement of the parties, this matter has been
submitted on a documentary record without a hearing. The
record includes documentary evidence taken from the
Commission file on May 18, 2005 and bound by a court
reporter. In addition, I have "blue backed" to designate as
also part of the record: my June 20, 2005 letter to the
parties designating a briefing schedule; Ms. Brooks' June 8,

2005 letter to me describing additional attorney's fee payments; Ms. Demory's July 5, 2005 letter and attached check register describing additional attorney's fee withholdings; Ms. Brooks' brief filed on July 15, 2005; and Ms. Demory's brief filed on July 29, 2005; and Ms. Brooks' brief filed on August 15, 2005.

2. History.

The relevant history is not in dispute. ALJ White entered an Opinion and Order on July 24, 2003, finding in part that (1) Lendel Thomas sustained a compensable heart attack which caused his death, (2) Mr. Thomas' widow is entitled to dependent's benefits, and (3) the respondents controverted this claim in its entirety. The Full Commission affirmed ALJ White's findings in an Opinion and Order filed on January 22, 2004. The respondents paid accrued benefits and accrued attorney's fees in February of 2004.

On or about March 10, 2004, the claimant's attorney, Jay Tolley, filed a motion for lump sum attorney's fees. Mr. Tolley initially requested a lump sum fee of \$150,458.00. By letter dated May 20, 2004, Mr. Tolley reduced his request to \$30,218.69, one-half owed by the claimant and one-half owed by the respondents. In addition, Mr. Tolley requested that the respondents pay the entire

\$30,218.69 lump sum fee requested, and then recoup the claimant's one-half out of future indemnity benefits paid to the claimant's widow. By letter dated June 16, 2004, Mr. Tolley again amended his lump sum attorney's fee request. Mr. Tolley requested that the respondents pay their one-half fee in lump sum (\$15,109.34), and that the claimant's one-half fee continue to be paid by a 25 percent withholding from future bi-weekly widow's benefit payments.

ALJ White inexplicably ignored Mr. Tolley's June 16, 2004 request that the claimant's one-half fee not be subject to lump sum payment, and ALJ White entered an Order on September 14, 2004 finding in relevant part:

Accordingly, I find that the claimant's motion must be, and hereby is, granted. Counsel for the claimant is hereby awarded a lump sum attorney's fee in the amount of \$30,218.69 with one-half to be paid by the respondents and one half to be paid by the claimant.

Despite the fact that the ALJ's September 14, 2004 Order was not consistent with the claimant's attorney's June 16, 2004 amended request, despite the fact that the ALJ's Order fails to indicate how the claimant's one half-lump sum fee is to be paid, and despite the fact that the ALJ's Order, requiring a lump sum fee be paid by the deceased claimant, appears on its face inconsistent with Seward v. The Bud Avants Co., 65 Ark. App. 88, 985 S.W.2d 332 (1999),

neither the claimant's attorney or the respondents' attorney appealed ALJ White's September 14, 2004 Order.

Instead, the respondents paid their \$15,109.34 one-half lump sum attorney's fee, as ordered, and stopped withholding the claimant's one-half attorney's fees from the widow's benefits in light of the September 14, 2004 Order's directive that one-half of the lump sum fee be "paid by the claimant."

By letter to the Commission dated November 2, 2004, attorney Tolley asserted that the respondents are in violation of ALJ White's September 14, 2004 Order because the respondents "have failed to pay the claimant's share of the lump sum fee." This case was re-assigned to me in light of ALJ White's separation from the Commission. Pursuant to an Interim Order that I filed on April 20, 2005, the respondents began withholding 12.5% (a one-half attorney's fee) from all indemnity benefits paid in this case beginning April 26, 2005. In addition, Patti Thomas, the deceased claimant's widow, has sent to Tolley & Brooks a payment for the claimant's one-half attorney's fee on benefits accrued between November 2004 and April 25, 2005.

The parties and I identified the issues for resolution at the present time as follows in the Prehearing Order filed on May 18, 2005:

Claimant:

1. Claimant contends respondent is in violation of Judge White's Order in that it has not paid the portion of attorney fees due by claimant from the funds it is holding for claimant. Claimant also contends that the 20% penalty has attached to this amount in arrearage.
2. The claimant's attorney's fee should not be discounted by 10% if the claimant's attorney is not permitted to receive the claimant's one-half share (\$15,109.34) in lump sum payable by the respondents.

Respondents:

1. Payment of claimant's one-half of the attorney's fee from the September 14, 2004 Order.

ALJ:

1. Potential liability between claimant and respondent for accrued attorney's fees between October 28, 2004 and the ALJ's interim order filed on April 20, 2005 and after April 22, 2005. [sic]

DISCUSSION

Issue 1: Are the respondents in violation of ALJ White's September 14, 2004 Order for not having paid the claimant's portion of the ordered lump sum attorney's fee and later recouping their lump sum payment from future installments owed to the claimant's widow?

I find that the respondents are not in violation of ALJ White's September 14, 2004 Order for not having paid the claimant's portion of the ordered lump sum attorney's fee because the September 14, 2004 Order did not direct the respondents to do so.

In the alternative, Mr. Tolley's November 2, 2004 letter to the Commission requested that the September 14, 2004 Order "be clarified so that the language will specifically direct the respondents to pay the claimant's attorney fees in an immediate lump sum as already directed by the Order dated September 14, 2004." During prehearing telephone conferences, I expressed my reservations to Ms. Brooks regarding my authority to do so in light of Seward v. The Bud Avants Co., 65 Ark. App. 88, 985 S.W.2d 332 (1999). In her brief filed July 15, 2005, Ms. Brooks accurately points out that the Court of Appeals in Seward never specifically addressed the issue as to whether a respondent could be ordered to pay a claimant's ordered one-half lump sum attorney's fee and then recoup the payment from benefits later paid in installments. As Ms. Brooks notes, the claimant's attorney in Seward was primarily advocating a statutory interpretation of Ark. Code Ann. § 11-9-716 such that the respondents should be found solely liable for both halves of a lump sum attorney's fee.

Nevertheless, I also note that an administrative law judge in Seward initially awarded a lump sum attorney's fee payable by claimant and by respondents in Seward, and that order was never appealed. When that order was later interpreted by the Full Commission, a majority of the Commissioners found that the claimant's one half of the fee ideally should have been taken out of any benefits accrued but unpaid. If there were no accrued but unpaid benefits, the majority found that the respondents should withhold 10% from claimant's future bi-weekly checks until the discounted lump sum attorney's fee owed by the claimant was paid off to the claimant's attorney. The dissenting Commissioner argued instead that either (1) the respondents should pay the claimant's ordered lump sum attorney's fee and recoup that payment by withholding a percentage of claimant's bi-weekly payments [as Ms. Brooks argues here] or (2) if the claimant is to pay the claimant's one-half fee in installments, that fee should not be discounted for lump sum computation. See Jerry Seward v. The Bud Avants Co., Full Workers' Compensation Commission, Opinion filed March 13, 1997 (D902929). As discussed above, the claimant's attorney argued before the Court of Appeals that the respondents were liable for the entire lump sum fee under Ark. Code Ann. § 11-9-716. See Seward, 65 Ark. App. 88, 93.

In response to the various statutory interpretations available to it, the Court of Appeals in Seward concluded:

There is nothing in § 11-9-716 that requires the Commission to approve a lump-sum payment of the entire amount of an attorney's fee or that prohibits the Commission from approving a plan by which an attorney's fee is paid partly by lump sum and partly in installments. Since the amendment to Ark. Code Ann. § 11-9-715(a)(2)(B)(i) contains the specific language that the half of the fee chargeable to the injured employee or his dependents is to be paid "out of compensation payable to them," it appears to have been the intention of the legislature to enable the Commission to approve the lump-sum payment of attorney's fees chargeable to the employer while providing for installment payments of the portion of the attorney's fee chargeable to the injured employee or the injured employee's dependents. Therefore, we affirm the Commission's decision to provide for the payment of the attorney's fee in that fashion, with the employer's portion to be paid in lump sum, and the claimant's portion to be paid in installments out of the compensation payable to him.

Although the claimant's attorney in the present case makes a somewhat different argument than the claimant's attorney in Seward, I again note that Commissioner Humphrey's dissent at the Commission level in Seward argued the same statutory interpretation currently asserted by Ms. Brooks. Neither a majority of the Full Commission nor the Court of Appeals in Seward adopted the statutory interpretation currently advocated by Ms. Brooks. Under circumstances strikingly similar to the circumstances in the present case, the Court of Appeals concluded that the

Legislature intended installment payments of the claimant's one-half attorney's fee. Clearly, the Court had available to it in Seward that portion of Commissioner Humphrey's dissent argument again advocated by Ms. Brooks, since the Court discussed and agreed with other portions of Commissioner Humphrey's dissent, and the Court could have interpreted that the Legislature intended the claimant's one-half fee to be paid by the respondents and later recouped by the respondents from future installments, had the Court agreed with Commissioner Humphrey's statutory interpretation. Absent any persuasive argument to distinguish the facts in the present case from the facts in Seward, I must respectfully deny Mr. Tolley's November 3, 2004 request that I "clarify" ALJ White's September 14, 2004 Order by directing the respondents to pay the claimant's attorney's one-half attorney's fee in immediate lump sum and later recoup that payment from the widow's installments.

Issue 2: Can the claimant's attorney assert the doctrine of *res judicata* against the claimant regarding ALJ White's finding that the claimant owes one-half of the lump sum attorney's fee of \$30,218.69?

I find that the claimant's attorney cannot assert the doctrine of *res judicata* against the claimant on the claimant's liability for a lump sum fee payable to the attorney in the amount of \$15,209.34 for the following reasons. First, I note that ALJ White's finding regarding

the claimant's liability for a lump sum attorney's fee was not consistent with Mr. Tolley's June 16, 2004 letter advising ALJ White that Mr. Tolley was not going to seek a lump sum fee from the decedent's widow. Second, I note that Mr. Tolley was the attorney for the decedent's widow. Therefore, to the extent that ALJ White's September 14, 2004 order deviated from the fee agreement to which Mr. Tolley referred in his June 16, 2004 letter, it was the claimant's attorney, not the respondents' attorney, who had a duty to timely appeal the Order or to seek modification from ALJ White. Third, ALJ White's September 14, 2004 Order gives no indication how the claimant was supposed to pay a \$15,209.34 lump sum attorney's fee which is particularly perplexing since, as the Court of Appeals had previously noted in Seward, Ark. Code Ann. § 11-9-715 provides that a claimant's one-half attorney's fee is to be paid "out of compensation payable to them." Here, Ms. Brooks' brief concedes that the decedent's widow had no lump sum of compensation from which to pay a lump sum attorney's fee, but instead had only the expectation of future installments to be paid by the respondents.

The rationale underlying the doctrine of permitting one party to assert *res judicata* against another is to end litigation by preventing a party who has had one fair trial

of a question of fact from again drawing it into controversy. Mohawk Tire and Rubber Co. v. Bridges, 259 Ark. 728, 536 S.W.2d 126 (1976). I cannot say that the decedent's widow received a fair trial on the lump sum attorney's fee issue when ALJ White's September 14, 2004 Order inexplicably ignored the fee agreement expressed in the claimant's attorney's June 16, 2004 letter, and the claimant's attorney inexplicably failed to appeal that Order.

Issue 3: How shall the claimant's one half of the claimant's attorney's fee be paid out?

Consistent with the reasoning of the Full Commission in Seward, supra, as modified by the Arkansas Court of Appeals, the respondents shall withhold from all future indemnity benefits payable in this case the claimant's one-half attorney's fee, and pay the withheld amount to the claimant's attorney by separate check in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002). Pursuant to the conclusions of the Court of Appeals in Seward, supra, I find that the claimant's one-half fee should not be subject to discount, and a 12.5% fee shall therefore be withheld and paid from all future indemnity benefits payable on this claim.

Issue 4: Are either the respondents or the claimant liable for a 20% penalty for late payment of accrued attorney's fees?

As I previously advised Ms. Brooks, I am not aware of any statutory authority for awarding a 20% penalty for late payment of attorney fees. While the Commission and its ALJs have the authority to order contempt sanctions, for the reasons discussed above, I find that neither the claimant or the respondents under the unique circumstances of this case have engaged in any sanctionable conduct for having failed to comply with the ALJ's September 14, 2004 directive that the claimant pay a one-half lump sum attorney's fee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent has paid one-half of the lump sum attorney fees ordered by Judge White.
2. Specifically, respondent on October 28, 2004 paid \$14,815.35 and previously paid some smaller checks equaling in total the one-half lump sum due by respondent for their one-half share (\$15,109.34) of the lump sum attorney's fee awarded in ALJ White's September 14, 2004 Order.
3. The parties can stipulate to the findings of fact and conclusions of law from the two prior Opinions in this case.

4. ALJ C. Michael White's September 14, 2004 Order directed the claimant and the respondents to each pay a \$15,109.34 attorney's fee to the claimant's attorney. ALJ White's order did not direct the respondents to pay both halves of the fee and then recoup the claimant's one-half fee from future installments. ALJ White's award of a \$15,109.34 lump sum attorney's fee payable by the claimant is inconsistent with the attorney-client fee agreement in Mr. Tolley's June 16, 2004 letter to ALJ White where Mr. Tolley indicated that he was not requesting the claimant's one-half fee be paid in lump sum.

5. In light of the statutory interpretation of the Arkansas Court of Appeals in Seward v. The Bud Avants Co., 65 Ark. App. 88, 985 S.W.2d 332 (1999), I find that I am without statutory authority to direct the respondents to pay the claimant's \$15,109.34 portion of the lump sum attorney's fee ordered by ALJ White on September 14, 2004.

6. I find that ALJ White's September 14, 2004 Order is not res judicata regarding his finding that the (deceased) claimant pay a \$15,109.34 lump sum attorney's fee to the claimant's attorney.

7. Instead, I find that the claimant's attorney is entitled to receive a 12.5% attorney's fee on all installments of indemnity benefits payable in this claim, consistent with Seward, supra.

8. Neither the respondents or the claimant owe the claimant's attorney a 20% penalty for late payment of attorney's fees in this case.

ORDER

The respondents are directed to continue withholding a 12.5% attorney's fee from all future indemnity benefits paid in this claim, and to pay the withheld amount to the claimant's attorney by separate checks. The respondents are also directed to pay to the claimant's attorney those attorney's fees already withheld pursuant to my April 20, 2005 interim order.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge