

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F014264

JULIA WOOD

CLAIMANT

ZIEGLER CHIROPRACTIC, INC.
UNINSURED

RESPONDENT

OPINION FILED MARCH 28, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

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

Respondent represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on January 3, 2005, in Springdale, Arkansas. No pre-hearing order was entered in this case, due to the limited scope of the current proceeding.

A hearing had previously been held in this case on April 2, 2001. As a result of this hearing, an Opinion was entered on April 26, 2001. This Opinion was subsequently appealed to the Full Commission. In its Order, dated July 12, 2001, the Full Commission required that the respondent post a bond as a condition for processing this appeal, Ark. Code Ann. §11-9-808. The respondent was given 10 days in which to post the required bond, This required bond was never posted by the respondent. Ultimately, by Order dated October 31, 2001, the Full Commission granted the claimant's motion and dismissed the respondent's appeal for its failure to post the required bond. As a result, the initial Opinion of April 26, 2001, became final.

A pre-hearing conference was held in this claim on April 16, 2002. At that point, the disputed issue was given as the matter of whether Dr. Robert Ziegler was personally liable for the benefits previously awarded against Ziegler Chiropractic. This scheduled hearing was subsequently cancelled by agreement, as the parties had reached a tentative agreement on a pay out of the benefits awarded.

This agreement between the parties, concerning the payment in installments of the benefits awarded, apparently broke down and a hearing was again requested by the claimant. At this point, the claimant requested not only an Order finding Dr. Ziegler personally liable for the benefits awarded, but also requested imposition of the penalties provided by the Act on the amounts previously awarded and an Order holding the respondent in contempt for failing to pay the Award. A pre-hearing conference was scheduled on the claimant's request. This pre-hearing conference was subsequently cancelled at the request of the parties.

Again, at the claimant's request, this matter was set for hearing on March 18, 2004, on the issues previously mentioned. Immediately prior to this scheduled hearing, the matter was continued at the request of the claimant and an Order was entered compelling the respondent to comply with certain discovery filed by the claimant (specifically, the production of the respondent's income tax returns for the years 1998, 1999, 2000, and 2001).

Ultimately, on November 16, 2004, the claimant requested a hearing based not only on the respondent's continued failure to pay the benefits previously awarded, but also on the respondent's failure to comply with the order of discovery. This request resulted in the current hearing on January 3, 2005.

By agreement of the parties the issues to be litigated and resolved at the present time are as follows:

- (1) Whether Dr. Robert Ziegler is personally liable for the benefits awarded to the claimant in the previous Opinion;
- (2) Whether Dr. Ziegler and/or Ziegler Chiropractic Clinic is liable for the penalties provided by Ark. Code Ann. §11-9-802(c) and (e);
- (3) Whether Dr. Robert Ziegler and/or Ziegler Chiropractic should be held in contempt of this Commission and punished pursuant to Ark. Code Ann. §11-9-706(b).

The issue of past income tax returns was abandoned after Dr. Ziegler announced that no returns were filed for this period and that the income and taxes for these years are the subject of an ongoing dispute with the IRS and the State of Arkansas.

In regard to these issues, the claimant contends that Dr. Robert Ziegler is the person who makes all the decisions on behalf of Ziegler Chiropractic Clinic and that he is the one who apparently chose to operate the business in an uninsured status and that, therefore, any liability in this case should attach to him personally; that he should not be protected by the corporate veil, when he, in fact, was the decision maker and he, in fact, is the person who caused Ziegler Chiropractic Clinic not to be insured. The claimant further contends that there is a final Order in this case, directing that certain medical benefits be paid and that temporary total disability benefits are paid from February 2, 2000 until the claimant started receiving unemployment benefits and that those benefits have not been paid and that, therefore, Dr. Ziegler is personally in contempt of this Commission and the penalty should be assessed against him in the amount up to \$10,000.00, and that, also, a late payment penalty should be assessed (T.3-4).

In regard to these issues, the respondent contends that Dr. Ziegler has always operated Ziegler Chiropractic Clinic through hiring, firing, and every thing he has done; he should not be held personally liable for any debts or fines or anything else, it should be all Ziegler Chiropractic Clinic; and he should not be subject to the penalty for not paying the benefits. He has attempted to pay benefits to the claimant and the claimant refused those benefits and, of course, the Act does not state a rule as far as a pay out on benefits awarded. He agrees that there is a final Order for temporary disability, medical, and attorney's fees, and we've made an effort to get this to a figure that he can afford to pay, based on his financial position, and he

should not be subject to any penalty by the Act.

DISCUSSION

I. WHETHER DR. ROBERT ZIEGLER IS PERSONALLY LIABLE FOR BENEFITS PREVIOUSLY AWARDED TO THE CLAIMANT, UNDER THE OPINION OF APRIL 26, 2001

The burden rests upon the claimant to prove all of the elements necessary to "pierce the corporate veil." This action must be taken by the trier of fact with great caution, Quinn-Matchet Partners, Inc. v. Parker Corporation, 85 Ark. App. 143(2004).

One of the elements the claimant must show is that the corporate entity of Ziegler Chiropractic has been illegally abused to his detriment. After consideration of the evidence presented, I am not convinced that the claimant has shown this. The record reveals that Ziegler Chiropractic continues to be a viable business and has continuously generated income. The testimony of Dr. Ziegler reflects that he may be in dire financial straits. However, this would appear to be the result of personal indebtedness, rather than obligations by the Ziegler Chiropractic, Inc. Essentially, the only real asset of Ziegler Chiropractic, Inc. appears to be its rights to the professional services of Dr. Robert Ziegler. The only source of income for this corporation is its rights to the proceeds that these services generate. It further appears that Dr. Ziegler's only real asset is his ownership interest in Ziegler Chiropractic, Inc. and his only source of income is that received from the corporation. There is simply no evidence that the claimant would have any greater opportunity of collecting the awarded benefits, from Dr. Ziegler personally, than she does from Ziegler Chiropractic, Inc.

II. PENALTIES

The next issue concerns the claimant's entitlement to two of the potential penalties provided by Ark. Code Ann. §11-9-802. These penalties are found in

subsection (c) and (e) of this section.

Ark. Code Ann. §11-9-802(c) provides:

"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 Commission Order making the award is had as provided in §11-9-711 and §11-9-712."

In regard to this subsection, the Commission has absolutely no discretion. The imposition of this penalty is mandatory and automatic, upon a showing that the awarded installments of compensation were not paid within the prescribed time. A respondent's financial inability to pay any of the installments awarded is irrelevant.

Ark. Code Ann. §11-9-802(e) provides:

"In the event that the Commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant."
(Emphasis mine)

_____ In the present case, the prior Order awarded the claimant "benefits" in the form of both the reasonably necessary medical services and temporary total disability benefits. At this point, it is important to note that Ark. Code Ann. §11-9-802(e) allows for imposition of the penalty on "benefits," rather than "installments" of compensation. While the expense of medical services would not constitute an "installment" of compensation, it has been clearly recognized by the Appellate Courts as a "benefit" provided by the Act. On the other hand, controverted attorney's fees have been expressly excluded by the Appellate Courts as a basis for an award of the penalty provided by Ark. Code Ann. §11-9-802(c), and I can find no rationale or basis to justify a different result under Ark. Code Ann. §11-9-802(e).

In its Order of October 31, 2001, the Full Commission dismissed the respondent's appeal of the initial Opinion. When the appeal time ran on the Full

Commission's Order, in the first part of December of 2001, my initial Opinion became final. At that point, all accrued "benefits" awarded by this Opinion became due. It is undisputed that, as the date of the hearing, on January 3, 2005, the respondent had paid absolutely none of the benefits awarded in the prior Opinion. As an excuse for this failure, the respondent contends that it has been financially unable to pay the benefits awarded, since December of 2001. The respondent further appears to argue that it has been unable to pay any of the medical expenses, because the claimant has not provided the respondent with statements setting out the charges for these medical services.

The record shows that since December of 2001, there have apparently been negotiations between the parties for the payment of the awarded benefits in "installments." However, the respondent has not kept any of these agreements. Again, the respondent contends that its failure to do so was due to a lack of finances. Dr. Ziegler testified that on one occasion he attempted to pay an installment of \$350.00 on the temporary total disability benefits awarded to the claimant. However, the record shows that this payment was never actually physically tendered to the claimant. It is undisputed that, except for this alleged attempt to make a \$350.00 partial payment, the respondent has made no attempt to satisfy the prior Award for over three years.

Dr. Ziegler testified that, since 2001, he has received, as profits, \$55,000.00 to \$60,000.00 a year from Ziegler Chiropractic, Inc. Based upon this amount of yearly profit, Ziegler Chiropractic, Inc. could have reasonably attempted to pay more than \$350.00 over the past three years toward its obligation under the prior Opinion.

I also find no merit to the respondent's contention that it has not attempted to pay the medical benefits awarded, because the claimant has refused to provide the respondent with copies of the statements for the medical services awarded. The

providers of these medical services were clearly identified at the April 2, 2001 hearing, and in the prior Opinion. There is no evidence that the respondent has made any attempt whatsoever to contact these medical providers and either obtain a statement of their charges or negotiate payment of these charges. The prior Opinion clearly found these charges to be the obligation of the respondent. This would also place on the respondent the duty to take all reasonably necessary steps to satisfy this obligation, including directly contacting the medical providers. I would also note that there is no indication that the respondent took any action to obtain these statements from the claimant, until shortly prior to the most recent hearing.

The evidence presented fails to show that the respondent totally failed to make any good faith attempt to satisfy its obligations under the prior Opinion for over three years. Instead it has delayed and avoided attempts to collect these benefits by negotiating then breaking agreements to pay these amounts in installments, by threatening but never filing bankruptcy proceedings, and by failing to cooperate in discovery to ascertain their true assets and income.

After consideration of all the evidence presented, I find that the respondent's failure to pay the benefits awarded in the prior Opinion is willful and intentional. Thus, Ark. Code Ann. §11-9-802(e) is applicable to the present claim. I further find that the appropriate penalty for this willful and intentional refusal to pay these benefits is the maximum provided by this subsection. This penalty shall apply to both the temporary total disability benefits the medical benefits awarded.

Although the penalty provided by Ark. Code Ann. §11-9-802(c) would clearly be applicable and appropriate in regard to the temporary total benefits awarded in the prior Opinion, it is my further opinion that the legislature did not intend that the penalties provided by subdivision (c) and subdivision (e) be cumulative. Thus, since I have found that the penalty provided in subdivision (e) is applicable, the claimant

would only be entitled to the penalty awardable under this subdivision (i.e. 36% of both installments of temporary total disability and medical benefits).

III. CONTEMPT

The final issue to be addressed concerns the matter of whether the respondent should be held in contempt for refusing to comply with a final Opinion and Order of this Commission. Although I have found that the evidence is sufficient to prove that the respondent has willfully and intentionally failed to pay the benefits awarded in this Opinion, I am not convinced that a "willful failure" is synonymous with a "willful refusal" to comply with a final Order or Award. It is my opinion that the sanctions for contempt provided by Ark. Code Ann. §11-9-706 require more than that necessary to invoke the penalty sanctions provided by Ark. Code Ann. §11-9-802(e). However, I am concerned that the respondent may not be taking his obligation under the prior Award seriously and may doubt the Commission's ability and resolve to enforce its Awards. I am also concerned that the respondent's financial straits, upon which it is to excuse its failure to comply with the Commission's Award, is based solely upon the testimony of Dr. Ziegler.

Therefore, at the present time, I decline to rule on the question of whether the respondent should be held in contempt for its failure to comply with the Commission's prior Order and Award. Instead, I am requesting that this matter be referred to the Commission's Compliance section for further investigation. Upon completion of its investigation, the Commission's Compliance section may reinstitute contempt proceedings under Ark. Code Ann. §11-9-706 or seek a referral to the Fraud Unit of the Arkansas Insurance Department.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including January 31, 2000, the relationship of employee-uninsured employer existed between the parties.
3. The claimant has failed to present sufficient evidence to justify "piecing the corporate veil" and finding that Dr. Robert Ziegler is the true uninsured employer and is personally liable to the claimant for any benefits awarded in this claim.
4. On January 31, 2000, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability.
5. On January 31, 2000, the claimant sustained a compensable injury to her low back, in the form of a right sided herniated disc at L4-5.
6. The medical services rendered to the claimant for her compensable back injury by and at the direction of Dr. Thomas Atkinson, Dr. Kelly Danks, and Dr. Robert Ziegler represent "reasonably necessary medical services" for the claimant's compensable injury. Pursuant to Ark. Code Ann. §11-9-508, the respondent herein is liable for the expense of such services, subject to the medical fee schedule established by this Commission.
7. The claimant was rendered temporarily totally disabled as a result of the effects of her compensable injury from February 2, 2000 until July 1, 2000.
8. The respondent has failed to pay the installments of compensation awarded to the claimant for temporary total disability benefits within 15 days after they became due. Thus, the claimant could have been found entitled to the 20% penalty on such installments provided by Ark. Code Ann. §11-9-802(c).

9. The respondent has willfully and intentionally failed to pay any of the benefits awarded by the prior Opinion of April 26, 2001. Thus, the penalty provided by Ark. Code Ann. §11-9-802(e) is applicable to the present claim. The appropriate amount of this penalty is the maximum provided by this subdivision (i.e. 36%) on all "benefits" awarded by this Opinion. This shall include the installments of temporary total disability benefits and the medical benefits awarded, with the exception of any expense for any services provided to the claimant directly by Ziegler Chiropractic, Inc.
10. As the penalties provided by Ark. Code Ann. §11-9-802(c) and (e) are not cumulative, the claimant is only entitled to the higher penalty provided under subdivision (e).
11. The respondent has controverted the claimant's entitlement to any penalty provided by Ark. Code Ann. §11-9-802.
12. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted penalties herein awarded. This fee shall be in addition to the controverted attorney's fees previously awarded.

ORDER

The respondent continues to be liable for the expense of reasonably necessary medical services for the claimant's compensable injury, subject to the medical fee schedule.

The respondent continues to be liable for the temporary total disability benefits previously awarded, which totals \$5,645.14.

The respondent shall also be liable for the 36% penalty provided by Ark. Code Ann. §11-9-802(e) on the temporary total disability benefits and medical benefits

previously awarded. This penalty shall be in addition to those benefits.

The respondent continues to remain liable to the claimant's attorney for the maximum statutory attorney's fee on the temporary total disability benefits previously awarded, one-half of this fee to be paid in addition to such benefits and one-half of this fee to be withheld by the respondent from such benefits. The respondent shall also be liable to the claimant's attorney for the maximum statutory attorney's fee on the penalty herein awarded to the claimant, under the provisions of Ark. Code Ann. §11-9-802(e). One-half of this fee is the obligation of the respondent in addition to this penalty and the remaining one-half of this fee shall be withheld by the respondent from this penalty.

The respondent continues to remain liable for interest, at the maximum legal rate, on all benefits previously awarded from the date such benefits were awarded until paid.

All penalties and attorney's fees, herein awarded, shall bear the maximum legal rate of interest until paid.

A decision on whether the respondent should be held in contempt, pursuant to the provisions of Ark. Code Ann. §11-9-706 is reserved for future determination, if necessary. It is my request that this matter be referred to the Compliance Division of the Commission for further investigation and any action it may deem appropriate.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

