

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F209546**

**MARGARET CLARK, EMPLOYEE**

**CLAIMANT**

**ARKANSAS CHILDREN'S HOSPITAL, SELF-INSURED EMPLOYER**

**RESPONDENT**

**RISK MANAGEMENT RESOURCES, TPA**

**RESPONDENT**

**OPINION FILED NOVEMBER 20, 2006**

Submitted on the record before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 24, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondent represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The issue of the claimant's entitlement to additional workers' compensation benefits, in the form of attorney fees, growing out of the August 13, 2002, compensable accident was submitted for a ruling based on a record consisting of stipulations, the prior hearing record, medical reports, prior rulings and briefs.

The parties have complied written stipulations, with a Certificate of Service of August 24, 2006, which is herein designated a part of the record as Commission Exhibit #1. The claimant has submitted a August 23, 2006, brief with exhibits, setting forth the contentions and arguments of same, which is herein designated Claimant Exhibit #1. The respondent has set forth its

contentions and arguments in its August 24, 2006, brief, which is herein designated a part of the record as Respondent #1.

### **DISCUSSION**

On August 13, 2002, the claimant sustained an accidental smoke inhalation injury in the employment of respondent. Respondent instituted the payment of medical and indemnity benefits on behalf and to the claimant, however the temporary total disability benefits were paid at the weekly rate of \$405.00.

In April 2003, the claimant's temporary total disability benefits were stopped. On August 15, 2003, claimant, through her attorney, requested a hearing on the resumption of temporary total disability benefits, the appropriate compensation benefit rate, additional medical treatment, and controversion. Claimant contended that side effects from ultra high doses of steroids , required for treatment of her compensable pulmonary problem, resulted in a left bicep tendon tear and corresponding medical treatment under care of Dr. Michael Moore.

Respondent asserted that the claimant had been provided all appropriate benefits to which she was entitled, and that it had paid the medical expenses and indemnity benefits for the exacerbation of the claimant's asthmatic condition. Respondent controverted the claimant's request for workers' compensation benefits for a bicep tendon tear maintaining that the claimant could not meet her burden of proof that the lift bicep tendon tear was related to the work related injury of August 13, 2002 or the use of steroids in the treatment of the compensable injury. Finally, it was the position of the respondent at the time of the August 15, 2003, hearing request that the appropriate weekly temporary total disability compensation benefit rate of the claimant was \$405.00.

A pre-hearing conference conducted in connection with the claimant's hearing request resulted in a September 19, 2003, Pre-hearing Order and Hearing Notice, scheduling an October 30, 2003, hearing on the above issues, as well as controverted attorney fees. Within a week of the scheduled hearing respondent agreed with the claimant's contentions and the hearing was cancelled. An Agreed Order was entered relative to the continuing temporary total disability benefits, the compensation benefit rate, and medial treatment associated with the left bicep tendon tear. All other issues were reserved pursuant to the Order.

In the summer of 2004, claimant requested a hearing on her entitlement to additional temporary total disability benefits, medical expenses, continuing medical treatment, and controverted attorney fees. In its pre-hearing filing respondent contended that it had paid the claimant's medical expenses and indemnity benefits from the exacerbation of her asthmatic condition from August 13, 2003, including the payment of workers' compensation benefits for a bicep tendon tear and that the claimant would be unable to meet her burden of proof with respect to her claim for additional benefits for the work related injury.

On October 25, 2004, a hearing was conducted before the Administrative Law Judge on the issues of continued temporary total disability benefits subsequent to June 2004, additional medical benefits which included an evaluation at National Jewish Hospital in Denver, Colorado, and controverted attorney fees. Ultimately, on October 14, 2005, the Full Commission awarded the claimant's treatment/evaluation at National Jewish Hospital, however reversed that Administrative Law Judge award of temporary total disability benefits.

In October 2005, Dr. Michael Moore assessed the claimant with 15 % permanent impairment rating to the right upper extremity relative to the claimant's right elbow problem.

Respondent commenced the payment of permanent partial disability benefit at the weekly rate of \$319.00, which was based on the adjusted weekly compensation benefit rate generated in accordance with the October 30, 2003, Agreed Order. In correspondence of February 9, 2006, claimant's attorney asserted entitlement to attorney fee on the indemnity payable to the claimant growing out of the claimant's elbow problem. On February 16, 2006, respondent took the position that the claimant's elbow problem had not been controverted and that controverted attorney fees were not due and owing. In April 2006, a hearing was requested by claimant's attorney regarding entitlement to attorney's fee on the 15 % impairment to the right upper extremity issued by Dr. Moore. Respondent maintained that all appropriate benefits had been paid.

A June 28, 2006, hearing was scheduled on the issues of additional medical treatment and controverted attorney fees. Subsequently, the issue of additional medical treatment was withdrawn leaving the remaining issue of claimant's attorney entitlement to a continued fee on the controverted difference between the weekly benefits rates of \$405.00/\$304.00, vs. \$425.00/\$319.00, for temporary total/permanent partial disability. Further, claimant contends that since respondent controverted the treatment of Dr. Moore, attorney fees should be awarded on the temporary total and permanent partial benefits growing out of that treatment.

After a thorough consideration of all of the evidence in this record, to include the stipulations entered by the parties, application of the appropriated statutory provisions and case law, I make the following:

### **FINDINGS**

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

2. On August 13, 2002, the relationship of employee-employer existed between the parties.

3. On August 13, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$425.00/\$319.00, for temporary total/permanent partial disability.

4. The respondent controverted the claimant's medical treatment under the care of Dr. Michael Moore relative to a left biceps tendon tear and the difference between the appropriate compensation benefit rate and that initially paid.

5. Pursuant to the October 30, 2003, Agreed Order appropriate attorney fees were paid on the controverted indemnity benefits due and owing to the claimant. There is no evidence to reflect that at the time of the October 30, 2003, Agreed Order, that the claimant had a problem with her right biceps tendon or received medical treatment under the care of Dr. Moore relative to same.

6. Claimant begin receiving medical treatment under the care of Dr. Michael Moore relative to her right elbow in March 2005, and after surgery was assessed with a 15% permanent physical impairment to the right upper extremity in October 2005. Respondent paid indemnity benefits to the claimant to correspond with the afore rating, in a timely manner, and did not controvert the payment of same.

7. All appropriate attorney fees have been paid in this claim on the controverted indemnity benefits.

### **CONCLUSIONS**

The sole issue before the Commission at this juncture is that of claimant's entitlement to controverted attorney fees growing out of the compensable August 13, 2002, compensable

inhalation injury sustained in the employment of respondent. The positions of the parties are as set forth above. The present claim is one governed by the provisions of Act 796 of 1993, in that the claim is one for workers' compensation benefit growing out of an injury having been sustained subsequent to the effective of the afore provision.

It is clear that but for the services of claimant's attorney she would not have received payment of indemnity benefits at the appropriate rate of \$425.00/\$319.00, for temporary total/permanent partial disability nor would respondent have acknowledged the compensability of the claimant's medical treatment under the care of Dr. Michael Moore relative to her left biceps tendon tear. Controverted attorney fee on the afore, with respect to indemnity benefits, was address and paid pursuant to an October 30, 2003, Agreed Order.

Ark. Code Ann. § 11-9-715(a)(2)(B)(ii), provides that attorney fees shall be allowed only on the amounts compensation for indemnity benefits controverted and awarded. In the instant claim, respondent controverted that compensability of the claimant's medical treatment relative to her left biceps tendon, which treatment was being provided by Dr. Michael Moore. Dr. Moore commenced providing medical treatment in connection with the claimant's right biceps tendon in March 2005. Once an impairment rating was generated relative to the right upper extremity respondent paid corresponding indemnity benefits at the appropriate compensation benefit rate. The claimant has failed to sustain her burden of proof that the respondent has controverted indemnity benefits associated with the upper extremity or the 15% permanent physical impairment. The claimant for controverted attorney fees in connection to the claimant's right upper extremity is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**