

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F214212**

**DELOIS LEE, EMPLOYEE**

**CLAIMANT**

**ADVANCE AUTO PARTS, EMPLOYER**

**RESPONDENT**

**ROYAL INDEMNITY COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 15, 2006**

Hearing before Administrative Law Judge Barbara W. Webb on May 18, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jason J. Campbell, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on May 18, 2006, before Administrative Law Judge Barbara W. Webb. A prehearing telephone conference was held in this case on April 17, 2006. A copy of the Prehearing Order was introduced into evidence as Commission Exhibit No. 1. The parties agreed to the following stipulations:

1. The claimant sustained a compensable injury arising out of and during the course of her employment with Advance Auto Parts on December 5, 2002.

2. The claimant earned sufficient wages to entitle her to compensation rates of \$188.00 per week for temporary total disability and \$154.00 per week for permanent partial disability.

3. This claim has been the subject of prior hearings, the last hearing conducted on April 1, 2004.

4. An opinion was filed by the Administrative Law Judge on July 13, 2004, which was subsequently affirmed and adopted by the Full Workers' Compensation Commission in an opinion filed May 17, 2005.

5. The Full Commission opinion was affirmed by the Arkansas Court of Appeals in an opinion filed February 1, 2006. That opinion became final on February 22, 2006, and is now the law of the case.

6. Payment was not made within the required time from the entry of the mandate of the Arkansas Court of Appeals.

7. The claimant did not receive her check for the additional temporary total disability benefits awarded by the opinion until after April 21, 2006.

The claimant contends that respondents failed and/or refused to pay the benefits previously awarded within the time required by law. The claimant further contends that on April 21, 2006, she received a lump sum payment of temporary total disability for the period previously awarded, specifically, May 23, 2003, through December 5, 2003, together with accrued interest as of April 21, 2006. The claimant contends she is entitled to payment of a statutory penalty pursuant to A.C.A. § 11-9-802 for late payment and additional attorney's fees for continued controversy.

The respondents contend that any delay in payment was due to delays caused by bookkeeping errors together with the claims management being transferred to another jurisdiction and that the delays should not entitle claimant to a statutory penalty.

The record in this case consists of a transcript of the testimony of the claimant, Delois Lee, and the attached exhibits consisting of the Pre-hearing Order filed April 18, 2006, Commission Exhibit No. 1; Claimant's Exhibit 1 consisting of

Exhibit A, a copy of the payment dated April 21, 2006, in the amount of \$3,849.81; and Exhibit B, the Arkansas Court of Appeals Opinion dated February 1, 2006.

At the hearing, the claimant's attorney announced that she was waiving the double controversion issue acknowledging that the respondents did pay an attorney's fee in connection with the original temporary disability award. However, the claimant is contending that she is entitled to a twenty percent penalty and attorney's fees on that penalty. The claimant further reserves all other issues in connection with future benefits.

In addition, I am bluebacking and receiving into evidence correspondence dated May 22, 2006, May 23, 2006, and May 26, 2006.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The claimant sustained a compensable injury arising out of and during the course of her employment with Advance Auto Parts on December 5, 2002.

2. The claimant earned sufficient wages to entitle her to compensation rates of \$188.00 per week for temporary total disability and \$154.00 per week for permanent partial disability.

3. This claim has been the subject of prior hearings, the last hearing conducted on April 1, 2004.

4. An opinion was filed by the Administrative Law Judge on July 13, 2004, which was subsequently affirmed and adopted by the Full Workers' Compensation Commission in an opinion filed May 17, 2005.

5. The Full Commission opinion was affirmed by the Arkansas Court of Appeals in an opinion filed February 1, 2006. That opinion became final on February 22, 2006, and is now the law of the case.

6. Payment of awarded benefits was not made within the required time from the entry of the mandate of the Arkansas Court of Appeals.

7. The claimant did not receive her check for the additional temporary total disability benefits until April 21, 2006.

8. The claimant has proven by a preponderance of the evidence that she is entitled to the payment of a twenty percent penalty for any installment of temporary total disability payable under the terms of the Court of Appeals award but not paid within fifteen days after entry of said mandate.

9. The claimant is entitled to a reasonable attorney's fee consisting of the maximum statutory attorney's fee on all the controverted penalties assessed herein.

### **DISCUSSION**

Ark. Code Ann. § 11-9-802(c) provides as follows:

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.

The term "installment" for purposes of subsection (c) includes compensation, and includes interest awarded on compensation benefits. *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

The penalty allowed by subsection (c) of this section does not apply to medical bills and attorney's fees. *Smith's Store v. Kirker*, 6 Ark. App. 222, 639 S.W.2d 751 (1982).

The issue in this case is very straightforward. Basically, the parties agreed that the payment of temporary total disability awarded by the Workers' Compensation Commission as affirmed by the Arkansas Court of Appeals in an opinion dated February 1, 2006, was not timely paid. The parties further agreed that the payment of the temporary total disability benefits as awarded was made on

April 21, 2006, approximately thirty days following the entry of the Court of Appeals mandate on February 22, 2006.

The claimant contends that the respondents' argument that the late payment was the result of a clerical or administrative mistake, is an insufficient excuse to avoid the late payment penalty codified in Ark. Code Ann. § 11-9-802(c). The claimant argues that to allow such an excuse, would place the injured worker in an untenable position. Relying on the Supreme Court decision in *Arkansas State Highway & Transportation Dept. v. Godwin*, 270 Ark. 743, 606 S.W.2d 127 (1980), the claimant contends that the imposition of the late payment penalty statute is mandatory.

On the other hand, respondents contend that the late payment was not willful or intentional. They argue that the late payment was a result of a default in communication due to the fact that the case was reassigned to a different claims management service. Respondents further contend that once the proper adjuster became aware of the opinion, payment was issued on March 23, 2006. However, the new claims management office used the claimant's former address. Respondents' counsel first received notice that the benefits awarded had not been paid when they received the letter to the Commission requesting a hearing on the issue of nonpayment. A stop payment was issued on the first check and a new check was issued to the claimant.

While this case is clearly distinguishable from cases in which respondents have either continued to controvert payment of expenses and/or have "drug their feet" in sending payment, I have no found authority which permits the discretionary waiver of the twenty percent payment penalty under the facts as submitted herein. While the failure to pay the benefits may not have been willful or intentional, it is undisputed that the payment was made outside the fifteen day period in which it

became due. The clear provisions of § 11-9-802(c) provide that a twenty percent penalty “shall” be added to any unpaid installment at the same time as but in addition to the installment unless review of the compensation order making the award is pursued.

Alternatively, assuming arguendo, that I do have the discretion to waive the penalty, I find that the claimant should not be held responsible for a delay in payment caused by an administrative shuffle of the respondent over which the claimant had no control. Moreover, the claimant properly notified the Commission when her address changed and proper notification was forwarded to all parties concerned as evidenced by Claimant’s Exhibit No. 2, a letter dated November 8, 2005, putting all parties on notice that the claimant’s address had changed to a post office box in Conway, Arkansas, and requesting that checks and all other information be sent to the new address. Therefore, for the reasons set forth herein, I find that the claimant has established by a preponderance of the evidence that she is entitled to a twenty percent penalty on the late payment of the temporary total disability benefits and is entitled to the maximum statutory attorney’s fee on all controverted penalties assessed herein. *Taylor v. CV’s, Full Workers’ Compensation Commission*, Opinion filed April 14, 2006 (F202289).

**ORDER**

For the reasons set forth herein, respondents are hereby ordered to pay a twenty percent penalty on the temporary total disability benefits awarded and which were paid late and the maximum statutory attorney’s fees in connection therewith.

IT IS SO ORDERED.

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BARBARA W. WEBB  
Administrative Law Judge

