

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E105634

VICKI THOMPSON,
EMPLOYEE

CLAIMANT

DEPARTMENT OF CORRECTION,
EMPLOYER

RESPONDENT NO. 1

PUBLIC EMPLOYEE CLAIMS DIVISION,
CARRIER

RESPONDENT NO. 1

DEATH AND PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT NO. 2

OPINION FILED MAY 3, 2006

Case submitted on stipulated facts before ADMINISTRATIVE LAW
JUDGE MARK CHURCHWELL.

The claimant was represented by HONORABLE PHILIP M. WILSON,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by HONORABLE RICHARD SMITH,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case was submitted by the parties for a decision
on stipulated facts. A prehearing order was enter in this
case on January 10, 2006. This prehearing 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
this prehearing order was made Commission's Exhibit No. 1 to
the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. Employer/employee/carrier relationship on 3/6/91.
2. WCR for TTD = \$209.00; and for PPD = \$173.53.
3. Respondents accepted the claim.
4. Claimant is PTD.
5. On 12/10/92 an Opinion was entered finding that claimant had established a safety violation by clear and convincing evidence for which respondents began payments, thereby increasing her compensation rates to \$262.39 and \$196.79 respectively.
6. Respondents paid the safety violation until such time as the Trust Fund assumed liability for PTD benefits on 9/11/00.
7. Thereafter, respondents no. 1, PECD, ceased to pay the safety violation penalty.
8. Respondents have continued to pay reasonable and related medical expenses.

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

1. Payment of 25% penalty for safety violation.

2. Whether either respondent should continue to pay the safety violation after 9/11/00.

In addition, the claimant's attorney asserted in his prehearing filing that he is entitled to an appropriate attorney's fee on these controverted sums. The record consists of the January 10, 2006 prehearing order, the claimant's brief filed on February 17, 2006¹, respondent no. 1's brief originally filed on February 9, 2006, and respondent no. 2's brief filed on February 6, 2006. I have "blue-backed" these documents to designate the record.

DISCUSSION

The facts in this case are not in dispute. The claimant sustained a compensable injury on March 6, 1991, which rendered her permanently and totally disabled. The claimant's compensation rate for total disability is \$209 per week. However, because the claimant's injury was caused in substantial part by her employer's failure to comply with applicable safety provisions, the claimant's compensation was increased 25% to \$262.39 per week pursuant to Ark. Code Ann. § 11-9-503 (1987). In addition to paying other

¹Although claimant's brief was not filed timely, neither respondent attorney upon inquiry filed an objection to inclusion of the claimant's brief into the record. I am therefore accepting claimant's brief into the record.

benefits, the Public Employee Claims Division paid the claimant \$262.39 per week for permanent and total disability until September 11, 2000, when the Death and Permanent Total Disability Trust Fund assumed liability for weekly benefit pursuant to Ark. Code Ann. § 11-9-502 (1987)².

Beginning on September 11, 2000, the Death and Permanent Total Disability Trust Fund took over liability and paid the claimant permanent and total disability compensation at a rate of only \$209 per week. Neither the Public Employee Claims Division or the Death and Permanent Total Disability Trust Fund have paid the claimant the difference between \$262.39 per week and \$209 per week for any period after September 11, 2000. The issue at present is who, if anyone, is liable to the claimant for the difference between \$262.39 per week and \$209 per week after September 11, 2000.

²Both the Public Employee Claims Division and the Death and Permanent Total Disability Trust Fund apparently agree that only the base compensation payments of \$209 per week, rather than the full \$262.39 per week paid by the Public Employee Claims Division, count toward the Public Employee Claims Division's liability for \$75,000 in weekly benefits for permanent and total disability under Ark. Code Ann. § 11-9-502(b).

Arkansas is one of approximately 13 states with workers' compensation laws which have at least at one time³ resulted in compensation increases for an employer's failure to provide safety devices, obey safety regulations, or otherwise comply with a duty imposed by statute or regulation. 6 Larson Workers' Compensation Law § 105.01 (2000). Courts have generally classified these statutes as penal in nature. Roberts v. Smith Furn. & Appl. Co., 263 Ark. 869, 567 S.W.2d 947 (1978). Accord Ernest Simpson Const. Co. v. Conn, 625 S.W.2d 850 (Ky. 1981) ["The purpose... is not to compensate workers or their families but to penalize those employers who intentionally fail to comply with safety regulations"]; Garza v. W. A. Jourdan, Inc., 572 P.2d 1276 (N.M. Ct. App. 1977) ["(T)he safety device statute is not compensatory but punitive, and the portion stating 'the compensation otherwise payable... shall

³Act 796 of 1993 re-wrote Ark. Code Ann. § 11-9-503 and eliminated the compensation rate increase payable to a claimant for an employer's safety violation. Under the current law, an employer's safety violation identifies the employer as an "extra-hazardous employer." The extra-hazardous employer designation requires a safety consultation and an accident prevention plan pursuant to Ark. Code Ann. § 11-9-409 (Repl. 2002). Since the claimant's injury occurred prior to July 1, 1993, this claim is controlled by the provisions of Ark. Code Ann. § 11-9-503 as it existed prior to the amendments of Act 796 of 1993. See Act 796 of 1993, § 41.

be increased ten percent' is the measure of computing the amount of penalty levied"]; Prier Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988) [Describing these payments as a percentage safety-violation penalty computed on the basis of disability caused by a work-related injury].

I note that several state laws which increase the compensation rate if the employer commits a safety violation likewise decrease the compensation rate if the employee commits a safety violation. See generally, New Mexico Stat. Ann. § 52-1-10; Whittaker v. McClure, 891 S.W.2d 80 (Ky. 1995); and Schwartz v. Department of Ind., Labor & Human Rel., 240 N.W.2d 173 (Wis. 1976). My research indicates that Arkansas apparently never had a parallel provision decreasing the compensation rate if the employee's injury was caused by a safety violation committed by the employee.

Against this background, I note that Ark. Code Ann. § 11-9-503 (1987) provides:

Where established by clear and convincing evidence that an injury or death is caused in substantial part by the failure of an employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees, compensation provided for by § 11-9-501(a)-(d) shall be increased by twenty-five percent (25%).

To the extent that it has been argued that the Death and Permanent Total Disability Trust Fund should make these

enhanced payments of compensation, I am persuaded by the Fund's analysis that the Fund is only liable for "weekly benefits", and that the penalty assessed by Ark. Code Ann. § 11-9-503 is not "weekly benefits" as that term has been construed in other contexts by the Arkansas Courts. In this regard, Ark. Code Ann. § 11-9-502(b) provides:

(b) (1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars (\$75,000) of **weekly benefits** for death or permanent total disability shall be paid by the employer or his insurance carrier in the manner provided in this chapter.

(2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars (\$75,000) in **weekly benefits** shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund. [Emphasis added.]

As the Death and Permanent Total Disability Trust Fund notes in its brief, the Arkansas Courts have consistently held that "weekly benefits" as used in Section 502, refers to payments for death or permanent total disability only. "Weekly benefits" do not include payments for temporary disability or lump sum payments to widows upon re-marriage. Sparks Regional Medical Center v. Death and Permanent Total Disability Bank Fund, 220 Ark. App. 204, 737 S.W.2d 463

(1987); Death and Permanent Total Disability Trust Fund v. Tyson Foods, 304 Ark. 359, 801 S.W.2d 653 (1991).

In light of the persuasive authority from our own and other jurisdictions, indicating that the purpose of safety violation statutes such as our own is to punish the employer rather than to compensate the employee, and are in fact a "penalty", I find that penalty payments pursuant to Ark. Code Ann. § 11-9-503 are not "weekly benefits" within the meaning of Ark. Code Ann. § 11-9-502. Therefore, I find that the Death and Permanent Total Disability Trust Fund can have no liability for making those penalty payments.

On the other hand, I find nothing in the plain language of Ark. Code Ann. § 11-9-503, its legislative history, or the public policy considerations for a safety violation statute indicating that the employer's liability for the penalty extinguished on September 11, 2000, as the Public Employee Claims Division asserts.

With regard to the relevant public policy considerations, I note that the Kentucky Supreme Court laid out the utility of imposing an ongoing penalty, where not prohibited by statute, as follows in Whittaker v. McClure, 891 S.W.2d 80, 82 (Ky. 1995):

In imposing penalties on workers and employers where violation of a known safety rule results in injury to the worker, the legislature provided incentives for following and enforcing safety rules which are consistent with its goals of providing a safer workplace and reducing the number of compensable injuries. To be most effective, the amount of such a penalty should not be affected by whether the Special Fund is partially liable for the payment of income benefits. This is because Special Fund liability for a portion of income benefits does not in any way diminish the desirability of encouraging workers and their employers to practice workplace safety. [Citations omitted].

Likewise, nothing in the plain language of either Ark. Code Ann. § 11-9-502 or § 11-9-503 indicates to me any discernable express or implied legislative intent that the employer/carrier's penalty liability terminates when the Death and Permanent Total Disability Trust Fund takes over payment after \$75,000 in weekly benefits for permanent total disability. By comparison, the Kentucky safety violation statute is restricted only to increased payments for "compensation for which the employer would otherwise have been liable." [Emphasis added]. Since the Kentucky Special Fund is not "the employer", the Kentucky Supreme Court in Whitaker, supra. concluded that Kentucky Revised Statute 342.165 does not permit the Special Fund to take advantage of a 15% safety violation penalty assessed against the employee. By comparison, the plain language of Ark. Code

Ann. § 11-9-503 contains no such restrictive language, and would therefore appear to require a penalty against an employer on all compensation owed to the claimant for the work injury, regardless of whether the compensation is paid by the employer/carrier or instead paid by the Death & Permanent Total Disability Trust Fund. Accord Hot Springs County Bicentennial Park v. Walker, 271 Ark. 688, 610 S.W.2d 268 (1981) [Awarding a controverted attorney's fee against the employer/carrier on all controverted disability benefits, including that portion of benefits paid by the Death and Permanent Total Disability Trust Bank, because "[t]here is no language in the [attorney's fees] statute limiting the award of the attorney's fees to amounts which the employer and its carrier both controvert and owe."].

Moreover, I note that in Prier Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1998), the Full Commission awarded a safety violation penalty against an employer for total disability in a case involving Second Injury Fund liability. The Court found that the Commission's penalty was excessive under the circumstances of the case where (1) the claimant's injury caused only 10% of his permanent disability (2) under Arkansas law, the employer was only liable for the 10% disability caused by the injury and the Second Injury Fund

was liable for the remaining 90% disability and (3) according to the Court, an employer is liable for a penalty under Section 503 only on benefits for the degree of disability causally related to the safety violation. Where the accidental injury involving the safety violation caused at most a 10% disability, the Court found that the Commission erred in ordering a penalty on the basis of total disability rather than 10% disability. By comparison, in the present case, there is no dispute that the claimant's compensable injury caused his total disability.

With regard to legislature history, my research indicates that the safety violation penalty statute presently contained in Ark. Code Ann. § 11-9-503 was initially enacted in a similar form in Initiated Measure 1968, No. 1, § 1. See Ark. Stat. Ann. § 81-1310 (1971 Supp.) In that original form, the benefit increase was 15%, rather than today's 25%. In 1976, the legislature amended the law to provide that the safety violation must be established by clear and convincing evidence and to provide that the 15% increase be paid to the Second Injury Fund. See Act 1227 of 1975 (Ext. Sess., 1976), § 5. In 1986, the legislature removed the language regarding payment to the

Second Injury Fund and increased payment from 15% to 25%.
See Act 10 of 1986 (2nd Ex. Sess.), § 2.

Finally, I feel compelled to comment on the unpublished Commission decisions which the respondents rely on to assert that no penalty is payable after the Death and Permanent Total Disability Trust Fund assumes payments pursuant to Ark. Code Ann. § 11-9-502. The parties have cited to an Administrative Law Judge's decision filed on June 22, 1998 which was affirmed and adopted by the Full Commission in an unpublished April 14, 1999 opinion. The administrative law judge's June 22, 1998 opinion appears to me to have reasoned that (1) the Section 503 penalty is only computed on benefits referenced in Section 501; (2) benefits after \$75,000 are payable under Section 502, not under Section 501; therefore (3) no further penalty is payable by the respondent employer under Section 503 after paying \$75,000 under Section 501, because then the Death and Permanent Total Disability Trust Fund starts payments under Section 502, not Section 501, after the employer pays \$75,000 in weekly benefits.

I disagree with this conclusion for two reasons. First, I conclude that the reference to Section 501 in Section 503 is in regard to determining the rate of

compensation payable to the claimant, thereby establishing the method for calculating the penalty payments due, and not intended to identify the entity paying the compensation, as the ALJ's June 22, 1998 opinion appears to reason.

Moreover, I point out that benefits payable by the Fund under Section 502 are payable at compensation rates determined under Section 501, just as the penalty owed by the employer under Section 503 is based on compensation rates determined under Section 501. Second, I note that on December 9, 1998, approximately six months after the ALJ's analysis, the Arkansas Court of Appeals affirmed a separate Full Commission decision finding that (1) the safety violation penalty applies to the wage-loss portion of permanent total disability and (2) a controverted attorney's fee also applies on the controverted 25% increase in compensation payable under Ark. Code Ann.

§ 11-9-501. Bussell v. Georgia-Pacific Corp., 64 Ark. App. 194, 981 S.W.2d 98 (1998).

In summary, the plain language of Ark. Code Ann. § 11-9-503, the Court's reasoning in Prier Brass v. Weller, supra., and the public policy considerations in enacting a safety violation penalty statute, all lead me to conclude that a safety violation penalty against the employer/carrier

for permanent and total disability is appropriate where, as here, the compensable injury caused the permanent total disability. I therefore find that the Public Employee Claims Division is liable for continuing penalty payments after September 11, 2000, and I find that the claimant's attorney is entitled to the maximum statutory attorneys fee provided for under Ark. Code Ann. §11-9-715 (1987) on the ongoing penalty payments awarded herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee/carrier relationship existed on March 6, 1991.
2. The claimant's weekly compensation rate for TTD is \$209.00 and for PPD is \$173.53.
3. Respondents accepted the claim.
4. Claimant is permanently and totally disabled.
5. On December 10, 1992 an Opinion was entered finding that claimant had established a safety violation by clear and convincing evidence, for which respondents began payments, thereby increasing her compensation rates to \$262.39 and \$196.79 respectively.
6. Respondent no. 1 paid the safety violation until

such time as respondent no. 2 assumed liability for permanent and total disability benefits on September 11, 2000.

7. Thereafter, respondent no. 1 ceased to pay the safety violation penalty.

8. Respondent no. 1 has continued to pay reasonable and related medical expenses.

9. I find that Respondent no. 2 has no liability for payments pursuant to Ark. Code Ann. § 11-9-503 (1987) in this case.

10. I find that Respondent no. 1 has continuing liability for the 25% penalty for safety violation after September 11, 2000 in this case.

11. The claimant's attorney is entitled to the maximum attorney's fees allowable under Ark. Code Ann. § 11-9-715 (1987) on the sums awarded herein.

AWARD

Respondent no. 1 is directed to make payments in accordance with the findings of fact set forth herein. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995), and

Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998); reversed on other grounds 336 Ark. 515, 988 S.W.2d 3 (1999).

The claimant's attorney is entitled to the maximum allowable attorney's fee on the sums awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (1987) and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge