

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F312876

JIMMY BARK, Employee	CLAIMANT
RHEEM MANUFACTURING, Employer	RESPONDENT #1
OLD REPUBLIC INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JUNE 5, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

Respondent #1 not participating in hearing.

Respondent #2 represented by DAVID PAKE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On May 7, 2007, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on March 5, 2007, and a pre-hearing order was filed on the same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulation:

1. The opinion filed by the Court of Appeals on December 20, 2006 is final.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether the Second Injury Fund is liable for an attorney fee.
2. Costs pursuant to A.C.A. §11-9-714 (alleged by both parties.)

At the time of the hearing the Second Injury Fund withdrew its request for costs pursuant to A.C.A. §11-9-714. However, claimant is still requesting costs.

The claimant contends that the Second Injury Fund adopted the position of the

respondent carrier and paid the claimant at an inappropriate compensation rate notwithstanding the fact that the claimant alleged entitlement to benefits at a rate higher than the rate at which the carrier was paying. The claimant contends that his attorney is entitled to an attorney's fee from the Second Injury Fund in regard to all accrued benefits as reflected in a February 7, 2007 letter from the Special Funds' accountant. In addition, the claimant contends that his attorney is entitled to an attorney's fee on future benefits regarding the difference between the \$261.00 compensation rate at which the Second Injury Fund paid the claimant and the \$380.00 rate to which the claimant was entitled.

The Second Injury Fund's contentions are set forth in the pre-hearing order attached as Exhibit 1 to the order and contained in the transcript.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The opinion filed by the Court of Appeals on December 20, 2006 is final.
2. The claimant has failed to prove that the Second Injury Fund controverted his entitlement to the correct compensation rate; therefore, the Second Injury Fund is not liable for payment of a controverted attorney fee.

FACTUAL BACKGROUND

A pre-hearing conference was originally conducted in this case on December 22, 2004. A pre-hearing order was filed indicating that the issues to be litigated included Second Injury Fund liability and the claimant's correct compensation rate. A hearing was set on these issues, but prior to the scheduled hearing the Second Injury Fund accepted

liability for permanent total disability benefits. In a letter dated February 21, 2005, Attorney Walker indicated that claimant would not pursue the issue of whether the Second Injury Fund had controverted the claimant's entitlement to permanent total disability benefits. A hearing was subsequently conducted on February 28, 2005 and the only issues litigated at that time were the claimant's correct compensation rate as well as an attorney fee on the compensation rate. Because the Second Injury Fund had accepted liability and no claim was being made against it for an attorney fee, the Second Injury Fund did not appear at the hearing and did not participate.

In an opinion filed March 24, 2005, I found that the claimant's correct compensation rate for total disability benefits equaled \$261.00 per week. This decision was appealed by the claimant to the Full Commission which in an opinion filed February 9, 2006 reversed the finding and found that claimant was entitled to compensation at the rate of \$380.00 per week for total disability benefits. The Full Commission's decision was subsequently appealed by the respondent and cross-appealed by the claimant to the Arkansas Court of Appeals. In an opinion filed December 20, 2006, the Court of Appeals affirmed the Full Commission's opinion finding that claimant's compensation rate equaled \$380.00 per week for total disability benefits.

Once the compensation carrier paid claimant's impairment rating, the Second Injury Fund began paying claimant his permanent total disability benefits at the rate of \$261.00 per week. The Second Injury Fund continued to pay permanent total disability benefits at that rate until the mandate from the Arkansas Court of Appeals became final. Once the Court of Appeals' decision became final, the Second Injury Fund hand delivered a check to claimant for the compensation benefits attributable to the higher rate.

Although claimant's attorney did not request an attorney fee on the permanent total disability benefits accepted by the Second Injury Fund, claimant's attorney did request an attorney fee from the claimant on those benefits. An order approving payment of an

attorney fee from the claimant in the amount of 12.5 percent on permanent total disability benefits was approved by this administrative law judge on February 20, 2007.

Claimant has now filed this claim contending that the Second Injury Fund is liable for an attorney fee on the difference between benefits which were paid at the rate of \$261.00 per week and the correct rate of \$380.00 per week.

ADJUDICATION

The statute regarding payment of an attorney fee by the Second Injury Fund is codified at A.C.A. §11-9-715 (a)(2)(A). It states as follows:

Whenever the commission finds that a claim against the Treasurer of State, as custodian of the Second Injury Trust Fund, or as custodian of the Death and Permanent Total Disability Trust Fund, has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid from the fund, in addition to compensation awarded, and the fee shall be allowed only on the amount of compensation controverted and awarded from the fund.

The question of whether or not a particular claim is controverted is a question of fact for the Commission. *Aluminum Company of American v. Henning*, 260 Ark. 699, 543 S.W. 2d 480 (1976).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the Second Injury Fund did not controvert the claimant's correct compensation rate. First, I note that the mere failure to pay compensation benefits does not amount to controversion, in and of itself. *Revere Copper and Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W. 2d 477 (1983); *Walter v. Southwestern Bell Telephone Company*, 17 Ark. App. 43, 702 S.W. 2d 822 (1986). Thus, the mere fact that the Second Injury Fund did not pay claimant permanent total disability benefits at the rate of \$380.00 per week does not in and of itself amount to controversion. In this particular case, it is

important to note that the issue of claimant's correct compensation rate was one which was litigated by the claimant and the respondent employer. Once the Second Injury Fund accepted liability for permanent total disability benefits and Attorney Walker indicated that claimant would not pursue the issue of whether the Second Injury Fund controverted claimant's entitlement to permanent total disability benefits, the Second Injury Fund no longer participated in this claim. The Second Injury Fund did not appear at the hearing and did not participate in the appeals to the Full Commission or to the Arkansas Court of Appeals.

While claimant contends that the Second Injury Fund adopted the position of the respondent employer with respect to the compensation rate, I note from a review of the documentary evidence that the Second Injury Fund did not take a position as to the claimant's correct compensation rate, but instead deferred to a final decision following litigation between the respondent employer and the claimant. In a letter to this Administrative Law Judge dated February 22, 2005, Attorney Pake on behalf of the Second Injury Fund stated:

The only remaining issue is the claimant's compensation rate. Mr. Walker contends the claimant is entitled to a certain average weekly wage and Diane Graham contends the claimant is entitled to a different rate. The Fund takes no position either way. Obviously, the claimant and respondent #1 can settle that issue by either stipulation or submit the issue to you. Either way, the Fund will not contest the claimant's wage rate as determined by either method. (Emphasis added.)

As previously noted, my decision with respect to the compensation rate was subsequently appealed to the Full Commission by the claimant. In response to an inquiry from Dorothy Jackson of the Workers' Compensation Commission, Attorney Pake wrote a letter dated June 15, 2005, again stating that the Second Injury Fund would abide by any final award.

The Fund will not submit a brief in this case. The sole issue to be determined on appeal is the correct compensation rate. The Fund has previously stated that it will abide by whatever compensation rate is found in a final award. (Emphasis added.)

The final award in this case occurred after the Court of Appeals issued its opinion in December 2006 and the time for filing a review with the Arkansas Supreme Court had passed. Once the claimant's correct compensation rate was determined, the Second Injury Fund hand delivered to the claimant a check for benefits commensurate with the correct compensation rate.

I do not find under the circumstances presented in this case that the Second Injury Fund controverted claimant's entitlement to benefits at the correct compensation rate. Instead, the Second Injury Fund indicated prior to the initial hearing that it would defer to the outcome of litigation with respect to the correct compensation rate. Once the correct compensation rate was determined on appeal, the Second Injury Fund paid claimant benefits in accordance with the correct compensation rate.

In reaching this decision, I note that the courts have recognized that one of the purposes of an attorney fee statute is to put the economic burden of litigation on the party that makes the litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W. 2d 647 (1988). In this case, the Second Injury Fund did not make the litigation necessary. The litigation was necessary due to a conflict between claimant and his employer over the correct compensation rate. The initial hearing and the subsequent appeals to the Full Commission and the Court of Appeals would have proceeded regardless of the Second Injury Fund's position.

In summary, in order for an attorney fee to be assessed against the Second Injury Fund, a finding must be made that the Second Injury Fund controverted claimant's entitlement to the correct compensation rate. I find under the facts presented in this case that the Second Injury Fund did not controvert the claimant's correct compensation rate.

Instead, the Second Injury Fund deferred to the outcome of litigation and once a determination was made paid appropriate compensation benefits. Therefore, I find that the Second Injury Fund is not liable for payment of an attorney fee pursuant to A.C.A. §11-9-715(a)(1)(A).

Having found that the Second Injury Fund is not liable for payment of an attorney fee on the correct compensation rate, the Second Injury Fund is likewise not liable for any costs pursuant to A.C.A. §11-9-714.

ORDER

The Second Injury Fund did not controvert the claimant's correct compensation rate. Therefore, the Second Injury Fund is not liable for an attorney fee on the difference between the rate at which benefits were paid and the compensation rate determined by the Arkansas Court of Appeals. Accordingly, this claim is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE