

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F503899

RUSSELL COMPTON, Employee

CLAIMANT

LOY FOX d/b/a FOX CONSTRUCTION,  
Uninsured Employer

RESPONDENT

OPINION FILED MARCH 5, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by ANDREW HATFIELD, Attorney, Rogers, Arkansas.

STATEMENT OF THE CASE

On February 7, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on December 13, 2006, and a pre-hearing order was filed on December 22, 2006. 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 stipulations:

1. The prior opinion of September 7, 2006 is final.

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

1. Penalty pursuant to A.C.A. §11-9-802.
2. Attorney fee.

The claimant contends the respondent has not paid benefits awarded pursuant to the opinion of September 7, 2006; therefore, a penalty should be assessed pursuant to A.C.A. §11-9-802.

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 prior opinion of September 7, 2006 is final.
2. Respondent has not paid benefits awarded within 15 days after they became due following the September 7, 2006 opinion. Therefore, pursuant to A.C.A. §11-9-802 a 20% penalty will be added on to all unpaid indemnity benefits. I do not find that the failure to pay benefits was willful and intentional; therefore, the 36% penalty is not applicable.
3. Respondent has controverted claimant's entitlement to the 20% penalty.

#### FACTUAL BACKGROUND

A prior hearing was conducted on this case on August 9, 2006, and an opinion was filed on September 7, 2006 finding that the claimant was an employee of the respondent and awarding compensation benefits; including, temporary total disability benefits at the rate of \$175.00 per week. The opinion also awarded payment of medical benefits as well as an attorney fee on all indemnity benefits.

The September 7, 2006 opinion was not appealed and therefore has now become final. The parties have agreed that since the time of the opinion respondent has made two payments in the amount of \$50.00 each in satisfaction of the award. No other payments have been forthcoming.

Claimant has filed this claim contending that respondent's failure to pay compensation benefits gives rise to a penalty pursuant to A.C.A. §11-9-802.

ADJUDICATION

A.C.A. §11-9-802(c) states:

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.

In this particular case, other than two payments of \$50.00 each, no other payments have been forthcoming pursuant to the award entered on September 7, 2006. In *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W. 2d 776 (1996), the Court noted: “We have long held that failure to begin paying benefits within the statutory period gives rise to the 20-percent penalty laid out in the statute (citations omitted).”

Accordingly, pursuant to A.C.A. §11-9-802 I find that a 20% penalty should be assessed on all indemnity benefits awarded to claimant in the opinion of September 7, 2006.

Although medical benefits are also unpaid, the penalty provided by subsection (c) does not apply to medical bills or attorney fees. *Smith’s Store v. Kirker*, 6 Ark. App. 222, 639 S.W. 2d 751 (1982).

I also note that I do not find that the respondent’s failure to pay benefits due and owing to the claimant to be willful and intentional so as to invoke the 36% penalty provided for in A.C.A. §11-9-802(e). Loy Fox, owner of the respondent, testified at the hearing that he is not currently employed and that he is in the process of looking for work in the construction industry. In short, I do not find the respondent’s failure to pay the benefit to be willful and intentional, but simply a lack of funds from which to pay.

Finally, respondent has controverted claimant’s entitlement to the 20% penalty; therefore, claimant’s attorney is entitled to the maximum attorney fee on the penalty itself.

AWARD

\_\_\_\_\_ Respondent has failed to pay benefits awarded in an opinion of September 7, 2006. Therefore, pursuant to A.C.A. §11-9-802(c) a 20% penalty will be added to all indemnity benefits. In addition, respondent is liable for an attorney fee on the 20% penalty.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE