

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511308

LONNIE HENSON,  
EMPLOYEE

CLAIMANT

MANUFACTURERS TRANSPORT, LLC,  
EMPLOYER

RESPONDENT NO. 1

AMERICAN INTERSTATE INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

**OPINION FILED JULY 11, 2007**

Case submitted on documentary evidence before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant is represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 is represented by HONORABLE MICHAEL R. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 is represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

This case has been submitted to the Administrative Law Judge on documentary evidence by agreement of the attorneys in a June 19, 2007, telephone conference. Respondent No. 1 has no potential liability in the issues presently before the Commission, and Mr. Ryburn did not participate in the June 19, 2007, telephone conference. As agreed by Mr. Giles and Mr. Pence in that telephone conference, the issues to be

litigated and resolved at the present time were limited to the following:

1. Mr. Giles' request for a controverted attorney's fee from the Second Injury Fund pursuant to Ark. Code Ann. § 11-9-715 (a) (2) (A).
2. Mr. Giles' alternative request for an attorney's fee from Mr. Henson pursuant to Ark. Code Ann. § 11-9-715 (a) (2) (C).

The record consists of Mr. Pence's May 4, 2007, letter and Mr. Henson's May 22, 2007, Affidavit with Mr. Giles' attached time records for work conducted on this case which I have "blue backed" to designate as part of the record.

#### **DISCUSSION**

The claimant sustained a compensable injury on October 5, 2005. The claimant reached maximum medical improvement on June 21, 2006. The Second Injury Fund was named a party on a claim for permanent disability benefits on July 6, 2006. The Second Injury Fund ultimately accepted liability for permanent and total disability six days after taking the claimant's deposition on November 2, 2006.

The claimant contends that the Second Injury Fund controverted the claimant's claim for permanent and total disability and should therefore pay the claimant's attorney a 25% fee pursuant to Arkansas Code Annotated Section 11-9-715(a) (2) (A). In the alternative, the claimant's attorney

seeks an attorney's fee from the claimant pursuant to Arkansas Code Annotated Section 11-9-715(a) (2) (C) for the attorney's legal assistance in obtaining lifetime benefits for permanent and total disability for the claimant. For the reasons discussed herein, I find that the Second Injury Fund did not controvert the claim and is therefore not liable for an attorney's fee. I also find that the claimant's attorney is entitled to a fee in the amount of \$2,112.50 payable from the biweekly benefits owed by the Second Injury Fund to the claimant.

**1. Controverted Attorney's Fee Payable By The Second Injury Fund.**

Arkansas Code Annotated Section 11-9-715(a) (2) (A)

(Repl. 2002) provides:

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 fees shall be allowed only on the amount of compensation controverted and awarded from the fund.

The Arkansas Court of Appeals summarized the law regarding controversion as follows in Osborne v. Bekaert Corp., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (CA 06-537 Del. December 13, 2006):

Making an employer liable for attorney's fees serves legitimate social purposes such as discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976). Put another way, the fundamental purposes of attorney's fees statutes such as Ark. Code Ann. § 11-9-715 is to place the burden of litigation expenses upon the party that made it necessary. *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). However, the mere failure of the employer to pay certain benefits does not, in and of itself, amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

In Osborne the Court affirmed a Commission decision that the respondents did not controvert a claimant's entitlement to benefits for permanent and total disability under circumstances where a claimant sought a hearing on various issues, including permanent and total disability in early 2004, and the respondents acknowledged liability for permanent and total disability in their answer to a prehearing questionnaire. In Donald J. Catlett v. Arkansas Aluminum Alloys, Inc., Full Workers' Compensation Commission, Opinion filed June 1, 2005 (E903941 and E710724), a majority of the Full Commission found that the Second Injury Fund did not controvert a 35% permanent partial disability for which they had acknowledged liability

in a prehearing order filed by the administrative law judge prior to a hearing on the extent of permanent disability.

In Lee v. ALCOA Extrusion Inc., 89 Ark. App. 228, 201 S.W.3d 449 (2005), the Court affirmed a Commission finding that the Second Injury Fund controverted a 25% disability under circumstances where the Fund did not accept any disability liability in its answer to the prehearing questionnaire, the permanent disability issue was set for a hearing, the hearing was continued at the request of the Second Injury Fund for an additional deposition, and the Fund accepted a 25% disability four days after the deposition.

Likewise, in Kenneth Neese v. C. Bean Transport, Full Workers' Compensation Commission, Opinion filed June 2, 2005 (F211780), a majority of the Full Commission also found that the Second Injury Fund controverted the claimant's entitlement to disability benefits. In Neese, the parties made wage loss disability a hearing issue in an order filed in December of 2003, and on February 12, 2004, one week before the scheduled hearing, the Second Injury Fund accepted liability for the claimant's permanent partial disability of 25%.

I conclude that the relevant facts in the present case are analogous to Osborne and Catlett, and distinguishable from Lee and Neese. In the present case, as in Osborne and Catlett, the Second Injury Fund completed its investigation before a prehearing order identifying hearing issues could be entered, and no prehearing order was ever entered naming permanent disability as a hearing issue because the Second Injury Fund filed a letter accepting permanent and total disability in lieu of filing a prehearing questionnaire answer.

Specifically, in the present case the Second Injury Fund was joined as a party on July 6, 2006. The claimant's discovery deposition was taken on November 2, 2006, and the Second Injury Fund accepted liability for permanent and total disability on November 8, 2006, before a hearing was held, before a pre-hearing order was entered, and before a pre-hearing conference was even scheduled. The Arkansas Court of Appeals has recognized that filing interrogatories and participating in depositions are methods of gathering information which the Fund must have in any case in which the Fund has been named as a party. Conducting such an investigation does not mean that the Fund has controverted a claim. Buckner v. Sparks, 32 Ark. App. 5, 794 S.W.2d 623

(1990). In the present case, there is no evidence before me indicating that the Fund conducted its investigation in an untimely manner or delayed a timely resolution of this matter upon completing its investigation. I therefore find that the Second Injury Fund did not controvert the claimant's benefits for permanent and total disability under the circumstances presented in the present case. I therefore find that the Second Injury Fund is not liable for an attorney's fee in this case.

**2. Attorney's Fee For Bona Fide Legal Services Payable By The Claimant**

Arkansas Code Annotated Section 11-9-715(a) (2) (C) (Repl. 2002) provides:

(i) Whenever the commission finds that a claim has not been controverted but further finds that bona fide legal services have been rendered in respect to the claim, then the commission shall direct the payment of the fees by the injured employee or dependents of a deceased employee out of the compensation awarded.

(ii) In determining the amount of fees when a claim is not controverted, the commission shall use its discretion in awarding an attorney's fee not to exceed twenty-five percent (25%) and in so doing shall take into consideration the nature, length, and complexity of the services performed and the benefits resulting to the compensation beneficiaries.

In the present case, I find that Mr. Giles provided the claimant bona fide legal services for the claimant's receipt of permanent and total disability. After considering the

nature, length, and complexity of the services performed, and the lifetime of monetary benefits resulting from the claim, I find appropriate the \$2,112.50 attorney's fee requested by Mr. Giles from the claimant based on 16.9 hours of services provided by Mr. Giles between September 4, 2006, and May 7, 2007, to be compensated at a rate of \$125 per hour.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The claimant has failed to establish by a preponderance of the evidence that the Second Injury Fund controverted his claim for permanent and total disability benefits. The Second Injury Fund is therefore not liable for a controverted attorney's fee in this case.
2. The preponderance of the evidence establishes that the claimant's attorney provided the claimant bona fide legal services for the claimant's receipt of permanent and total disability. The claimant's attorney is hereby awarded an attorney's fee of \$2,112.50 pursuant to Ark. Code Ann. § 11-9-715(a)(2)(C) (Repl. 2002).

**ORDER**

The Second Injury Fund is directed to begin withholding \$100.00 biweekly from the claimant's permanent and total disability biweekly checks of \$906.00, to pay the \$100.00 by separate check to the claimant's attorney, and to continue said withholdings biweekly until such time as the attorney's fee award of \$2,112.50 has been paid in full out of the claimant's biweekly benefits.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge