

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F109650/F412000

RANDY E. LEWIS, Employee	CLAIMANT
AUTO PARTS & TIRE, Employer	RESPONDENT #1
ZENITH INSURANCE COMPANY, Carrier	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 16, 2007

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by J. MATTHEW MAULDIN, Attorney, Little Rock, Arkansas.

Respondent #2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

OPINION

This case comes on for review on stipulations and briefs submitted by the parties. This claimant had previously filed a claim contending that he was permanently totally disability as a result of a compensable injury. At a pre-hearing conference on February 15, 2005, the Second Injury Fund accepted liability in the amount of 45% to the body as a whole. Prior to the hearing the Second Injury Fund accepted liability for permanent total disability benefits. However, the Second Injury Fund only acknowledged liability for permanent total disability benefits until the claimant's 65th birthday in accordance with A.C.A. §11-9-522(f). As a result, a hearing was conducted on May 23, 2005 at which time claimant contended that the provision of A.C.A. §11-9-522(f) limiting permanent total disability benefits until age 65 was unconstitutional. Claimant also sought payment of various attorney fees. Claimant's attorney contended that the Second Injury Fund had controverted claimant's entitlement to benefits in excess of 45% to the body as a whole. In addition, claimant's attorney contended that he was entitled to a fee from the claimant

on the 45% wage loss initially accepted by the Second Injury Fund. In an opinion filed June 21, 2005, I found that claimant had failed to prove by a preponderance of the evidence that A.C.A. §11-9-522(f) was unconstitutional; therefore, the Second Injury Fund was ordered to pay permanent total disability benefits until the claimant reached age 65. I also awarded claimant's attorney various attorney fees. I found that claimant's attorney was entitled to an attorney fee from the claimant in an amount of 5% on the 45% wage loss previously accepted by the Second Injury Fund. In addition, I also found that the Second Injury Fund had controverted claimant's entitlement to all benefits in excess of 45% to the body as a whole. Accordingly, claimant's attorney was awarded a maximum attorney fee on benefits in excess of 45%, one-half to be paid by claimant and one-half to be paid by the respondent.

The June 21, 2005 opinion was appealed to the Full Commission which in an opinion filed April 13, 2006 affirmed and adopted the June 21, 2005 opinion. The Full Commission's decision was appealed by the claimant to the Arkansas Court of Appeals. Relying upon their decision in *Osborne v. Bekaert Corporation*, ___ Ark. App. ___, ___ S.W. 3d __ (December 13, 2006) that A.C.A. §11-9-522(f) was unconstitutional, the Court reversed. In an opinion filed April 13, 2007, the Full Commission on remand in accordance with the Court of Appeal's decision reversed the original opinion of June 21, 2005.

Subsequent to that decision, claimant's attorney has filed a petition requesting a lump sum of the attorney fee due him from the Second Injury Fund. Claimant's attorney is not requesting a lump sum payment of the claimant's portion of his attorney fee. In lieu of a hearing, the parties have agreed to submit this case for consideration on briefs. These briefs, along with the pre-hearing order filed May 17, 2007, have been blue-backed. I would note that briefs submitted by respondent #1, the employer and workers' compensation carrier, have also been included. However, these briefs primarily address

an issue regarding an attorney fee awarded by the Full Commission in its decision of April 3, 2007. I have previously indicated to the parties that this issue will not be considered by this administrative law judge, but rather any issue regarding an attorney fee awarded by the Full Commission should be addressed to the Full Commission.

The statute regarding payment of a lump sum attorney fee is codified at A.C.A. §11-9-716 which provides that the Commission is authorized to approve lump sum attorney fees for legal services rendered in respect to a claim. The lump sum fees are allowed even though an employee is to be paid on an installment basis. The statute also indicates that any approved fee is to be discounted at a rate provided in A.C.A. §11-9-804.

Initially, the Second Injury Fund contends that there is no specific statutory authority authorizing a lump sum payment of an attorney fee against the Second Injury Fund. While it is true that the courts have held that the term “employer” cannot be interpreted as to include the Second Injury Fund for purposes of the awardance of an attorney fee under the same provisions of §11-9-715, I note that the lump sum attorney fee statute codified at A.C.A. §11-9-716 does not indicate that it only applies to employers. Indeed, the statute does not mention employers or any other respondent by name. To the contrary, it only indicates that the Commission is authorized to approve lump sum attorney fees in cases. This would include attorney fees owed by the Second Injury Fund. There is no indication that this statute should not apply to the Second Injury Fund. Lump sum payment of an attorney fee from the Second Injury Fund has previously been awarded by both the Arkansas Court of Appeals and the Full Commission. See, *Seward v. The Bud Avants Company*, 65 Ark. App. 88, 985 S.W. 2d 332 (1999); *Gerrald v. Douglas Tobacco Products, Inc.*, Full Commission Opinion filed June 1, 2000 (E417422).

The Second Injury Fund also contends that claimant’s attorney’s request for a lump sum payment of his attorney fee is barred by the doctrine of *res judicata*. The doctrine of

res judicata bars claims where there has been a final adjudication on the merits of an issue on all matters litigated and those matters which might have been litigated. *Wells v. Arkansas Public Service Commission*, 272 Ark. 481, 616 S.W. 2d 718 (1981). The Second Injury Fund contends that the request for payment of a lump sum attorney fee is a matter which should have been litigated at the time of the original hearing on May 23, 2005.

After my review of the applicable case law, I do not find that the request for a lump sum attorney fee is barred by the doctrine of *res judicata* in this particular case.

In support of its contention the Second Injury Fund relies primarily upon two decisions, the first is a decision by the Full Commission in *Gerrald*. In that particular case, a claimant's attorney also requested that the balance of his attorney fee be paid in a lump sum pursuant to A.C.A. §11-9-716. Citing the decision in *Gwin v. R.D. Hall Tank Company*, 10 Ark. App. 12, 660 S.W. 2d 947 (1983), the Commission noted that there was a potential question as to whether or not the request for a lump sum was barred by the doctrine of *res judicata* unless it was raised before the administrative law judge at the time of the initial hearing. In *Gerrald*, the Full Commission found that the doctrine of *res judicata* was not applicable because it was an affirmative defense and was not timely raised by the Second Injury Fund. Accordingly, the request for payment of a lump sum attorney fee was granted.

In *Gwin*, the Commission had found that a particular claimant was permanently totally disabled and awarded his attorney the maximum attorney fee. However, the award made no provision for the manner in which the attorney fee was to be paid. The carrier made payments to the claimant's attorney in quarterly installments and the attorney subsequently filed a petition requesting that his fee be paid bi-weekly. No request for a lump sum payment was made at that time. An administrative law judge entered an order

directing that the attorney fee be paid on a bi-weekly basis. Approximately one year later the attorney filed another petition requesting that the balance of his fee be paid in a lump sum. The Court of Appeals in that case found that the petition was barred by *res judicata*. The court noted that the manner in which the fee was to be paid was barred by *res judicata*.

In support of his contention that the doctrine of *res judicata* does not apply, claimant's attorney relies primarily upon the decision in *Seward*. In that particular case, claimant was found to be permanently totally disabled and the maximum attorney fee was awarded to be paid "in accordance with A.C.A. §11-9-715, §11-9-716, §11-9-801, and WCC Rule 10". Following that opinion, the workers' compensation carrier became insolvent and the Arkansas Property & Casualty Insurance Guaranty Fund assumed the carrier's obligation. The Guaranty Fund requested a hearing to determine the amount of attorney fee awarded and for a determination as to whether the claimant's share should be deducted from the weekly benefit that the Guaranty Fund was obligated to pay. One of the issues raised was whether this request was barred by *res judicata*. The Full Commission found that *res judicata* was not applicable because while the original opinion did order an attorney fee to be paid in a lump sum, it did not calculate a specific amount; therefore, the subsequent order determining the amount of fee and the way it was to be paid was a collateral matter which had not been previously litigated. The Commission's decision was appealed to the Arkansas Court of Appeals which affirmed the Commission's decision. In doing so, the court noted that the original opinion was not final and appealable as to the specific amount of the attorney fee. The court went on to note that the total fee due to claimant's attorney could not have been determined until the claimant was no longer receiving benefits. Therefore, the doctrine of *res judicata* did not apply.

In this particular case, I find based upon the decision in *Seward* that the doctrine of

res judicata is not applicable. Here, the original administrative law judge opinion filed June 21, 2005 ordered a maximum statutory attorney fee on all permanent total disability benefits in excess of the 45% previously accepted by the Second Injury Fund. However, the benefits to be paid claimant and consequently to claimant's attorney were only awarded until the claimant reached age 65 pursuant to the provisions of A.C.A. §11-9-522(f). The Court of Appeals' subsequent decision finding that A.C.A. §11-9-522(f) was unconstitutional increased the potential benefits and attorney fee due by the Second Injury Fund. Thus, the amount of lump sum attorney fee due from the Second Injury Fund could not properly be calculated until after the ruling from the Court of Appeals.

With respect to this issue, I also note that in the *Gerrald* decision there was a specific order by an administrative law judge ordering payment of an attorney fee on a bi-weekly basis. It was after this specific award became final that claimant's attorney in that case requested a lump sum payment. For that reason, the Arkansas Court of Appeals found that the request was barred by the doctrine of *res judicata*.

In this particular case, the original June 21, 2005 opinion did not address the manner of payment to claimant's attorney and it could not have been determined at that time given the issue regarding the constitutionality of A.C.A. §11-9-522(f).

Based upon the foregoing reasons, I find that the doctrine of *res judicata* does not bar claimant's attorney's petition for payment of a lump sum attorney fee.

In accordance with A.C.A. §11-9-716, I find that claimant's attorney is entitled to a lump sum attorney fee for fees owed to him by the Second Injury Fund. This fee is to be calculated in accordance with the provisions of A.C.A. §11-9-716 and §11-9-804 regarding the discount and claimant's life expectancy. Claimant's portion of the attorney fee will continue to be deducted from claimant's weekly disability payments.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE