

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F200737

IRENE TIDWELL,
EMPLOYEE

CLAIMANT

SOUTHWEST ARKANSAS DEVELOPMENT COUNCIL, INC.,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 15, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE SCOTT A. SCHOLL, Attorney at Law, Jacksonville, Arkansas.

The respondents were represented by HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 28, 2006 in Little Rock, Arkansas. A prehearing order was entered in this case on October 2, 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. In addition, a post-hearing conference was conducted on February 12, 2007.

The following stipulations were submitted by the parties in the prehearing order or in the post-hearing conference and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. This claim was the subject of a prior Opinion of the Full Commission filed September 13, 2005 and subsequently affirmed by the Arkansas Court of Appeals.
3. The claimant earned an average weekly wage of \$264.84, entitling her to a compensation rate of \$177 for total disability benefits.
4. The respondents have not paid the claimant any temporary disability compensation as of November 28, 2006. [post-hearing]

By agreement of the parties at the start of the hearing as amended in a post-hearing conference, the only issues to be litigated and resolved at the present time are limited to the following:

1. The claimant's entitlement to temporary total disability benefits.
2. Attorney's fees. [post-hearing]

The record consists of the November 28, 2006 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" to designate as part of the record, by post-hearing agreement, the opinion filed by the Full Commission on September 13, 2005.

DISCUSSION

The claimant sustained two right ankle fractures in an automobile accident on January 9, 2002. One of the fractures was immediately identified and treated with surgery. An MRI performed on July 12, 2002 identified the second fracture in the talar dome. Dr. Andrew Murphy, an orthopedist, indicated on July 31, 2002 that arthroscopic debridement of the ankle and removal of the osteochondral lesion might be indicated if the claimant remained symptomatic when she returned for follow up in six to eight weeks.

In his September 30, 2002 follow up, Dr. Murphy recommended arthroscopic evaluation and debridement and osteochondral lesion excision. Dr. Murphy indicated that the surgery would be scheduled at a mutually convenient time. The claimant appears to have undergone a pre-surgical evaluation on February 26, 2003. [C. Exh. 1 p. 63] The

claimant underwent her proposed ankle surgery on March 4, 2004. The claimant returned to Dr. Murphy for post-surgical follow up in March, April, and May of 2003. The claimant did not present for follow up with Dr. Murphy again after May of 2003 until March 15, 2006. [Jt. Exh. 1 p. 21] Dr. Murphy testified that he evaluated the claimant for anatomical impairment on March 15, 2006, and he did not perform any kind of treatment at that time.

The claimant has not returned to work since her injury. The compensability of the claimant's injury was resolved when the Arkansas Court of Appeals rendered a decision. The respondents had not yet paid for any of the claimant's medical treatment or for any period of temporary disability at the time of the November 28, 2006 hearing.

All outstanding issues were reserved at the hearing held on November 28, 2006, except the claimant's claim for temporary total disability. The claimant seeks temporary total disability compensation from the date of her scheduled ankle injury until the end of her healing period. The respondents contended at the November 28, 2006 hearing that the claimant is entitled to temporary disability from January 9, 2002 until September 30, 2002 (when Dr. Murphy

proposed surgery), and from March 13, 2003 (when Dr. Murphy performed surgery) to August 16, 2003. [T. 20-21] In the post-hearing telephone conference, the parties agreed that this decision would contain a finding on attorney's fees associated with any award of temporary disability benefits.

A. Temporary Disability

The claimant's work related injury at issue is an ankle injury, therefore the claimant's injury is considered a scheduled injury. See Ark. Code Ann. §11-9-521(a). For a scheduled injury, a claimant is entitled to temporary total disability benefits until the healing period ends or until the claimant returns to work, whichever occurs first. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2002). The healing period continues until the injured employee is as far restored as the permanent character of the injury will permit. The healing period ends once the underlying condition has become stable and when nothing further in the way of medical treatment will improve the permanent character of the injury. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The persistence of pain is not sufficient, by itself, to extend

the healing period provided that the underlying condition has stabilized. Id.

1. When Did The Claimant's Post-Surgical Healing Period End?

Dr. Murphy addressed the end of the claimant's post-surgical healing period in several places in his deposition. As the claimant's attorney noted at the hearing, in one instance, Dr. Murphy indicated that the claimant reached maximum medical improvement between March of 2005 and June of 2004. [Jt. Exh. 1 p. 25] However, two sentences later, answering the same question, Dr. Murphy indicated that the claimant reached maximum medical improvement between her last visit in March of 2003 and her June of 2004 visit. [Jt. Exh. 1. p.25] Therefore, Dr. Murphy's reference to 2005 on page 25 appears to have been a mis-statement of the year of his last visit, since his last post-surgical follow up visit with the claimant was in 2003, not 2005. In addition, Dr. Murphy's reference to a June 2004 visit also appears inconsistent with his records and other testimony.

At any rate in other places in his deposition, Dr. Murphy more specifically indicated that the claimant reached maximum medical improvement in August of 2003. [Jt. Exh. 1

p. 20, 25, 26] Absent any more definitive evidence as to when in August the claimant's healing period ended, I find that the claimant's healing period ended in the middle of August on August 16, 2003.

2. Did The Claimant's Original Healing Period End On September 30, 2002, Causing The Claimant To Enter A New Healing Period When She Underwent Her Second Surgery?

The Arkansas Court Of Appeals has previously recognized that, where an injured worker will experience no further improvement without surgery, and the injured worker refuses to accept that one remaining form of treatment, the mere existence of surgery as a possible form of future treatment does not prohibit a finding that a claimant's healing period has ended when the claimant steadfastly refuses to undergo surgery. Conversely, the Court also stated in the same case that were the claimant to change his mind and submit to surgery, he could be entitled to additional temporary disability benefits during his recovery. Thurman v. Clarke Industries, Inc., 45 Ark. App. 87, 872 S.W.2d 418 (1994).

Likewise, in Breakfield v. In & Out, Inc., 79 Ark. App. 402, 88 S.W.3d 861 (2002), the Court of Appeals affirmed a Commission finding that a claimant's healing period ended when she abandoned her medical treatment. The Court

affirmed a finding that the claimant had abandoned her medical treatment where (1) the claimant's treating physician proposed three epidural steroid injections, (2) the workers' compensation insurance company was willing to pay for the treatment, and (3) the claimant received her first injection but failed to show up again for follow up.

In the present case, the respondents contend that the claimant last received active treatment on September 30, 2002, so as to end her healing period, and then entered a new healing period when she underwent surgery in 2003. I note that this case is complicated somewhat by the fact that neither Dr. Murphy or the claimant in 2006 had adequate recollection to explain during their testimony why the claimant's surgery was not performed after September 30, 2002 until March of 2003. The claimant only testified that the delay "could have" been for financial reasons.

At any rate, on the record before me, and for the following reasons, I find that the claimant remained within her healing period for the period at issue from September 30, 2002 to March 13, 2003. First, there is no doubt that the March 2003 ankle surgery was intended to improve the permanent condition of the claimant's ankle, and would

therefore represent the type of medical treatment which would normally extend the healing period. Second, unlike the circumstances in Thurman, at no point has Dr. Murphy ever indicated that, but for the proposed surgery, the claimant's healing period would have ended on September 30, 2002. To the contrary, Dr. Murphy is the only physician who has rendered an opinion on the claimant's healing period, and Dr. Murphy has opined that the claimant's healing period ended much later than September 30, 2002. Third, unlike the circumstances in Breakfield, in the present case the respondents had not agreed to pay for the proposed surgery as the entire case was controverted and in litigation, and the claimant did not fail to show up for a scheduled follow up procedure as occurred in Breakfield. Instead, Dr. Murphy indicated at the end of September of 2002 that the surgery would be scheduled at a "mutually convenient time". Nothing in Dr. Murphy's reports, Dr. Murphy's testimony, or the claimant's testimony indicates to me that the claimant affirmatively acted to refuse or purposely delay surgery, or that she intended to abandon her proposed treatment for any specific period prior to her pre-operative evaluation performed on February 26, 2003.

Because the preponderance of the evidence establishes that the claimant remained within her healing period from January 9, 2002 until August 16, 2003 and since the claimant did not work during that period, I find that the claimant is entitled to an award of temporary total disability from January 9, 2002 until August 16, 2003.

B. Attorney's Fees

Because the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Attorney's fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii) (Repl. 2002). Attorney's fees for indemnity benefits controverted and awarded shall be 25% of the compensation. Ark. Code Ann. § 11-9-715(a)(1)(B) (Repl. 2002). Whether a claim has been controverted is a question of fact for the Commission. Aluminum Company Of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976).

In the present case, the Full Commission filed an opinion on September 13, 2005, which reversed an administrative law judge and found that the claimant

sustained a compensable injury while employed by the respondent. The Commission's decision was subsequently affirmed by the Arkansas Court of Appeals. After finding that the claimant sustained a compensable injury, the Full Commission's majority opinion filed September 13, 2005 stated in part:

All accrued benefits shall be paid in lump sum without discount and interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809. The claimant's attorney is also awarded the maximum attorney's fee as provided by Ark. Code Ann. §11-9-715. Further, for prevailing upon this appeal, the claimant's attorney is hereby awarded an additional fee in the amount of \$500.00 also in accordance with this statute. The respondent is directed to pay all benefits in accordance with the findings of fact set forth herein.¹

At the most recent hearing held on November 28, 2006, the respondents contended that the claimant was entitled to a limited period of temporary disability benefits, but the respondents had not yet paid any undisputed portion of the accrued temporary disability benefits from 2002 - 2003 prior

¹For a Commission explanation of the scope of controverted attorney's fees where the respondents controvert a claim in its entirety, see Tilley v. Aeroquip Corp., Full Workers' Compensation Commission, Opinion filed August 5, 1999 (E412583).

to the November 28, 2006 hearing. The claimant has therefore been required to obtain counsel to represent her at a hearing to obtain a Commission order before being paid any amount of benefits for temporary disability benefits.

As the Commission summarized in Catlett v. Arkansas Aluminum Alloys, Inc., Full Workers' Compensation Commission, Opinion filed June 1, 2005 (E903941 & E710724):

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988). Whether or not a particular claim is controverted is a question of fact for the Commission. Aluminum Co. of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). The mere fact that a respondent investigates a claim prior to admitting liability does not require a finding of controversion. Stucco, Inc. v. Rose, 52 Ark. App. 42, 914 S.W.2d 767 (1996). In order to assess a controverted attorney's fee against the Fund, there must be an award from the Commission. Schalski v. Family Cleaners & Laundry, Workers' Compensation Commission E711809 (March 3, 2004).

In Catlett, the Commission denied an attorney's fee on benefits voluntarily accepted and paid, but awarded an attorney's fee on benefits expressly and admittedly controverted.

In the present case, the respondents did not at the 2006 hearing *expressly and admittedly* controvert the

claimant's entire period of temporary total disability awarded herein, but neither did they voluntarily pay any portion of that accrued temporary total disability before the 2006 hearing. Because the respondents have not yet paid any portion of the claimant's temporary disability awarded herein, and since the claimant was required to obtain counsel and seek a Commission award to obtain payment of her accrued temporary disability benefits, I find that the respondents, through their lack of any payment of accrued temporary disability compensation after the Court of Appeals' decision became final, have controverted all of the claimant's temporary disability compensation awarded herein. I therefore find that the claimant's attorney is entitled to a 25% attorney's fee on the temporary disability compensation awarded herein. The 25% attorney's fee awarded herein is separate and apart from the as yet unpaid maximum controverted attorney's fee previously awarded by the Full Commission in its September 13, 2005 opinion where the respondents had at that time controverted the claimant's injury in its entirety. See generally Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996) [Finding

appropriate a second attorney's fee for controversion where claimant was required to initiate a second round of litigation to establish his entitlement to temporary disability benefits].

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. This claim was the subject of a prior Opinion of the Full Commission filed September 13, 2005 and subsequently affirmed by the Arkansas Court of Appeals.

3. The claimant earned an average weekly wage of \$264.84, entitling her to a compensation rate of \$177 for total disability benefits.

4. The claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from January 9, 2002 until August 16, 2003.

5. By their non-payment of any accrued temporary disability benefits after the prior Court of Appeals decision became final, the respondents controverted the claimant's entire award of temporary total disability compensation made herein. The claimant's attorney is therefore entitled to a 25% attorney's fee on all temporary

total disability benefits awarded herein. This 25% fee is separate and apart from the maximum attorney's fees previously awarded by the Commission in its September 13, 2005 opinion.

AWARD

The respondents are directed to pay temporary total disability benefits 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 Ark. Code Ann. §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).

For the reasons discussed herein, the claimant's attorney is awarded a 25% attorney's fee on the entire period of indemnity benefits awarded herein, one-half of said fee to be paid by the claimant and one-half to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002). In addition to the 25% attorney's fee awarded herein, the respondents

are also directed to withhold from the claimant's accrued benefits, and to pay by separate check to the claimant's attorney, the claimant's one-half of the separate accrued attorney's fee also owed on these indemnity benefits as a result of the Full Commission's prior September 13, 2005 award of maximum attorney's fee which is also now payable on the indemnity benefits awarded herein. The respondents are also directed to pay to the claimant's attorney the respondents' one-half of the Full Commission's September 13, 2005 award of maximum attorney's fees now payable on the indemnity benefits awarded herein.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge