

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707384

DALE AYERS	CLAIMANT
LABOR READY	RESPONDENT
ESIS, INC. INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 25, 2008

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondent represented by MELISSA WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 10, 2007, in Springdale, Arkansas.

A pre-hearing order was entered in this case on November 20, 2007. This pre-hearing order set out the stipulations offered by the parties, and identified the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On July 20, 2007, the relationship of employee-self insured employer-TPA existed between the parties.
2. On July 20, 2007, the claimant sustained a compensable injury to his left leg.

3. There is no dispute, at present, over the payment of medical expenses.
4. The claimant was temporarily totally disabled from July 21, 2007 through August 17, 2007 and from September 27, 2007 through at least November 1, 2007.
5. During the above period the claimant was paid \$800.00 in temporary total disability benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The appropriate weekly compensation rates.
2. The respondent's entitlement to a credit for any overpayment.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"It is claimant's contention that claimant sustained a compensable injury arising out of and in the course of employment with the respondent on or about 7/20/07. Claimant contends entitlement to workers' compensation benefits as set forth in the issues response in the prehearing memorandum and specifically, reasonable, necessary, and related medical expenses; temporary total disability benefits; Ark. Code Ann. 11-9-505 benefits; permanent partial/total disability benefits (reserved); and controverted attorney fees."

In regard to these issues, the respondent contends:

"Respondents contend that claimant's contract of hire was day to day. He was only hired and only worked one day at the time of his injury. He made \$51.44 for that day's work. His TTD/PPD rate is \$34.00 per week. Respondents

further contend that the claimant was off work for 4 weeks subsequent to his injury which entitled him to \$136.00. He then went to work in a light duty capacity on 8/17/07, again working one day a week, his contract of hire. He was taken completely off work again on 9/27/07 for a 5 week period, which will entitle him to \$170.00 in temporary disability benefits. To date, respondents have paid \$800.00 in temporary disability benefits. In light of this, they are entitled to a credit in the amount of \$494.00 for overpayment of temporary disability benefits. There is no medical documentation establishing entitlement to temporary disability benefits beyond the above mentioned 5 week period."

DISCUSSION

_____The central issue in this case concerns the appropriate weekly compensation rates for any disability benefits to which the claimant may be entitled, as a result of his compensable injury of July 20, 2007. However, the real dispute does not arise over the actual compensation rate itself, but rather the average weekly wage upon which it would be based. A determination of the claimant's average weekly wage would be controlled by the provisions of Ark. Code Ann. §11-9-518.

This determination is complicated by the fact that the respondent employer is a temporary employment company. Most of its employees do not actually work for the respondent, but their labor is contracted to various clients of the respondent employer. The claimant falls into this category.

There was no written contract between the claimant and the respondent employer. The oral contract between these parties appears to be the standard contract for this particular type of employment. Essentially, the respondent employer agreed to refer

or send the claimant to work at a client business, should such work be available. The actual number of hours and/or days this work was to be performed and the rate of pay for this work was basically controlled by the client business. The client business also controlled the type of work and the hours of work, as well as overseeing the actual employment activities. The claimant appears to be free to accept or reject any offered assignment.

In this type of employment, the Commission has generally calculated the average weekly wage by simply dividing the wages earned during the previous 52 week period and dividing this by the actual number of weeks worked. However, it is my opinion that such a method would be inappropriate in the present case, as the claimant was injured on what could be considered his first day of employment. It is my opinion that the facts of this case are such that they represent "exceptional circumstances." Thus, this Commission should determine the average weekly wage by a method that is just and fair to all parties concerned.

The claimant testified that he had a previous brief period of employment with the respondent and worked for approximately two months during March and April of 2006. At that time, his job assignments had consisted primarily of construction work and unloading trucks. He stated that during this period he recalled working 40 plus hours per week. However, he was unable to recall his wages during this period.

Ryan Burt, the branch manager of the respondent's Springdale office, acknowledged that the claimant had a previous period of

employment with this respondent that lasted a couple of months, during which the claimant was assigned general labor positions. He also acknowledged that during this previous period of employment, the claimant generally worked 40 hours a week. He further stated that overall the claimant had been a good worker.

More importantly, Mr. Burt testified that, on and after July 20, 2007, the Springdale office had sufficient clients to provide the claimant with a reasonable opportunity to work 40 hours per week, if the claimant so desired. Finally, he stated that these positions would likely have paid between \$6.25 and \$7.00 per hour.

Based upon the evidence presented, I am convinced that, had the claimant not been injured, the respondent employer would have had available for the claimant a 40 hour work week and that the claimant would have accepted this amount of employment. Based upon the evidence presented, I am further convinced that the claimant would have averaged at least \$6.60 per hour for this 40 hour work week. Using these figures, the claimant would have an average weekly wage of \$264.00. Based upon an average weekly wage of \$264.00, at the time of his compensable injury, the appropriate weekly compensation rates would be \$176.00 for total disability and \$154.00 for permanent partial disability, Ark. Code Ann. §11-9-501.

The stipulations reveal that the claimant was temporarily totally disabled from July 21, 2007 through August 17, 2007, and from September 27, 2007 through at least November 1, 2007. During these periods the claimant would have been entitled to temporary total disability benefits at the weekly rate of \$176.00. The

stipulations further reveal that during this 9 week period, the respondent actually paid the claimant temporary total disability benefits of \$800.00. At the appropriate weekly compensation rate, he should have received \$1,584.00 for these periods of temporary total disability. The respondent would owe the claimant an additional \$784.00 for this 9 week period of temporary total disability. There would be no "overpayment" of temporary total disability benefits by the respondent that would entitle it to a credit against future benefits.

Although the respondent actually paid \$800.00 toward temporary total disability benefits, it subsequently denied that it owed more than \$306.00 for temporary total disability. Thus, the respondent controverted the claimant's entitlement to temporary total disability benefits in excess of \$306.00, rather than the \$800.00 it had actually paid. The fee for the claimant's attorney should be calculated accordingly.

I would also note from Respondent's Exhibit No. 1, that there is apparently a child support lien filed in this case. Thus, any temporary total disability benefits herein awarded to the claimant would be subject to this child support lien in the manner provided by Ark. Code Ann. §11-9-110.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On July 20, 2007, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On July 20, 2007, the claimant sustained a compensable injury to his left leg.
4. There is no dispute, at the present time, over the claimant's entitlement to medical services at the respondent's expense.
5. The claimant was rendered temporarily totally disabled by his compensable injury for the periods beginning July 21, 2007 and continuing through August 17, 2007, and beginning again on September 27, 2007 and continuing through at least November 1, 2007.
6. During the foregoing 12 week period, the claimant was paid \$800.00 in temporary total disability benefits by the respondent.
7. On July 20, 2007, the claimant was earning an average weekly wage of \$264.00. This would entitle him to total disability benefits of \$176.00 and permanent partial disability benefits of \$154.00.
8. The evidence presented fails to reveal that the respondent has made any overpayment of indemnity benefits to the claimant. Thus, it

would have no "credit", in regard to such benefits.

9. The respondent has controverted the claimant's entitlement to any disability benefits in excess of \$34.00 per week.
10. The claimant's attorney is entitled, at present, to the maximum statutory controverted attorney's fee on the difference between the 12 week period of temporary total disability benefits herein awarded at the appropriate weekly compensation rate of \$176.00 (i.e. 9 times \$176.00 equals \$1,584.00) and the amount of such benefits calculated at the weekly compensation rate of \$34.00, as contended by the respondent (9 times \$34.00 equals \$306.00).

ORDER

The respondent shall pay to the claimant temporary total disability benefits for the periods of July 21, 2007 through August 17, 2007 and from September 27, 2007 through at least November 1, 2007 at the weekly compensation rate of \$176.00. The respondent is entitled to a credit for all weekly indemnity benefits previously paid. The respondent is also directed to comply with the child support lien provisions of Ark. Code Ann. §11-9-110, in regard to these payments.

The respondent continues to be liable for reasonably necessary medical services for the claimant's compensable injury.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. These controverted temporary total disability benefits, at present, total \$1,278.00. One-half of this fee is the obligation of the respondent in addition to such benefits. The remaining one-half of this fee shall be withheld by the respondent from the additional temporary total disability benefits herein awarded.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE