

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F606905

OLEN FIVEASH, Employee	CLAIMANT
TERRA RENEWAL SERVICES, INC., Employer	RESPONDENT #1
ZURICH AMERICAN INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JANUARY 7, 2008

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

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondent #1 represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

Respondent #2 represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On December 5, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 12, 2007, and a pre-hearing order was filed on September 13, 2007. 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 Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed between claimant and respondent #1 at all relevant times.
3. Claimant sustained a compensable injury on June 13, 2006.
4. Claimant was earning sufficient wages to entitle him to the maximum

compensation rates of \$488.00 per week for total disability benefits and \$366.00 per week for permanent partial disability benefits.

5. The claimant's healing period ended on March 5, 2007.
6. Claimant is permanently totally disabled.
7. Respondent #2 will assume payment of permanent total disability benefits on February 13, 2010.

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

1. Attorney fee on permanent total disability benefits.

The claimant contends his attorney is entitled to a fee on permanent total disability benefits.

The respondents contend they did not controvert claimant's entitlement to permanent total disability benefits; therefore, no attorney fee is due.

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 stipulations agreed to by the parties at the pre-hearing conference conducted on September 12, 2007, and contained in a pre-hearing order filed September 13, 2007, are hereby accepted as fact.

2. Respondent #1 and the Death & Permanent Total Disability Trust Fund did not controvert claimant's entitlement to permanent total disability benefits; therefore, they are not liable for an attorney fee. However, claimant's attorney has provided bona fide legal services with respect to this claim; therefore, pursuant to A.C.A. §11-9-715(a)(2)(C)(i) claimant is responsible for paying an attorney fee in an amount equal to 12.5%.

FACTUAL BACKGROUND

The facts in this case are not in dispute. The parties have agreed that claimant suffered a compensable injury to his right shoulder on June 13, 2006. As a result of claimant's compensable injury he underwent surgery by Dr. Sites on August 24, 2006. On March 6, 2007, Dr. Sites stated that claimant had reached maximum medical improvement and he assigned claimant an anatomical impairment rating of 23% to the body as a whole.

Respondent #1 accepted claimant's injury as compensable and paid claimant temporary total disability benefits beginning June 14, 2006 and continuing through March 6, 2007, the date of Dr. Sites' report stating that claimant had reached maximum medical improvement. Respondent #1 also accepted the 23% impairment rating assigned by Dr. Sites and began paying claimant benefits at the permanent partial disability rate of \$366.00 per week beginning on March 7, 2007.

On March 28, 2007, claimant hired attorney Osborne to represent him. On behalf of claimant a pre-hearing questionnaire was filed on April 5, 2007 requesting permanent total disability benefits. After this request was filed respondent #1 was given an extension for filing a pre-hearing questionnaire in response to claimant's request. The parties then entered into settlement negotiations which according to claimant's testimony lasted for a longer period of time than July and August. When the settlement negotiations were unsuccessful, respondent #1 in a letter to claimant's attorney dated August 24, 2007 indicated that it accepted claimant as permanently totally disabled. Respondent #1 subsequently filed a pre-hearing questionnaire with the Commission on August 28, 2007 again indicating that it had accepted claimant as permanently totally disabled. Likewise, the Death & Permanent Total Disability Trust Fund in a letter between August 24 and August 31, 2007 also acknowledged liability for permanent total disability benefits.

As a result of this acceptance, respondent #1 began paying claimant benefits at the total disability rate as of August 22, 2007. Respondent #1 also paid claimant the

difference in the permanent partial disability rate and the total disability rate for the period of March 7, 2007 through August 21, 2007.

Claimant has filed this claim contending that his attorney is entitled to a controverted fee on permanent total disability benefits.

ADJUDICATION

When the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to claimant's attorney. A.C.A. §11-9-715(a)(2)(B). One of the purposes of the attorney fee is to put the economic burden of litigation on the party which makes the litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W. 2d 647 (1998). Whether or not a particular claim is controverted is a question of fact for the Commission. *Aluminum Company of America v. Henning*, 260 Ark. 699, 543 S.W. 2d 480 (1976). Furthermore, the fact that a party 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).

With respect to this issue, it has also been noted by the Commission and by the Arkansas Court of Appeals that a claim may not have been controverted if the parties are engaged in settlement negotiations. This is due to the fact that the Court and the Commission have recognized that settlement negotiations are encouraged to avoid needless litigation. *Lambert v. Baldor Electric*, 44 Ark. App. 117, 868 S.W. 2d 513 (1993). Obviously, the mere fact that the parties do engage in settlement negotiations does not automatically mean that the claim is not controverted. Instead, as previously noted, the issue of whether a claim has been controverted is a question of fact for the Commission.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that respondent #1 and the Death & Permanent Total Disability Trust Fund did not controvert claimant's entitlement to permanent total disability benefits.

In reaching this decision I believe it is important to note that at all times claimant has been paid compensation benefits by respondent #1. Immediately after his injury respondent #1 began paying claimant temporary total disability benefits. Respondent #1 continued to pay temporary total disability benefits up to the date claimant was released by his treating physician as having reached maximum medical improvement. On that date claimant's treating physician assigned claimant a permanent physical impairment rating in an amount equal to 23% to the body as a whole. The respondent immediately accepted this impairment rating and began paying claimant benefits at the permanent partial disability rate.

Only three weeks after claimant had been assigned the impairment rating by Dr. Sites the claimant hired his attorney who filed a pre-hearing questionnaire requesting permanent total disability benefits on April 5, 2007, only one month after the rating had been assigned by Dr. Sites. After claimant's request for permanent total disability benefits the parties entered into negotiations regarding a settlement. Neither respondent #1 nor the Death & Permanent Total Disability Trust Fund submitted documents to the Commission indicating that it was denying claimant's request for permanent total disability benefits. When settlement negotiations were unsuccessful, both respondent #1 and the Death & Permanent Total Disability Trust Fund accepted claimant as permanently totally disabled. Based upon these facts I do not find that respondent #1 or the Death & Permanent Total Disability Trust Fund controverted this claim. In fact, it should be noted that the Trust Fund was not even made a party to this claim until after claimant had filed his request for permanent total disability benefits.

In summary, the issue of whether or not a particular claim is controverted is a question of fact for the Commission. Based upon the evidence presented in this case, I find that neither respondent #1 nor the Death & Permanent Total Disability Trust Fund controverted claimant's entitlement to permanent total disability benefits. As previously

noted, respondent #1 has continued to pay claimant disability benefits since the time of his compensable injury. When claimant requested permanent total disability benefits, the parties entered into settlement negotiations which were subsequently unsuccessful. Both respondent #1 and the Trust Fund immediately accepted claimant as permanently totally disabled. Given this evidence, I do not find that either respondent #1 or the Death & Permanent Total Disability Trust Fund controverted claimant's entitlement to benefits. Therefore, they are not liable for a controverted attorney fee.

Even though I have found that neither respondent #1 nor the Death & Permanent Total Disability Trust Fund controverted claimant's entitlement to permanent total disability benefits, I note that pursuant to A.C.A. §11-9-715(a)(2)(C)(i) that if the Commission finds that a claim has not been controverted but further finds that bona fide legal services have been rendered in respect to a claim the Commission may direct payment of an attorney fee by an injured employee. In this particular case, I do find that claimant's attorney provided bona fide legal services by representing claimant and attempting to settle the case. When settlement negotiations were unsuccessful, respondent #1 and the Trust Fund accepted claimant as permanently totally disabled. Based upon this evidence, I find that claimant's attorney has provided bona fide legal services with respect to this claim. Accordingly, I find that claimant is responsible for paying an attorney fee to his attorney in the amount of 12.5% on the permanent total disability benefits. In addition to future benefits, this award would also apply to benefits which claimant has previously been paid by respondent #1 dating back to March 7, 2007. In order to avoid the claimant not receiving any benefits until amounts due for prior attorney fees are paid, I am hereby ordering respondent #1 and the Trust Fund to withhold 25% of claimant's future permanent total disability benefits and pay to claimant's attorney. Once the fee on all prior benefits has been paid the parties are then instructed to withhold 12.5% from payments subsequent to that time.

AWARD

Respondent #1 and the Death & Permanent Total Disability Trust Fund did not controvert claimant's entitlement to permanent total disability benefits. Therefore, they are not liable for a controverted attorney fee. Pursuant to A.C.A. §11-9-715(a)(2)(C)(i), claimant's attorney did provide bona fide legal services with respect to this claim. Accordingly, claimant is responsible for paying an attorney fee in the amount of 12.5% to his attorney. Until the attorney fee on previously paid permanent total disability benefits is satisfied, respondent #1 and the Trust Fund are instructed to withhold an attorney fee of 25% for claimant's attorney. Once all past due amounts have been paid to claimant's attorney, the parties are then instructed to withhold only 12.5% as an attorney fee for claimant's attorney.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$241.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE