

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F005412**

**MELANIE KELLEY, EMPLOYEE** **CLAIMANT**

**COOPER ENGINEERED PRODUCTS,  
EMPLOYER** **RESPONDENT**

**CROCKETT ADJUSTMENT, INC.,  
INSURANCE CARRIER/TPA** **RESPONDENT**

**OPINION FILED APRIL 4, 2008**

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Floyd M. Thomas, Jr., Attorney at Law, El Dorado, Arkansas.

The respondents were represented by Mr. Michael J. Dennis, Attorney at Law, Pine Bluff, Arkansas.

**STATEMENT OF THE CASE**

On January 8, 2008, the above captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing telephone conference was conducted on July 24, 2007, and a Prehearing Order was entered that same date. A copy of the July 24, 2007, Prehearing Order was marked as Commission Exhibit "1" and made a part of the record herein without objection, subject to any modifications made at the full hearing on the record. It is noted that the July 24, 2007, Prehearing Order originally set this claim for a hearing on November 14, 2007; however, respondents requested a continuance by motion dated November 12, 2007. Said continuance request was granted and this matter was reset for a hearing on January 8, 2008.

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At the January 8, 2008, full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including February 7, 1999.
- 3) The claimant's compensation rates are \$375.00 per week for temporary total disability and \$281.00 per week for permanent partial disability.
- 4) The Full Commission Opinion entered in this matter on March 7, 2007, is *res judicata* and the law of the case and hereby incorporated by reference.
- 5) The claimant sustained compensable cervical and lumbar injuries on February 7, 1999.
- 6) Judge McKinney's Opinion entered on May 7, 2003, is *res judicata* and the law of the case and hereby incorporated by reference.
- 7) The claimant's temporary total disability began on March 15, 2000.
- 8) The claimant reached the end of her healing period on August 4, 2003.
- 9) The March 7, 2007, Full Commission Opinion found the claimant to have a 14% whole body impairment and a 28% wage loss disability for a total of 42%.
- 10) Respondents are entitled to a credit for unemployment benefits in the amount of \$7,124.00 which the claimant received while temporary total disability benefits were accruing.
- 11) The Full Commission Opinion filed March 7, 2007, became final

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on April 9, 2007, as no appeal was taken.

- 12) Respondents paid \$46,857.07 in indemnity benefits and \$5,085.60 in attorney's fees on April 30, 2007, which was six days after the March 7, 2007, Full Commission award was to be paid. (T. pg. 18, lines 21-24).
- 13) The parties agreed that issue number three outlined in the Prehearing Order filed July 24, 2007, would not be addressed at the full hearing on January 8, 2008.

The parties agreed at the January 8, 2008, full hearing that the following issues would be presented for determination:

- 1) Whether respondents correctly paid benefits pursuant to the March 7, 2007, Full Commission Opinion, including interest, if applicable.
- 2) Whether respondents should be assessed a 20% penalty for the late payment of the March 7, 2007, Full Commission award pursuant to A.C.A. § 11-9-802(c).
- 3) Whether the claimant's March 21, 2007, cervical spine surgery was reasonable, necessary, and related to the February 7, 1999, compensable injury.

At the full hearing, the claimant contended, in summary, the following:

- 1) The Full Commission's decision in this claim was handed down on March 7, 2007, but no appeal was taken from the Commission's decision by either side.
- 2) On April 11, 2007, a letter was sent to the respondents' attorney advising him of the amount the claimant calculated was due under the award, advising the respondents that the sum that was due under the award had to be paid within fifteen days from the date that the appeal time ran.

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- 3) The total amount demanded by the claimant was \$69,689.23 in indemnity benefits and \$5,960.90 in attorney's fees.
- 4) Despite the fact that the claimant's attorney calculated the amounts due under the award and despite the fact that he reminded the respondents that the sums were due under the award and had to be paid within fifteen days of April 9, 2007; the respondents did not send checks until April 30, 2007, and then the checks were not in the correct amounts.
- 5) The checks issued by the respondents were \$46,856.07 for indemnity and \$5,085.60 for attorney's fees.
- 6) Since nothing was paid on the award until April 30, 2007, six days after the award became final, the penalty of 20% must be imposed as required by A.C.A. § 11-9-802(c).
- 7) Even if the amounts paid by the respondents are correct it still owes a penalty of 20% because the amount was not timely paid.
- 8) Claimant's surgery on March 21, 2007, was reasonable, necessary, and related to her February 1999 compensable injury.

The respondents contended at the January 8, 2008, full hearing, in summary, the following:

- 1) That they had made payments of all amounts awarded by the Commission's March 7, 2007, decision.
- 2) That no penalties are appropriate.
- 3) The calculations made by claimant's attorney are incorrect.
- 4) Respondents contend that the 20% penalty requested by the claimant is discretionary with the Commission and that such discretion should be exercised here by the Commission and not

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award a penalty due to the complexities of the case.

- 5) The claimant's March 21, 2007, surgery was not reasonable, necessary, or related to the claimant's February 1999 compensable injury.

**DISCUSSION**

This claim has been the subject of several Administrative Law Judge Opinions and Full Commission Opinions. The parties have agreed that the prior Opinions issued by ALJs and the Full Commission are incorporated by reference herein.

This claim originated when the claimant worked for the respondents as the new job coordinator in its engineering department on February 7, 1999. On that date, the claimant sustained an admittedly compensable neck and back injury after being hit in the head by a steel core bar that weighed over four hundred pounds. Ultimately, the claimant returned back to work for the respondents for some nine months until she was laid off. The claimant also applied for and drew twenty-six weeks of unemployment insurance benefits. On August 27, 2001, the claimant underwent a cervical fusion at C5-6 which was performed by Dr. Richard Jordan for which benefits were paid.

This claim became the subject of prior hearings which related to the claimant's healing period, compensability of her back injury, and her entitlement to a proposed L5/S1 percutaneous diskectomy. In an Opinion dated May 7, 2003, Administrative

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Law Judge McKinney found that the claimant's healing period had not ended and found her back condition to be a compensable injury. Administrative Law Judge McKinney at that time awarded the claimant temporary total disability from May 15, 2000, through a date yet to be determined.

On February 23, 2006, a hearing was held in El Dorado, Arkansas, before Administrative Law Judge Mark White which addressed the following issues:

- 1) Whether the claimant was entitled to additional temporary total disability benefits.
- 2) Whether the claimant was entitled to additional permanent partial disability benefits.
- 3) Whether the claimant had sustained wage loss in excess of her permanent anatomical impairment rating.
- 4) Enforcement of the Commission's prior Orders.
- 5) Controversion and attorney's fees.

On May 9, 2006, Administrative Law Judge Mark White issued his Opinion as a result of the February 23, 2006, hearing. Administrative Law Judge Mark White found that the claimant had reached the end of her healing period on August 4, 2003, and found that the claimant was entitled to temporary total disability benefits from May 15, 2000, through August 4, 2003. Administrative Law Judge Mark White also found that the claimant sustained permanent impairment of 14% to the body as a whole as a result of her compensable injury, and found that the claimant had suffered

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wage loss in the amount of 86% over and above her permanent anatomical rating for a total impairment of 100%. An appeal followed Administrative Law Judge Mark White's May 9, 2006, Opinion, and on March 7, 2007, the Full Commission affirmed and modified Administrative Law Judge Mark White's May 2006 Order.

The Full Commission Opinion filed March 7, 2007, affirmed Administrative Law Judge Mark White's finding that the claimant had reached maximum medical improvement on August 4, 2003, and affirmed Administrative Law Judge Mark White's determination that the claimant had sustained a 14% permanent impairment to the body as a whole as a result of her February 1999 compensable injury. The Full Commission, however, modified Administrative Law Judge Mark White's finding of an 86% wage loss disability over and above the claimant's permanent anatomical impairment. The Full Commission found that the claimant was only entitled to wage loss in the amount of 28% over and above her permanent anatomical impairment rating of 14% to the body as a whole, for a total impairment of 42%.

It is undisputed that no one appealed the Full Commission's Opinion/Order filed March 7, 2007. It is also undisputed that the appeal time for that March 7, 2007, Order ran on April 9, 2007, and that the award became final fifteen days thereafter on April 24, 2007. The parties agree that on April 30, 2007, approximately six days after the award became final respondents paid \$46,857.07 in indemnity benefits to the

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claimant and \$5,085.60 in attorney's fees. The claimant contends that the amounts received on April 30, 2007, were incorrect and late. The claimant has requested a finding by the Commission of the correct amount the respondents should have paid on or before April 23, 2007, and a determination that claimant is entitled to a 20% penalty pursuant to A.C.A. § 11-9-802(c) due to the failure of respondents to timely pay the award outlined in the Full Commission Opinion filed March 7, 2007.

**B. Adjudication**

The first issue to decide is whether the respondents correctly paid benefits pursuant to the March 7, 2007, Full Commission Opinion, including interest, if applicable. I find after reviewing the evidence contained in the record herein that the respondents did not correctly pay benefits pursuant to the March 7, 2007, Full Commission Order. In order to determine the proper amount, an analysis of the prior Opinions and Orders entered in this matter must be made.

The evidence in the record shows that the parties are in agreement that the claimant was entitled to TTD benefits from May 15, 2000, through April 4, 2003, which represented 168 weeks and one day. It is also agreed by the parties that the claimant's temporary total disability rate was \$375.00 per week. Based on those calculations, it is clear that the claimant was entitled to \$63,053.57 in temporary total disability compensation. It is also agreed by the parties that the respondents were

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entitled to a credit for unemployment benefits the claimant received during this period of TTD in the amount of \$7,124.00. Based on the exhibits contained in the record herein from Crockett Adjustment found at Exhibit 2 of Respondents' Exhibit No. 1, I find that respondents did pay \$49,057.11 in temporary total disability benefits prior to Administrative Law Judge Mark White's May 2006 Opinion that set the claimant's date of maximum medical improvement.

After giving the respondents credit for the unemployment benefits of \$7,124.00 and the payments they made prior to Administrative Law Judge Mark White's May 2006 Opinion, I find that the respondents still owed the claimant \$6,872.46 in temporary total disability benefits as of May 9, 2006. Judge White affixed that TTD period in his May 9, 2006, Opinion/Order, and the respondents were unsuccessful in their appeal of Judge White's May 9, 2006, Opinion. Therefore, I find that the claimant was entitled to interest at the rate of 10% on the \$6,872.46 for the number of days (356) between May 9, 2006, and April 30, 2007. The total with interest is \$7,541.74. This administrative law judge did contact the Federal Reserve to obtain the Federal Reserve primary credit discount rate which on May 9, 2006, was 5.75% and based on that rate received from the Federal Reserve pursuant to A.C.A. § 16-65-114 the legal rate of interest is 10%. Therefore, I find that the total amount respondents owed for temporary total disability benefits by April 23, 2007, equaled

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\$7,541.74.

The calculations regarding permanent partial disability are relatively simple. The claimant was entitled to 189 weeks of permanent partial disability benefits at \$281.00 per week for a total of \$53,109.00 pursuant to the Full Commission's Order filed March 7, 2007, of which there was no appeal. The records from Crockett Adjustment contained at Exhibit 2 of Respondents' Exhibit No. 1 show that the respondents actually paid \$11,379.37 in permanent partial disability benefits prior to the March 7, 2007, Full Commission award. Leaving a balance due of \$41,729.63 in permanent partial disability benefits that was due on or before April 23, 2007. The Federal Reserve primary credit discount rate on March 7, 2007, was 6.25 which would make the appropriate interest rate 10% which would begin to accrue on March 7, 2007, with regard to permanent partial disability benefits per the final order of the Full Commission. It is undisputed that respondents did not pay any money toward the March 7, 2007, Full Commission Order until April 30, 2007, therefore the claimant is entitled to interest at the rate of 10% on the \$41,729.63 that was owed as of March 7, 2007, for the claimant's permanent partial disability. The per diem rate calculates to \$11.43 per day for 54 days (3/7/07-4/30/07) which totals \$617.22 (\$11.43 x 54). Therefore, I find with interest the respondents owed \$42,346.85 (\$617.22 + \$41,729.63) in permanent partial disability that was due on or before April 23, 2007.

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Therefore, I find that the respondents should have paid \$49,888.59 (\$7,541.74 +\$42,346.85 (including interest) in indemnity benefits prior to April 23, 2007.

The next issue which must be determined is whether claimant is entitled to a 20% penalty pursuant to A.C.A. § 11-9-802(c) in the amount of 20% due to the respondents' failure to pay the award granted by the Full Commission in their March 7, 2007, Order within fifteen days after the award became final. A.C.A. § 11-9-802(c) specifically states "there **shall** be added to such unpaid installment an amount equal to twenty percent (20% ) thereof, which **shall** be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award as provided in §§ 11-9-711 and 11-9-712." Respondents stipulated and acknowledged on the record that they made payment of the award at least six days after the Full Commission award of March 7, 2007, became final. It is undisputed that the Full Commission Order was entered on March 7, 2007, and that no appeal was taken on or before April 9, 2007; therefore, respondents had until approximately April 23, 2007, to make payment and they admittedly did not make any payment until April 30, 2007.

Respondents argued at length at the January 8, 2008, hearing that this administrative law judge had "discretion" on whether to order a 20% penalty pursuant to A.C.A. § 11-9-802(c). Respondents further argued that due to the complexities of this award and the amount of calculations necessary to pay the award, that respondents

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should not be penalized for simply being six days late on their payment. I find all of respondents' arguments regarding the 20% penalty to be without merit. Arkansas Code Annotated § 11-9-802(c) is clear as to the time frame in which the respondents have to pay an award. It is also abundantly clear that the respondents did not pay the Full Commission award filed March 7, 2007, within the time frames outlined in A.C.A. § 11-9-802(c). There is no magic language contained in A.C.A. § 11-9-802(c) that gives the Commission "discretion" to entertain the excuses of complexities and hard calculations as argued by the respondents. Therefore, I find that pursuant to A.C.A. § 11-9-802(c) the claimant is entitled to a 20% penalty on the amount that the respondents owed as of April 24, 2006, in indemnity benefits which I have found to total \$49,888.59. Twenty percent of \$49,888.59 equals \$9,977.72. Therefore, respondents owe in penalty pursuant to A.C.A. § 11-9-802(c) the additional amount of penalty of \$9,977.72.

The next issue for determination is whether the claimant's March 21, 2007, cervical spine surgery was reasonable, necessary, and related to the claimant's February 7, 1999, compensable injury. An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. Ark. Dept. of

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Correction v. Holybee, 46 Ark. App. 232, 878 S.W.2d 420 (1994). It must be pointed out that the parties have stipulated and it has been previously adjudicated that the claimant sustained a compensable cervical injury on February 7, 1999.

Dr. Richard Jordan performed a C4-5 anterior cervical fusion on the claimant on March 21, 2007. The deposition of Dr. Jordan contained in the record at Joint Exhibit No. 2 shows that Dr. Jordan has also treated the claimant as far back as 2001 and performed a fusion at C5-6 on the claimant. Dr. Jordan in his deposition contained in the record at Joint Exhibit No. 2 clearly states that in his opinion the claimant's fusion he did in March of 2007 was related to the original injury the claimant suffered in February of 1999 within a reasonable degree of medical certainty.

Q. And you have told me in a letter dated March 30, 2007, that we'll introduce at the hearing in this case, that you believe that the disk herniation that you operated on – that you did the fusion for in March of 2007 is, in your opinion – and you say strongly – as part of the original injury that she suffered back in February of 1999?

A. I do.

Q. And you have come to that conclusion to a reasonable degree of medical certainty?

A. Yes.

(T. Joint Ex. 2, pg. 13-14, lines 24-25 & lines 1-8).

Dr. Jordan also stated that the cervical fusion on March 21, 2007, was reasonable and necessary due to the claimant's compensable injury in February of 1999. Dr. Jordan

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also stated that the claimant received improvement from the fusion and that claimant's post-fusion condition which further backed up the doctor's belief that the March 21, 2007, fusion was reasonable and necessary.

Based upon the long history treatment that the claimant has had with Dr. Jordan, Dr. Jordan's finding of relatedness within a reasonable degree of medical certainty and the claimant's post March 21, 2007 improvement, it is clear to this examiner that the claimant's cervical fusion on March 21, 2007, was reasonable, necessary, and related to the claimant's February 7, 1999, compensable injury and therefore the responsibility of the respondents.

With regard to attorney fees, this administrative law judge finds that the respondents have controverted the benefits awarded herein. The respondents have controverted the 20% penalty for late payment pursuant to A.C.A. § 11-9-802(c) since such penalty compensation was controverted, I find that claimant's attorney is entitled to a maximum statutory attorney's fees. Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fees is governed by the provisions of A.C.A. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare A.C.A. § 11-9-715 (Repl. 1996) with A.C.A. § 11-9-715 (Repl. 2002).

My calculations reflect an attorney's fee of \$1,197.79 is appropriate on the controverted penalty amount. With regard to attorney's fees awarded prior to the

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January 8, 2008, hearing, claimant's attorney is of course entitled to the maximum attorney's fees as ordered by Administrative Law Judges McKinney and White. Claimant's attorney stated in Claimant's Exhibit No. 4, page 7, that he was still entitled to \$1,301.72 in unpaid attorney's fees as a result of the previous ALJ orders. I make no finding with regard to the previously incurred attorney's fees as such request deals with fees dating back to the May 7, 2003, ALJ Opinion from Judge McKinney. Such determination would require this administrative law judge to consider facts and arguments outside of the issues specifically outlined at the full hearing. At the full hearing the parties asked this administrative law judge to determine whether the respondents correctly paid benefits pursuant to the March 7, 2007, Full Commission Opinion and therefore a determination of attorney's fees that accrued prior to the March 7, 2007, Commission order would be outside of the scope of the issues outlined herein. Therefore, it is necessary to reserve the issue of unpaid attorney's fees as a result of the May 7, 2003, ALJ order. However, suffice to say that I have made specific findings of TTD and PPD amounts, penalty amounts, and interest, the calculation of attorney's fees should be simple math; however, should the parties not be able to resolve the issue of attorney's fees, it will be specifically reserved. Even though this administrative law judge will not address attorney's fees on the May 7, 2003, indemnity benefits, it does not in any way affect the attorney's fees awarded

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herein for the controverted benefits awarded for controverted interest and the controverted 20% penalty pursuant to A.C.A. § 11-9-802(c).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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 arguments of counsel, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The stipulations agreed to by the parties at the full hearing on January 8, 2008, are reasonable and hereby accepted as fact.
- 2) The claimant has proven by a preponderance of the evidence that her March 21, 2007, cervical spine surgery was reasonable, necessary, and related to her February 7, 1999, compensable injury; and therefore the respondents' financial responsibility.
- 3) Respondents did not correctly pay benefits pursuant to the March 7, 2007, Full Commission Opinion. As of April 24, 2007, the respondents owed \$41,729.63 in permanent partial disability plus an additional \$617.22 in interest. It was further determined that the respondents owed \$6,872.46 in temporary total disability benefits as of April 24, 2007, plus \$669.28 in interest. The total amount owed by respondents for TTD and PPD plus interest on April 24, 2007, was \$49,888.59.
- 4) Respondents failed to timely pay the benefits pursuant to the Full Commission award filed March 7, 2007, within fifteen days after the award became due. I find that the respondents owed \$49,888.59 as of April 24, 2007, pursuant to the Full Commission award filed March 7, 2007, and therefore the respondents shall pay an amount equal to 20% of \$49,888.59. Said 20% penalty equals \$9,977.72. Said 20% penalty was controverted and is now

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owed by the respondents in a lump sum.

- 5) Claimant's attorney is entitled to maximum attorney's fees on all controverted benefits awarded herein pursuant to A.C.A. § 11-9-716 (Repl. 1996) since the claimant's injury occurred prior to July 1, 2001.

**AWARD**

Respondents are directed and ordered to pay all benefits as outlined in the findings of fact and conclusions of law listed herein. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate.

**IT IS SO ORDERED.**

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**S. DALE DOUTHIT**  
**Administrative Law Judge**

SDD/pjb