

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E812872

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| MARK LAWRENCE PHILLIPS, EMPLOYEE | CLAIMANT |
| SPORT STOP, INC., EMPLOYER | RESPONDENT |
| STATE AUTOMOBILE MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA | RESPONDENT #1 |
| DEATH & PERMANENT TOTAL DISABILITY TRUST FUND | RESPONDENT #2 |

OPINION FILED MARCH 26, 2008

Matter submitted before Chief Administrative Law Judge David Greenbaum on February 15, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant, *pro se*, did not participate.

Respondents #1 represented by Mr. A. Gene Williams, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 represented by Ms. Judy W. Rudd, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This claim has been submitted for decision on stipulations and legal briefs.

By agreement of the parties, the sole issue presented for determination is whether respondent #1 is entitled to a credit of \$36,315.00 paid in permanent partial impairment benefits prior to July 1, 2007, when the claimant, by agreement of the parties, became permanently and totally disabled. Because the issue presented did not effect the claimant's receipt of benefits, but, only involved a dispute between respondents concerning entitlement to a credit, if any, the claimant did not participate in the litigation process which, again, was submitted on agreed

stipulations and legal briefs. A procedural history of the issue will be set out below and the correspondence blue-backed as the record in this claim.

By letter dated October 16, 2007, respondent #1, by and through its attorney, requested a hearing on the issue of its entitlement to a credit. The claim was then assigned to this Administrative Law Judge. By letter dated October 29, 2007, the parties were asked to confer and then advise how they wish to proceed. On November 9, 2007, respondent #2 (The Fund) submitted a letter agreeing on the issue and requesting that the issue be presented on proposed stipulations, which were included, and requesting a briefing schedule on the issue presented for determination. The agreed stipulations are set out below:

1. Claimant sustained compensable injuries on 5/23/98.
2. Claimant's average weekly wage of 5/23/98 was \$553.85, entitling him to a total disability rate of \$359 per week and a permanent partial disability rate of \$269 per week.
3. Dr. Anthony Russell performed surgery on 10/08/98 at the L4-S1 disc space levels.
4. Claimant had prior lumbar disc surgery in 1994.
5. Dr. Anthony Russell assigned an 11% permanent partial impairment rating on 2/15/99.
6. Dr. Anthony Russell increased the permanent partial impairment rating to 15% on 6/21/99.
7. Dr. Anthony Russell increased the permanent partial impairment rating to 20% on 8/27/99.
8. Dr. Anthony Russell increased the permanent partial impairment rating to 30% on 5/16/02.

9. On 9/22/99 respondents paid \$24,210 to claimant as the undiscounted value of the 20% permanent partial impairment rating issued by Dr. Anthony Russell.
10. On 2/10/03 respondents paid \$12,105 as the value of the additional 10% rating assigned by Dr. Anthony Russell on 5/16/02.
11. On 10/8/98 respondents paid \$738 for TTD benefits for the period 10/8/98 through 10/21/98.
12. Claimant continued full time employment until on or about 7/01/07.
13. Respondents accepted the claimant as permanently and totally disabled as of 7/01/07.
14. Respondents paid a total of \$36,315 in permanent benefits for the impairment ratings.

A prehearing telephone conference was conducted on January 2, 2008, at which time a briefing schedule was established. Each party respondent was to submit legal briefs, advancing their respective arguments on or before February 1, 2008. Response briefs were due on or before February 15, 2008, at which time the claim would be submitted on the record, aforementioned.

Based upon the record, specifically, the stipulations agreed to by the parties, together with their legal arguments, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. Respondent #1 is entitled to a credit of \$36,315.00, representing permanent

impairment benefits previously paid against its statutory liability of \$75,000.00 in permanent total disability benefits.

DISCUSSION

The relevant facts in this case are undisputed. The claimant sustained a compensable low back injury on May 23, 1998. The claimant underwent back surgery performed by Dr. Anthony Russell on October 8, 1998. The claimant had undergone prior lumbar disc surgery in 1994. As reflected by the parties stipulations, Dr. Anthony Russell assigned permanent partial impairment ratings at various times, specifically, an 11% permanent anatomical rating on February 15, 1999; a 15% on June 21, 1999; a 20% on August 27, 1999; and eventually a 30% rating on May 16, 2002. Respondent #1 has paid a total of \$36,315.00 in permanent benefits for the claimant's impairment ratings. While respondent #1 paid the claimant the value for all permanent impairment ratings, the claimant continued to work for the respondent-employer until July 1, 2007, at which time the parties agreed that the claimant became permanently and totally disabled.

At issue is whether the respondent-employer and its carrier are entitled to a credit for previously paid permanent partial disability benefits against its liability for permanent total disability benefits. Respondent #1 maintains that it is entitled to a credit for the \$36,315.00 in permanent partial impairment benefits previously paid. The Fund contends that the permanent character of the claimant's injury did not become total disability until July 1, 2007, and that this Commission is prohibited

from granting respondent #1 credit for payment of any benefits prior to July 2, 2007, against its \$75,000.00 liability for permanent and total disability benefits pursuant to Ark. Code Ann. §11-9-502.

The Fund has previously argued that it is only responsible for benefits after a claimant is determined to be permanently and totally disabled and that employers and its carriers are not entitled to credit for permanent anatomical impairments. This issue was decided in a recent decision, *Death & Permanent Total Disability Trust Fund v. Legacy Insurance Service*, 95 Ark. App. 189, 235 S.W.3d 544 (2006). The Court held that a carrier was entitled to credit for anatomical impairment ratings paid in a claim. The Fund now argues that the holding in the *Legacy* decision is not controlling based upon the unique facts of this claim. Specifically, The Fund maintains that in *Legacy, supra*, the claimant was rendered permanently and totally disabled on the same date that his healing period ended, while in the instant claim, the claimant did not become permanently and totally disabled until July 1, 2007, because he continued working for the employer herein for several years after his permanent impairment benefits were paid out.

The Fund's innovative arguments are simply not persuasive. Our Courts have consistently held that permanent indemnity benefits are to be credited against the employer's liability for permanent total disability benefits. In the case of *Sparks Regional Medical Center v. Death & Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1087), the employer contended that all weekly benefits,

whether temporary total or permanent disability should be credited against the limit. The Commission found that only permanent disability benefits were to be credited against the limit:

Since there are clearly two separate forms of disability payment, *i.e.*, temporary and permanent, it is compatible with a common sense interpretation of §10(c)(2) to find that only permanent disability benefits are to be counted toward the ceiling at which the Bank Fund takes over since permanent benefits are the benefits which are payable by the Bank Fund and are the benefits which are clearly referred to in the statute.

22 Ark. App. at 207, 737 S.W.2d at 465.

The Court of Appeals affirmed the decision that only payments after the end of the healing period may be credited against the limit. 22 Ark. App. at 208, 737 S.W.2d at 465. In a later decision, the Court again confirmed the end of the healing period as the point after which benefits are to be credited against the limit. In *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990), the employer contended that the employer had in fact been permanently totally disabled from the date of the injury and that all indemnity benefits should be credited against the permanent total disability limit. The Court of Appeals rejected this contention because the Commission found the healing period had not yet ended.

In a subsequent decision, the Court of Appeals held that permanent partial disability benefits paid for a prior injury were to be credited against the permanent disability limit. *Death & Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992). In that case, a claimant sustained injuries

in 1979 and 1985 while employed by Whirlpool. The employer paid \$5,174.26 in permanent partial disability benefits for the earlier injury. The Commission held that the employer was entitled to credit for the permanent benefits paid. In affirming the Commission's decision, the Court wrote:

Finally, the appellant contends that permanent partial disability cannot be credited against the employer's obligation under Ark. Code Ann. §11-9-502(b)(1) because that statute permits credit only for benefits for "death or **permanent** total disability." (Emphasis supplied). However, we think that the applicable provision regarding benefits which may be credited is found in Ark. Stat. Ann. §81-1313(f)(1), which permits the weekly benefits paid for the prior injury to be credited in determining whether the employer's statutory limit of disability has been met. The "weekly benefits" referred to in this statute do not include temporary disability payments, and are limited to benefits for permanent disability.... Given that only permanent disability benefits may be credited, we must hold that §81-1313(f)(1) permits credit for permanent partial disability payments. To hold otherwise would be to reach the absurd result of allowing credit only for benefits paid for a permanent total disability which is followed by continued employment by the same employer and a second injury resulting in another permanent total disability.

39 Ark. App. at 68, 837 S.W.2d at 296.

In its initial brief, The Fund maintained that the Supreme Court subsequently "repealed" the statute relied upon by the Court of Appeals in *Whirlpool*, citing *Nelson v. Timberline International, Inc.*, 332 Ark. 165, 964 S.W.2d 357 (1998). Additionally, The Fund argued, that *Whirlpool* was distinguishable from the facts in this claim since it specifically addressed credit for payment of the anatomical rating in a workers' compensation claim involving successive injuries while asserting this claim did not involve successive injuries. However, *Nelson* held that an employer was

entitled to credit for permanent partial disability benefits paid in a Second Injury Fund claim even when the successive injuries occurred during the same employer's employment. To the extent *Nelson* has any relevance, it supports that an employer is entitled to credit against the \$75,000.00 Death & Permanent Disability limit.

As previously pointed out, The Fund has again challenged an employer's entitlement to credit for anatomical impairment ratings against its \$75,000.00 limit for permanent and total disability, similar to its claim in *Legacy, supra*. In that case, the claimant was injured in 2000. His healing period ended on December 10, 2002. The employer paid \$38,628.00 in permanent partial disability benefits. The Fund contended that the employer was not entitled to credit against its \$75,000.00 limit. The Administrative Law Judge, the Full Commission, and the Court of Appeals held otherwise.

The Fund's attempt to distinguish this claim from the *Legacy* decision based upon the date that the claimant became permanently and totally disabled is simply without merit.

Ark. Code Ann. §11-9-502 requires that the first \$75,000.00 of weekly benefits for permanent total disability be paid by the employer or its insurance carrier while further providing that The Fund is responsible for all benefits in excess of that amount. The law distinguishes between temporary disability benefits and permanent disability benefits. While the case law has established that the employer and its carrier are not entitled to a credit for any temporary total or temporary partial

disability, they are entitled to a credit for all permanent disability benefits, including permanent impairment benefits. The \$36,315.00 paid in this claim was for impairment benefits related to the admitted injury. Our Courts have consistently held that the employer and its carrier are entitled to a credit for permanent disability benefits paid, without regard to the date when the claimant became permanently and totally disabled.

In its response brief, The Fund further argues that a recent Court of Appeals decision recognized the distinction between permanent partial and permanent total disability benefits. *O'Hara v. Christy Const. Co.*, ___ Ark. App. ___, ___ S.W.3d ___ (January 30, 2008). In that case, the claimant received a 20% impairment rating in 1994 and was later awarded a 20% wage-loss in 1998. After several years, he litigated the issue of change in physical condition, which resulted in an Award of permanent total disability. Although the Commission and the Courts recognize a difference between permanent partial disability benefits and permanent total disability benefits, the issue of credit for permanent partial disability against the permanent total disability limit was not an issue and that case has no application to this claim.

Both the employer and its carrier have exercised good faith in meeting its obligations under our workers' compensation laws, including the payment of \$36,315.00 in permanent impairment benefits. The employer returned the claimant to work and provided suitable employment to the claimant for more than five (5)

years before all parties agreed that the claimant was permanently and totally disabled. I find no compelling arguments for, in essence, penalizing the employer for providing work to the claimant despite significant permanent impairments. There is no issue concerning the claimant's entitlement to permanent total disability benefits. By providing the claimant with suitable employment for more than five (5) years, respondent #1 has, in essence, delayed the date in which The Fund becomes responsible for the payment of indemnity benefits. Clearly, respondent #1 is entitled to a credit for permanent partial disability benefits previously. All benefits previously paid represent permanent impairment benefits. The case law clearly supports the right to a credit for all permanent partial disability paid in the claim. Accordingly, I find that respondent #1 is entitled to a credit for the \$36,315.00 previously paid to the claimant toward its maximum statutory liability of \$75,000.00 pursuant to A.C.A. §11-9-502.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge