

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203675

BETTY SWEM,
EMPLOYEE

CLAIMANT

UNIVERSITY OF ARKANSAS,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 2, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by the HONORABLE JAY TOLLEY, Attorney
at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE RICHARD SMITH,
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal
an administrative law judge's opinion filed July 31, 2003.
The administrative law judge found, among other things, that
"the claimant received an advanced payment of compensation,
in the form of an erroneously made overpayment of temporary
disability benefits for the month of April of 2002.
However, it is impossible to determine with any certainty
from the evidence presented the exact amount of this

overpayment." The administrative law judge found that "this Commission has no authority to order the claimant to directly repay the respondent for any such advance payment of compensation and can only award the respondent a credit for such an advance payment of compensation against any future compensation which may become due and payable to the claimant." The administrative law judge also found that the respondents had controverted the claimant's entitlement to an amount of temporary total disability compensation, so that the claimant's attorney was entitled to a statutory fee.

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the claimant received an advanced overpayment of temporary total disability compensation in April 2002. We affirm the administrative law judge's finding that the Commission cannot order the claimant to directly repay this overpayment to the respondents. The Full Commission reverses the administrative law judge's finding that the claimant's attorney is entitled to a statutory fee for controversion.

I. HISTORY

The parties stipulated that the claimant sustained a compensable injury to her knee on February 26, 2002. The parties stipulated that the appropriate weekly compensation rates were \$295 for total disability and \$221 for permanent partial disability. According to a Form AR-3, a treating physician appears to have indicated that the claimant could return to restricted work on March 4, 2002.

Brooke Paul, the respondent-employer's program coordinator for workers' compensation, testified:

Q. At some point, were you notified by the claimant, Ms. Swem, that she was returning to work?

A. Yes, I was.

Q. Do you recall when you were actually contacted?

A. I was contacted via voice mail, and the voice mail said that she had returned to work on 4/15. I got the voice mail the week after 4/15 because I was out on vacation and some training out of the office.

Q. Was this voice mail from her?

A. Yes, it was....

Q. Did you subsequently learn that she had returned to work on an earlier date?

A. Yes, I did....The human resources office contacted me because they were entering the leave hours for the month of April, and I was informed that the leave hours were not as I thought they

were, that being - I had thought she had returned on the 15th. They informed me that she, in fact, had returned on April 1st.

Q. Okay.

A. For part time. And then full time on the 15th.

Q. What steps did you take then when you found that she returned to work on April 1st?

A. I contacted the department where she worked and asked the personnel representative in the department if, in fact, those hours were correct, that it was part time beginning the 15th, and she verified that yes, it was. And then I called Harriette and told Harriette that she had returned on the 1st for part time instead of the 15th, as we had previously thought.

Q. That's Ms. Upshaw, the claim manager?

A. Ms. Upshaw, the claim manager.

Q. What did Harriette ask you to do, if anything?

A. At that point, in that phone conversation, Harriette asked me to contact the claimant and tell her that she had been overpaid more than we thought and not to cash the checks that she had gotten.

The record contains a letter to the claimant from Harriette Upshaw, Claims Determination Manager for the Public Employee Claims Division, dated May 2, 2002:

I have learned that you returned to work on April 15, 2002. Temporary Total Disability benefits were paid to you through May 3, 2002. This has

resulted in an overpayment of \$800.70. Please send that amount by return mail to clear this account....

Ms. Paul testified that she contacted the claimant on May 7, 2002:

Q. What did you tell her?

A. That there was some overpayment and that Ms. Upshaw would be sending her a letter and that if she got any more checks that she hadn't cashed, don't cash them, and that there would be a letter coming from Ms. Upshaw to explain the overpayment.

Q. Did Ms. Swem make any comment about whether she had received the checks?

A. She wasn't sure if she had received - how many checks she had received or what she had cashed, and so I told her that if she got any more that she hadn't cashed, don't cash them and, in fact, there was an overpayment.

Ms. Upshaw wrote to the claimant on July 18, 2002:

When we last spoke, you told me you had not received all three of the checks mailed to you for temporary total disability benefits. After I verified each check had been cashed I inquired with Arvest Bank to verify those checks had been deposited in your account. All three had been deposited. I have attached a copy of the front and back of each check issued by Public Employee Claims. Those checks are # 02W 0544779, in the amount of \$1390.70, check # 02W 0544781 in the amount of \$590.00 and check #02 W 0564088 in the amount of \$590.00. Those checks total \$2570.70.

We paid ttd benefits from March 4 through May 3, 2002. We have been advised you returned to work six hours per day on April 1/April 5, 2002 and April 8/April 12, 2002. I understand you returned

to work full time, eight hours per day, on April 15, 2002. This has resulted in an overpayment of \$1285.51. Your check for the full amount should be returned to my attention at the address shown above....

Nathan Culp, then-Assistant Director, Public Employee Claims Division, wrote to the claimant's attorney on November 21, 2002:

Ms. Upshaw brought your letter of November 12, 2002, addressed to the Insurance Fraud Investigation Division to me. I have reviewed the situation and this is what I understand the facts to be in this matter:

1. Ms. Swem suffered a compensable injury on February 26, 2002, which was accepted by the Public Employee Claims Division.

2. The following temporary total disability benefits were paid to Ms. Swem:

<u>AASIS#</u>	<u>Benefit Dates</u>	<u>Print Date</u>	<u>Check #</u>	<u>Amount</u>
19340483	3/04/02-4/05/02	4/09/2002	210544779	\$1,390.70
19340497	4/06/02-4/19/02	4/09/2002	210544781	\$ 590.00
19354618	4/20/02-5/03/02	4/18/2002	210564088	\$ 590.00

3. Ms. Swem returned to work on April 15, 2002.

4. On April 24, 2002, Ms. Upshaw learned that Ms. Swem had returned to full-time work on April 15, 2002.

5. On April 24, 2002 Ms. Upshaw contacted Brooke Paul with the University of Arkansas Risk Management Division and asked her to contact Ms. Swem and ask her not to cash the check for 4/20/02 - 5/03/2002.

6. Ms. Paul contacted the claimant and advised her that the last check was an overpayment and not

to deposit it but to return it to the Public Employee Claims Division.

7. On May 2, 2002, Ms. Upshaw sent a letter to the claimant requesting that the claimant return the overpayment of \$800.70.

8. On May 8, 2002, Ms. Upshaw received a Form S from the University of Arkansas showing that Ms. Swem actually returned to work 6 hours a day from April 1st through April 8th, and from April 8th through April 12, 2002. Based on this new information Ms. Upshaw changed the amount that was requested from Ms. Swem due to overpayment from \$800.70 to \$1,285.36.

9. On May 8, 2002, Ms. Paul with the University of Arkansas advised Ms. Upshaw that Ms. Swem had told her that she had not received the check for the time period 4/20/2002 - 5/3/2002.

10. On May 8, 2002, Ms. Swem called Ms. Upshaw and told her that the last date of work was 2/25/2002 (the day before the accident) and that she was given an off work slip by Washington Regional Medical Center Emergency Room. Ms. Upshaw advised her that if she would send a copy of the off work slip then she would adjust the amount of overpayment. Ms. Swem told Ms. Upshaw that she had not received all three of the temporary total disability checks.

11. On May 8, 2002, Ms. Swem deposited check #'s 210564088 and 210544781, in the amounts of \$590.00 each in her account with Arvest Bank after having received notice of the overpayment and having been requested to not cash the checks.

12. On July 18, 2002, Ms. Upshaw wrote to Ms. Swem and telling her that she had copies of all three of the cashed checks which showed her signature and that they had been deposited into her bank account at Arvest Bank and requesting reimbursement in the amount of \$1,285.51. Ms.

Upshaw had rechecked her calculations and there was a 15 cent error.

13. Ms. Upshaw did not receive a response to her letter of July 18, 2002, and states that she left several phone messages for Ms. Swem which were not returned.

14. Ms. Upshaw wrote an E-Mail to your Ms. Swem advising her that she would refer the situation to the fraud unit for investigation. Ms. Upshaw advised me that she wrote this because Ms. Swem cashed the checks after she had told Ms. Paul that she had not received all three of the checks, had been informed that she was not entitled to the payments and Ms. Upshaw had not received any response from Ms. Swem after having verified that all three checks had been deposited.

I don't know what the basis of your threatened lawsuit is, but I would suggest that we view this situation as a misunderstanding between Ms. Swem and Ms. Upshaw and that Ms. Swem reimburse this Division the overpayment. This is not a typical overpayment case. We understand that this case involves an overpayment where the claimant was notified of the overpayment and requested to return the check. Ms. Upshaw advises that the claimant stated that she had not received the checks and then cashed them. At this point the Division has not referred the file to the Fraud Division....

I will take your client at her word that she is just asking to be shown the basis and will work with us in any way to resolve the matter. Therefore, I am enclosing the following information:

1. Copies of the cashed warrants;
2. Worksheet showing the basis for the amounts of overpayments;

3. Copy of Ms. Upshaw's letters of May 2, 2002 and July 18, 2002.

A pre-hearing order was filed with the Commission on December 18, 2002. The claimant contended that she was entitled to a change of physician. The respondents contended that they were entitled to repayment of temporary total disability compensation. In an order filed January 2, 2003, the administrative law judge granted the claimant a change of physician.

Hearing before the Commission was held on May 19, 2003. The administrative law judge noted that the change of physician issue was made moot by the order granting a change of physician. The parties agreed with the administrative law judge that the only remaining issues were "the respondents' entitlement to an order directing repayment of temporary total disability benefits, and attorney's fees." The claimant testified:

Q. Did you return to work at the University on a part-time basis?

A. Yes, I did.

Q. And you worked through April 14th on a part-time basis?

A. Yes, I did.

Q. And on April 15th, you went back to work on a full-time basis?

A. I returned to work on a Monday, so if the 15th was on a Monday, yes....

Q. And are you still working full time?

A. Yes, I am.

Q. Now, were you paid for your time in April?

A. I did not receive compensation in April....

Q. And your testimony is that you have not received any compensation for any of the time you worked in April from the University?

A. As far as I know, I have not.

The administrative law judge determined:

[T]he evidence presented shows that the claimant's healing period, from the effects of her compensable scheduled injury, had not ended by April 1, 2002. Thus, for the period of April 1, 2002 through April 14, 2002, the claimant would be entitled to temporary partial disability benefits, as provided by Ark. Code Ann. §11-9-520....

The respondent contends that it has made an overpayment of temporary total disability benefits in the amount of \$1,285.36, even after considering the amount that it believes the claimant would be entitled to for temporary partial disability benefits for the first two weeks of April of 2002. This figure appears to be excessive....

The respondent also used an elaborate and somewhat confusing method to calculate the amount that they believed to be appropriate for temporary partial disability benefits for the first two weeks of the month of April of 2002....

This leads to the real dilemma in this case at the hearing. None of the respondent's witnesses had any direct knowledge of the amount the claimant was actually paid for the work she performed for the respondent during the month of April of 2002. Obviously, such information would be crucial to the resolution of the current dispute....

From the evidence presented by the respondent, I can only say with any degree of certainty, that it establishes that it proves that the claimant was actually paid wages of only \$153.05 during the month of April of 2002....

As the respondent has proven by the greater weight of the evidence that an overpayment of compensation did in fact occur for temporary disability benefits for the month of April of 2002, and to ensure a fair decision to all parties concerned, I find that this matter must be set for an additional hearing. Both the parties will be allowed an opportunity to present any and all evidence they deem relative only in regard to the specific amount of the overpayment of compensation for temporary disability benefits that occurred for the month of April of 2002....

The administrative law judge found, "6. The respondent has proven by the greater weight of the credible evidence that the claimant received an advanced payment of compensation, in the form of an erroneously made overpayment of temporary disability benefits for the month of April 2002. However, it is impossible to determine with any certainty from the evidence presented the exact amount of this overpayment. 7. Pursuant to Ark. Code Ann. §11-9-807(a) this Commission has no authority to order the

claimant to directly repay the respondent for any such advance payment of compensation and can only award the respondent a credit for such an advance payment of compensation which may become due and payable to the claimant. 8. The respondent has controverted the claimant's entitlement to \$1,285.36 in temporary total disability benefits, by seeking repayment or a credit for such benefits previously paid."

II. ADJUDICATION

A. Temporary partial disability

The claimant sustained a compensable injury to her knee, a scheduled injury. Ark. Code Ann. §11-9-521. The record shows that the claimant returned to part-time work on April 1, 2002. An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during her healing period or until she returns to work, regardless of whether the employee has demonstrated that she is actually incapacitated from earning wages. See, Ark. Code Ann. §11-9-521(a); Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Even if the instant claimant's entitlement to additional temporary partial disability had been properly

included as an issue, which it was not, the claimant was not entitled to additional temporary partial disability when she returned to work on April 1, 2002.

In addition, the administrative law judge discussed at length the claimant's new allegation at hearing that the respondent-employer had not paid her for the month of April 2002. If the claimant's allegation is true, which we do not find, this issue involves an employment/contractual matter between the claimant and the respondent-employer, and is not within the jurisdiction of the Workers' Compensation Commission. The respondents have submitted some blue-backed documents after the hearing in order to show that the claimant had in fact been paid. The Full Commission has not considered this post-hearing exhibit, because it is not relevant to our adjudication of the properly-included issues before the Commission.

B. Reimbursement

Ark. Code Ann. §11-9-207(a) provides that, in addition to its other powers and duties, the Workers' Compensation Commission is given full power and authority:

(7) To determine the time for the payment of compensation and order the reimbursement of employers for amounts advanced[.]

Ark. Code Ann. §11-9-807 provides:

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

The administrative law judge in the present matter correctly cited Osborne v. Logan County, Workers' Compensation Commission E513263 (Aug. 20, 1998). That case essentially held that, if a respondent-carrier overpaid workers' compensation benefits, the respondent could be reimbursed only "out of any unpaid installment or installments of compensation due." The respondent cannot be directly reimbursed by the claimant. The Commission's holding in Osborne was based on Ark. Code Ann. §11-9-807. The respondents in the present matter ask the Commission to reverse our holding in Osborne and to order the claimant to directly reimburse Public Employee Claims for the overpayment. We cannot do so. It is indeed correct that Ark. Code Ann. §11-9-207 empowers the Commission to order reimbursement of employers for amounts advanced. However, the mechanism for doing so is found in Ark. Code Ann. §11-9-807. The employer is reimbursed "out of any unpaid

installment or installments of compensation due." If in the course of time the instant claimant becomes entitled to additional temporary total disability compensation as a result of her February 2002 compensable injury, then the respondent-employer can withhold temporary total disability as its "reimbursement" until the account is settled.

Based on our *de novo* review of the entire record, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission affirms the finding, "the claimant received an advanced payment of compensation, in the form of an erroneously made overpayment of temporary disability benefits for the month of April of 2002." The Full Commission affirms the administrative law judge's finding that the Commission cannot order the claimant to directly repay the respondents for the overpayment. We reverse the administrative law judge's award of an attorney's fee. The claimant did not contend that she was entitled to additional temporary total or temporary partial disability compensation, and the preponderance of the evidence does not otherwise indicate that the claimant prove she was entitled to same. The claimant's attorney is not entitled to a fee

in this case. Finally, the claimant expressly informs the Full Commission that she does not want another hearing. However, if either party desires another hearing in this matter, that party can simply request a hearing pursuant to the Rules of the Commission and Arkansas law.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur with the finding of the majority that claimant cannot be ordered to repay any alleged overpayment. Respondent must recoup the alleged overpayment by way of a credit against future benefits. However, I respectfully dissent from the finding that claimant has been overpaid workers' compensation benefits.

I would initially point out that the majority is wrong, as a matter of law, in finding that a claimant cannot be entitled to temporary partial disability benefits for a scheduled injury once he or she has

returned to work. First, even respondent acknowledges that claimant would be entitled to temporary partial disability benefits for any period of time she returned to work on a part-time basis. In fact, respondent attempted to calculate claimant's entitlement to these benefits during the first two weeks of April 2002.

Second, the majority's interpretation of Ark. Code Ann. § 11-9-521(a) (Repl. 2002) makes superfluous the provision's reference to temporary partial disability benefits and leads to an absurd result. The very definition of temporary partial disability includes situations where a claimant has returned to work earning less than the average weekly wage at the time of the compensable injury. While this type of benefit could be awarded in cases where claimant has less capacity to earn the same or greater wages, just about every case to come before this Commission involves a claimant who has, in fact, returned to some type of work. The majority has just denied temporary partial disability benefits, as a matter of law, to a whole class of injured workers. The majority has certainly removed any incentive injured workers suffering from a scheduled injury may have had

to return to any type of work and, thereby, lessen the extent of their temporary disability.

Further, the majority criticizes claimant for not specifically requesting temporary partial disability benefits. However, I must respectfully ask why would claimant request temporary benefits in any amount when, according to respondent, claimant was actually receiving benefits for temporary total disability during this same period of time? In short, when an overpayment has been alleged, a determination must be made as to the extent of any benefits to which claimant might have been entitled during that same period of time.

More importantly, I disagree with the majority's finding that respondent has proven by a preponderance of the evidence that it made an overpayment of benefits. I must ask another question: How can the Commission determine whether an overpayment has been made, if we do not know how much, if any, claimant earned in wages during this same period of time? It also must be remembered that respondent has the burden of proving that claimant earned wages,

particularly wages earned in its employment. Respondent has failed entirely to meet its burden of proof.

The only evidence on this question is claimant's testimony. Claimant credibly testified that during the month of April 2002, she worked for the employer but did not receive any wages. Claimant added that when she questioned the employer about this situation, she was told that she was not entitled to any wages because she was already receiving workers' compensation benefits during April. Therefore, since respondent did not pay claimant any wages for her work, there is no way it can claim an overpayment of benefits.

Finally, I note that the majority has declined to make specific findings as to the amount of any alleged overpayment or order another hearing (an option chosen by the ALJ) to give respondent a "second bite of the apple." I certainly do not expect the "do-right rule" to be followed in this case.

In my opinion, respondent has failed to prove that it made an overpayment of benefits and is, therefore, not entitled to any credit against future benefits. Accordingly, I must respectfully dissent.