

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105828

BILLY OSBORNE,
EMPLOYEE

CLAIMANT

BEKAERT CORPORATION,
EMPLOYER

RESPONDENT NO. 1

LIBERTY MUTUAL FIRE INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED JANUARY 17, 2006

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE JAMES ARNOLD,
II, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

Respondent No. 2, Death and Permanent Total Disability
Trust Fund, appeals an administrative law judge's opinion
filed April 6, 2005. The administrative law judge found
that Respondent No. 1 "should be given credit for the
payment of the claimant's permanent anatomical impairment
against the first \$75,000.00 of permanent and total

disability benefits." Respondent No. 1 cross-appeals the administrative law judge's opinion. The administrative law judge found that Respondent No. 1 had "controverted the claimant's status of being permanently and totally disabled." The claimant also cross-appeals the administrative law judge's decision. The administrative law judge found, "Ark. Code Ann. §11-9-522(f)(1) is not unconstitutional."

After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion that Respondent No. 1 should be given a credit for payment of the claimant's anatomical impairment, and we affirm the administrative law judge's finding that Ark. Code Ann. §11-9-522(f)(1) is not unconstitutional. The Full Commission reverses the administrative law judge's finding that Respondent No. 1 controverted permanent total disability benefits.

I. HISTORY

The parties stipulated that the claimant, age 65, "sustained compensable injuries to his left leg and hip on May 22, 2001." The parties stipulated that the claimant's healing period ended on May 22, 2002. Dr. Cygnet Schroeder

informed a representative of the respondent-carrier on May 24, 2002:

Mr. Osborne is close to one year post catastrophic event with a traumatic amputation involving the left lower extremity with extensive skin grafting and a course of physical therapy. At this time I feel that the patient is currently at maximum medical improvement. He currently is ambulatory for short distances with the use of a prosthetic and device.

As far as permanent restrictions in regards to Mr. Osborne, I do not feel he would be able to ambulate functionally for any other than household distances. He would have difficulties with prolonged standing or sitting. He has some weightbearing limitation as far as his residual limb due to the fragility of the skin associated with the grafting site. He also has residual sensory deficit in his femoral distribution on that side. I do not feel that he will be able to ambulate without the use of a device. This would limit his ability to carry objects, lift anything heavy. Most likely, any kind of employment found for him would involve vocational retraining and would have to be in the category of sedentary work according to the federal guidelines....

Dr. Schroeder assigned the claimant a 45% whole-person impairment rating.

The claimant's attorney wrote to a representative of the Commission on June 7, 2002: "Please set this case for hearing. The issue will be the Claimant's entitlement to permanent disability benefits in excess of his impairment rating. The Claimant will contend that he is permanently

and totally disabled and that his attorney is entitled to an appropriate attorney's fee."

The attorney for Respondent No. 1 wrote to the administrative law judge on July 1, 2002:

Please accept this letter as my Entry of Appearance on behalf of the Respondents in connection with the captioned Workers' Compensation Case. It is my understanding that Eddie Walker has requested a hearing on the issue of the Claimant's entitlement to permanent total disability benefits. The Respondents will need to take the Claimant's deposition to evaluate whether Mr. Osborne may be entitled to permanent total disability benefits. If the matter has already been set for Pre-Hearing Conference, please advise as to the date and time it will be held.

Claimant's Exhibit 4 is a cover sheet of the claimant's deposition, taken August 21, 2002.

Counsel for Respondent No. 1 wrote to the administrative law judge on March 2, 2004:

Enclosed you will find the Respondents' Response to Pre-Hearing Questionnaire for use in connection with the captioned workers' compensation claim which is scheduled for Pre-Hearing Conference on March 11, 2004. Please note that the Respondents agree that Mr. Osborne is permanently and totally disabled as a result of the compensable injury of May 22, 2001. It may very well be appropriate to have the Death and Total Disability Bank Fund joined as a party. Although it is irrelevant to Bekaert Corporation and Liberty Mutual because of the \$75,000.00 statutory cap on permanent disability benefits, this compensable injury occurred after the Claimant's 60th birthday so

there may be an issue of the application of A.C.A. §11-9-522(f)(1).

I am, by copy of this letter, forwarding a copy of the enclosed Response to Pre-Hearing Questionnaire to Eddie Walker. Thank you for your attention to this matter.

A pre-hearing conference was held on August 16, 2004, and a pre-hearing Order was filed on August 16, 2004. According to the pre-hearing order, the claimant contended that he was permanently and totally disabled. The claimant alternatively contended that "if for some reason the Commission determines that he is not permanently and totally disabled, he is entitled to permanent disability greatly in excess of his impairment rating." The claimant contended that Ark. Code Ann. §11-9-522(f)(1) "is arbitrary and has no rational basis. The claimant will contend that there is no legitimate purpose to be served by the statute as written and that it discriminates against a certain class of employees based upon age and is therefore unconstitutional." The claimant contended that his attorney was entitled to fees for legal services. The claimant contended that he had been paid at an inappropriate compensation rate of \$405 per week, and that his compensation rate should be established based upon his wage records.

Respondent No. 1 contended that it had voluntarily accepted and paid all compensation benefits to which the claimant was entitled. Respondent No. 1 specifically agreed that the claimant was "permanently and totally disabled as a result of his compensable injury." Respondent No. 1 contended that the only dispute between the parties was whether the claimant's total disability rate was \$405 per week or \$410 per week. Respondent No. 1 contended that \$405 per week was the proper compensation rate for both temporary and permanent total disability benefits. Respondent No. 1 denied that the claimant's attorney was entitled to fees for legal services, "except to the extent if the Commission may ultimately determine that the appropriate compensation rate if (sic) higher than \$405.00 per week."

Respondent No. 2, Second Injury Fund, contended that it was "willing to accept the claimant as permanently and totally disabled. Additionally, the Trust Fund will rely on Ark. Code Ann. §11-9-522 to limit its liability."

Respondent No. 2 contended that Respondent No. 1 must pay the anatomical rating prior to payment of permanent total disability benefits, and that Respondent No. 1 was not

entitled to credit for payment of the rating against its \$75,000 maximum liability.

According to the August 16, 2004 pre-hearing order, the parties agreed to litigate the following issues:

1. Extent of permanent disability.
2. Constitutionality of Ark. Code Ann. §11-9-522(f)(1).
3. Claimant's current compensation rate.
4. Death & Permanent Total Disability Trust Fund's liability.
5. Attorney's fees.

The administrative law judge corresponded with the parties on October 11, 2004:

It is my understanding from the various pieces of correspondence I have received from each of you as well as the pre-hearing filings that all parties agree and stipulate that the claimant is permanently and totally disabled and is entitled to the maximum compensation rate for the year 2001 in the amount of \$410.00 per week for total disability. The only issue to be litigated at this time is the constitutionality of Ark. Code Ann. §11-9-522(f)(1). I am requesting that each of you submitted (sic) simultaneous briefs on this issue to be due January 7, 2005....

I am cancelling the hearing scheduled for October 20, 2004, at 11:00 a.m. and will remove this case from my hearing docket. This case will be shown submitted on the record as of January 7, 2005....

The administrative law judge found, in pertinent part:

6. The claimant is permanently and totally disabled as a result of his compensable injuries.

9. I find that Ark. Code Ann. §11-9-522(f)(1) is not unconstitutional.

10. I find that Respondents No. 1 should be given credit for the payment of the claimant's permanent anatomical impairment against the first \$75,000 of permanent and total disability benefits....

11. Respondents No. 1 have controverted the claimant's status of being permanently and totally disabled....

12. That the claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

All of the parties appeal to the Full Commission.

II. ADJUDICATION

A. Credit

Ark. Code Ann. §11-9-502 describes Limitations on compensation - Exceptions.:

(a) The benefits shall be paid for a period not to exceed four hundred fifty (450) weeks of disability, except that this limitation shall not apply in cases of permanent total disability or death.

(b)(1) For injuries occurring on and after March 1, 1981, the first seventy-five thousand dollars (\$75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.

(2) An employee or dependent of an employee who receives a total of seventy-five thousand dollars (\$75,000) in weekly benefits shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.

Ark. Code Ann. §11-9-519(a) provides that "In case of total disability, there shall be paid to the injured employee during the continuance of the total disability sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of his or her average weekly wage."

The administrative law judge found in the present matter, "Respondents No. 1 should be given credit for the payment of the claimant's permanent anatomical impairment against the first \$75,000.00 of permanent and total disability benefits." The Full Commission affirms this finding. The Full Commission has adjudicated this issue in Thomas v. Legacy Insurance Services, Workers' Compensation Commission F100487 (May 4, 2005). In that case, the Full Commission affirmed an administrative law judge's finding that a respondent-employer was entitled to a credit for the amount of permanent anatomical impairment rating against the first \$75,000 of permanent and total disability benefits Respondent No. 1 must pay to the claimant. The Full Commission did not agree with the Fund's argument that anatomical impairment benefits paid by the respondent-employer could not be considered toward the \$75,000 cap. We held:

[W]hen a determination of permanent total disability has been made, the benefits paid by a respondent after the end of the healing period are classified as permanent and total disability benefits under Ark. Code Ann. §11-9-502(b). The statute then provides, "all benefits in excess of seventy-five thousand dollars shall be payable from the Death and Permanent Total Disability Trust Fund."

Likewise in the present matter, the Full Commission finds that Respondent No. 1 is entitled to a credit for the permanent partial disability benefits it has paid. We therefore affirm this finding by the administrative law judge.

B. Controversion

Ark. Code Ann. §11-9-715(a)(2)(B)(Repl. 1996) provides that whenever 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 the claimant's attorney. Whether or not a particular claim is controverted is a question of fact for the Commission.

Aluminum Co. of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988). The mere fact that a

respondent 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).

The administrative law judge found in the present matter, "Respondents No. 1 have controverted the claimant's status of being permanently and totally disabled." The Full Commission reverses this finding. The parties stipulated that the claimant sustained compensable injuries to his left leg and hip on May 22, 2001. The parties stipulated that the claimant's healing period ended on May 22, 2002. On May 24, 2002, Dr. Schroeder noted that the claimant had undergone a traumatic amputation involving his left lower extremity. Dr. Schroeder assigned the claimant a 45% whole-person impairment rating.

Respondent No. 1 cites Ark. Code Ann. §11-9-501(d)(2):

(A) The permanent partial disability rate provided herein shall also apply to scheduled permanent injuries except those resulting in amputation or permanent total loss of use of a member.

(B) The permanent partial disability rate for amputation or permanent total loss of use of a member shall be the same as the employee's total disability rate as specified in subsection (b) of this section, subject to the maximum as set forth in subdivision (b)(4) of this section.

The parties stipulated that temporary total disability compensation was paid. Respondent No. 1 states on appeal that, after the claimant's healing period ended on May 22, 2002, Respondent No. 1 continued to pay benefits at the claimant's total disability rate. On June 7, 2002, the claimant contended that he was permanently and totally disabled, and the claimant's attorney asked that a hearing be set. Counsel for Respondent No. 1 informed the administrative law judge on July 1, 2002 that Respondent No. 1 was investigating the claimant's entitlement to permanent total disability. The record indicates that the claimant's deposition was taken in August 2002.

No further action of record was taken until March 2, 2004, at which time Respondent No. 1 explicitly agreed that the claimant was permanently and totally disabled. The Full Commission recognizes that the claimant contended at an August 16, 2004 pre-hearing conference that he was permanently and totally disabled. Respondent No. 1 again specifically agreed that the claimant was permanently and totally disabled. On October 11, 2004, the administrative law judge determined that "the only issue to be litigated at this time is the constitutionality of Ark. Code Ann. §11-9-

522(f)(1).” The facts of the present case do not demonstrate that litigation was necessary in order to establish the claimant’s right to permanent total disability. The Full Commission therefore reverses the administrative law judge’s finding that Respondent No. 1 “controverted the claimant’s status of being permanently and totally disabled.”

C. Constitutionality

Ark. Code Ann. §11-9-522(f) (Supp. 1999) provides:

(1) Permanent total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.

(2) The purpose and intent of this subsection is to prohibit workers’ compensation from becoming a retirement supplement.

The administrative law judge found in the present matter, “I find that Ark. Code Ann. §11-9-522(f)(1) is not unconstitutional.” The Full Commission affirms this finding. Statutes are presumed to be constitutional, and the burden of proving otherwise is placed on the party challenging the legislative enactment. Golden v. Westark

Community College, 333 Ark. 41, 969 S.W.2d 154 (1998). The Supreme Court in Golden interpreted the constitutionality of Ark. Code Ann. §11-9-522(f) as written in 1996:

(1) Any permanent partial disability benefits payable to an injured worker age sixty-five (65) or older shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker received or is eligible to receive from a publicly or privately funded retirement or pension plan but not reduced by the employee's contributions to a privately funded retirement or pension plan.

(2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

The Court held in Golden:

We reverse the decision of the Commission and the Court of Appeals on the constitutional point and hold that §11-9-522(f) violates the Equal Protection Clause of the United States Constitution because the justification for the age-based classification for groups receiving both workers' compensation benefits and social security retirement benefits is not rationally related to a legitimate government purpose. Accordingly, §11-9-522(f) is void on its face and of no effect.

The legislature revised §11-9-522(f) in 1999, deleting the offset provisions which the Court found to be unconstitutional. The Full Commission does not see a valid equal protection argument in the present matter, in that the 65 year old claimant is not being treated differently than

those similarly situated. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that Ark. Code Ann. §11-9-522(f)(1) (Supp. 1999) is not unconstitutional. We affirm the administrative law judge's finding that Respondent No. 1 is entitled to a credit for payment of the claimant's permanent anatomical impairment against the first \$75,000 of permanent and total disability benefits Respondent No. 1 must pay. The Full Commission reverses the administrative law judge's finding that Respondent No. 1 controverted the claimant's permanent total disability status; therefore, we reverse the administrative law judge's award of an attorney's fee on the permanent total disability benefits which Respondent No. 1 voluntarily accepted and paid.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.