

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312876

JIMMY BARK, EMPLOYEE	CLAIMANT
RHEEM MANUFACTURING, EMPLOYER	RESPONDENT NO.1
OLD REPUBLIC INSURANCE COMPANY, CARRIER	RESPONDENT NO.1
SECOND INJURY FUND	RESPONDENT NO.2

**OPINION FILED MAY 16, 2008**

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

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

Respondent represented by HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas; however, did not present at the hearing.

Respondent No. 2 represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed June 5, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The opinion filed by the Court of Appeals on December 20, 2006 is final.

2. The claimant has failed to prove that the Second Injury Fund controverted his entitlement to the correct compensation rate; therefore, the Second Injury Fund is not liable for payment of a controverted attorney fee.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion which affirms and adopts the opinion of the Administrative Law Judge finding that the Second Injury Fund did not controvert the difference between the \$261.00 compensation rate initially paid by the Second Injury Fund and the \$380.00 rate to which the claimant was eventually found entitled. After conducting a de novo review of the record, I find that the Administrative Law Judge's opinion should be reversed and the Second Injury Fund found to have controverted the rate differential, with the Second Injury Fund being responsible for a maximum attorney's fee thereon.

The salient facts of this case are as follows. Respondent No. 1 accepted liability for a 10% impairment rating for the claimant's admittedly compensable injury and the Second Injury Fund accepted liability for permanent total disability benefits, payment from the Fund to begin on July 21, 2005. Claimant's attorney requested an increase in the weekly workers' compensation rate from \$261.00 to

\$380.00 per week and requested that the Second Injury Fund take a position as to the payment of permanent total disability benefits at the higher rate. On February 22<sup>nd</sup>, 2005, the Second Injury Fund took the following position:

The Fund is not due to initiate weekly benefits for permanent total disability until July 21, 2005. Hopefully, by then the issue will be settled (assuming neither party appeals your decision). If the issue is on appeal at the time of our takeover of weekly payments, we will make a decision at that time whether to pay at the rate contended by Respondent No. 1, or to pay the higher rate contended by the claimant, subject to the taking of a credit against future benefits if it is ultimately determined that the lower rate is the correct one. (emphasis added.)

On February 28, 2005, the case went to a hearing before the Administrative Law Judge on the claimant's entitlement to the rate differential. The Second Injury Fund waived it's appearance at the hearing and voluntarily did not participate in the appeals process which extended through the Arkansas Court of Appeals.

As promised in the letter of February 22<sup>nd</sup>, 2005, the Second Injury Fund made it's decision on the workers'

compensation rate on July 21, 2005. The Fund chose the lower rate. At this time, the case was on appeal to the Full Commission. After the Court of Appeals ruled in favor of the claimant on the increase in the workers' compensation rate, the Second Injury Fund made payment of the difference on January 28, 2007, in the amount of ten thousand forty two dollars (\$10,042.00). In response to a claim for a controverted attorney's fee by claimant's attorney on this award, the Fund denied liability and this litigation ensued.

The claimant's attorney was granted an attorneys fee to be paid by the claimant on the permanent total disability benefits which were not controverted in accordance with Ark. Code Ann. §11-9-715(a)(2)(C)(i).

Ark. Code Ann. §11-9-715(a)(2)(A) provides for the payment of attorney's fees from the Second Injury Fund on compensation controverted and awarded. The mere failure of an employer or compensation carrier to pay compensation benefits in a timely manner does not in and of itself amount to controversion. Horseshoe Bend Builders v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976). However, unreasonable delay in

the payment of claims will justify a finding of controversion and an award of attorney's fees. Ellis v. Clayton Shoe Co., 267 Ark. 882, 595 S.W.2d 229 (1979).

The Arkansas Workers Compensation Act begins with an unequivocal statement that the primary purpose of the workers' compensation law is "to pay timely...benefits to all legitimately injured workers". Ark. Code Ann. §11-9-101. The Act ends with an identical statement by the Seventy-Ninth General Assembly (Act 796 of 1993). Ark. Code Ann. §11-9-1001. The Arkansas Court of Appeals, in Ellis v. Clayton Shoe Co., *supra*, expounded on the public policy involved, as follows:

Over the forty year life span of the Workers' Compensation Act, the legislature has repeatedly expressed the public policy in this state as being that claims of working men and women arising from work related injuries shall be handled expeditiously at every stage in the process. . . .

....

Making an employer liable for the attorney's fees of the employee serves legitimate social purposes. Among them are discouraging oppressive delay in recognition of liability, deterring

arbitrary or capricious denial of claims, and insuring the ability of necessitous claimants to obtain adequate and competent legal representation. (emphasis added.)

In furtherance of the policy objectives discussed above, a claim should be found to have been controverted when payments are delayed without a reasonable basis. In this particular case, the Second Injury Fund delayed payment of benefits for one-and-one-half years and owed in excess of ten thousand dollars (\$10,000.00) when payments were finally made. What was the Second Injury Fund's justification for this delay? The Second Injury Fund takes the position that it was reasonable for the Fund to defer payment of benefits until such time as the Court of Appeals made a determination as to the appropriate amount of benefits to be paid. If this were the law, respondents could simply ignore a claim, wait on a decision, and then pay an award without having controverted the claim or incurring attorneys fees. Benefits could be delayed for years without penalty. This certainly would not promote the public policy objectives of the Act-to

promote timely payment of benefits and discourage unreasonable delay.

The Administrative Law Judge's opinion, adopted by the majority, denied this claim asserting that the courts have recognized that one of the purposes of an attorney fee statute is to put the economic burden of litigation on the party that makes the litigation necessary. The Administrative Law Judge said that the Fund did not make the litigation necessary and that the initial hearing and the subsequent appeals would have proceeded regardless of the Fund's position.

The Fund could have avoided any claim for attorneys fees if it had accepted the claimants position on July 21, 2005. Instead, the Fund chose to adopt the position of the Respondent No. 1. The Fund had a vested interest in the outcome of the litigation, i.e., liability for a significant increase in weekly benefits for permanent total disability. Likewise, Respondent No. 1 had exposure for an increase in weekly benefits for temporary total disability and permanent impairment. While the Fund had the bulk of the

exposure, the proof required was identical for both parties. Either one could have represented the interests of the other. When the Fund rejected the claim and allowed Respondent No. 1 to represent it's interests, it assumed equal responsibility for the litigation. It is of no consequence that the Fund voluntarily failed to appear at the hearing and did not participate in the appeals process.

In it's brief, the Second Injury Fund presents two "procedural" defenses. Firstly, the Fund argues that the claimant's attorney should have raised the controversion issue at the hearing on February 28, 2005, in order to avoid piecemeal litigation and that, in failing to do so, the claimant is now precluded from raising the issue under "the law-of-the-case" doctrine. The fact of the matter is that the issue of Fund controversion was not ripe for a determination on February 28, 2005. On the day of the hearing, the Fund was not yet obligated to pay benefits and was indicating that it would make a decision on the rate to be paid by July 21, 2005. On the day the Fund took a position adverse to that of the Claimant, the case was on

appeal to the Full Commission. It was impossible for the claimant to pursue the issue at this point in time. The issue could not be raised until the Court of Appeals issued it's ruling and the first round of litigation was completed. This is when the claimant' attorney raised the issue. The Fund's argument would have required claimant's attorney to have prosecuted a claim at a time when it did not even exist.

The second "procedural" defense argued by the Fund is that the claimant's attorney made an "election of remedies" when he asked for and received attorney's fees under Ark. Code Ann. §11-9-715(a)(2)(C)(i) and that, because of that election, he is now prohibited from obtaining attorney's fees under Ark. Code Ann. §11-9-715(a)(2)(A). The Fund contends that these are "two inconsistent remedies of the same claim" and that to recover under both statutes would amount to receiving "more than one recovery on inconsistent remedies".

Subsection 715(a)(2)(C)(i) provides for the payment of attorney' fees by the claimant when benefits have

not been controverted but valuable legal services have been rendered on behalf of the claimant. Many times, claimant's attorneys will do a considerable amount of work to establish a claim but the claim will be accepted by the respondent and the claim will not be controverted. Subsection 715(a)(2)(i) is designed to allow a claimant to pay his attorney for the work performed. In this case, the claimant's attorney established a permanent total disability claim for the claimant which was good enough to be accepted by the Second Injury Fund. The claim was not controverted and the Fund owed no fees on these benefits. The Administrative Law Judge approved the fee saying that "the Claimant attorney has provided valuable legal services, without which the Claimant would not likely received the benefits to which he has been determined entitled". Claimant's attorney was awarded a fee out the claimant's money in order to compensate the attorney for his efforts in obtaining the permanent total disability benefits.

Subsection 715(a)(2)(A) provides for the payment of attorney's fees from the Second Injury Fund when the Fund

controverts benefits. In this case, the controverted benefits were those representing the difference between the workers' compensation rate requested by the claimant and the one accepted and paid by the Fund.

The two statutes provide for the payment of fees under two different circumstances, both of which can, and do, exist in this case. There were two separate and distinct claims, each of which was to be dealt with differently with reference to the payment of attorney's fees. The first subsection allowed the claimant to pay fees on the non-controverted permanent total disability benefits. The second subsection provided for payment from the Fund on the controverted rate differential. Contrary to the allegations of the Fund, there is nothing inconsistent about making simultaneous claims under these two attorney fee statutes. Certainly, it would be no more inconsistent than making simultaneous claims for a controverted attorney's fee on disability benefits and fees for prevailing on appeal (Ark. Code Ann. §11-9-715(b)) or fees for a controverted change of physician request (Ark. Code Ann. §11-9-715(c)(1)). These

combinations of attorney fee claims are awarded simultaneously by the courts and the Commission on a regular basis.

In conclusion, the Administrative Law Judge was correct in saying that one of the purposes of the controverted attorney's fee statute is to place the economic burden of the litigation on the party causing the litigation, and the Funds complicity in this regard has been demonstrated. However, there is another equally important purpose in imposing attorney's fees and that is to discourage unreasonable delay in the payment of benefits. A ruling in favor of the Fund in this case would frustrate that purpose. The Fund had all the information it needed to determine the correct rate on July 21, 2005 and it chose to ignore that information and join with Respondent No. 1 in controverting this claim. For the next year and one half, the Fund held up payment and then denied responsibility for the statutory attorney's fees designed to compensate the claimant's attorney for procuring those very benefits in the Court of Appeals.

Therefore, based on a de novo review of the record, I find that the Second Injury Fund controverted the claimant's entitlement to the difference in the weekly benefit rate which was accepted and paid by the Fund on July 21, 2005 and the rate awarded by the Court of Appeals on December 20, 2006.

I respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner