

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F109650/F412000

RANDY E. LEWIS, EMPLOYEE	CLAIMANT
AUTO PARTS & TIRE, EMPLOYER	RESPONDENT NO. 1
ZENITH INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED APRIL 1, 2008**

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent No. 2 appeals the decision of the Administrative Law Judge finding that the claimant's attorney is entitled to a lump sum attorney fee by the Second Injury Fund. Based upon our de novo review of the record, we find that the claimant's attorney is not entitled to a lump sum attorney's fee. We also find that the Second Injury Fund as well as the respondent carrier are not

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responsible for an attorney fee awarded by the Full Commission in its decision of April 3, 2007.

The claimant previously filed a claim contending that he was permanently totally disabled as a result of a compensable injury. At a pre-hearing conference on February 15, 2005, the Second Injury Fund accepted liability in the amount of 45% to the body as a whole. Prior to the hearing the Second Injury Fund accepted liability for permanent total disability benefits. However, the Second Injury Fund only acknowledged liability for permanent total disability benefits until the claimant's 65<sup>th</sup> birthday in accordance with A.C.A. §11-9-522(f). As a result, a hearing was conducted on May 23, 2005, at which time the claimant contended that the provisions of A.C.A. §11-9-522(f) limiting permanent total disability benefits until age 65 were unconstitutional. The claimant also sought payment of various attorney fees. The claimant's attorney contended that the Second Injury Fund had controverted the claimant's entitlement to benefits in excess of 45% to the body as a whole. In addition, the claimant's attorney contended that

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he was entitled to a fee from the claimant on the 45% wage loss initially accepted by the Second Injury Fund.

In an opinion filed June 21, 2005, an Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that A.C.A. §11-9-522(f) was unconstitutional; therefore, the Second Injury Fund was ordered to pay permanent total disability benefits until the claimant reached age 65. The Administrative Law Judge also awarded the claimant's attorney various attorney fees. The Administrative Law Judge found that the claimant's attorney was entitled to an attorney fee from the claimant in an amount of 5% on the 45% wage loss previously accepted by the Second Injury Fund. In addition, the Administrative Law Judge found that the Second Injury Fund had controverted the claimant's entitlement to all benefits in excess of 45% to the body as a whole. Accordingly, the claimant's attorney was awarded a maximum attorney fee on benefits in excess of 45%, one-half to be paid by the claimant and one-half to be paid by the respondent. The June 21, 2005 opinion was appealed to the Full Commission which in an opinion filed

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April 13, 2006, affirmed and adopted the June 21, 2005 opinion. The Full Commission's decision was appealed by the claimant to the Arkansas Court of Appeals. Relying upon their decision in Osborne v. Bekaert Corporation, 97 Ark. App. 147 , \_\_\_ S.W.3d \_\_\_ (2006) that A.C.A. §11-9-522(f) was unconstitutional, the Court reversed the Full Commission. In an opinion filed April 13, 2007, the Full Commission on remand in accordance with the Court of Appeal's decision reversed the original opinion of June 21, 2005. Subsequent to that decision, the claimant's attorney filed a petition requesting a lump sum of the attorney fee due him from the Second Injury Fund. The claimant's attorney was not requesting a lump sum payment of the claimant's portion of his attorney fee. In lieu of a hearing, the parties agreed to submit the case for consideration on briefs. The Administrative Law Judge found that the claimant's attorney was entitled to a lump sum attorney fee but declined to address the issue regarding an attorney fee awarded by the Full Commission to the claimant for prevailing on appeal in its April 13, 2007, opinion. This issue was preserved for

the Full Commission to address in the appeal presently before us.

The Second Injury Fund contends that claimant's attorney's request for a lump sum payment of his attorney fee is barred by the doctrine of res judicata. The doctrine of res judicata bars claims where there has been a final adjudication on the merits of an issue on all matters litigated and those matters which might have been litigated. Wells v. Arkansas Public Service Commission, 272 Ark. 481, 616 S.W.2d 718 (1981). The Second Injury Fund contended that the request for payment of a lump sum attorney fee is a matter which should have been litigated at the time of the original hearing on May 23, 2005.

We find that the res judicata does not apply to the facts of this case. In support of its contention the Second Injury Fund relies primarily upon two decisions, the first is a decision by the Full Commission in Gerrald v. Douglas Tobacco Products, Inc., Full Commission opinion filed June 1, 2000 (Claim No. E417422). In that particular case, a claimant's attorney also requested that the balance

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of his attorney fee be paid in a lump sum pursuant to A.C.A. §11-9-716. Citing the decision in Gwin v. R.D. Hall Tank Company, 10 Ark. App. 12, 660 S.W.2d 947 (1983), the Commission noted that there was a potential question as to whether or not the request for a lump sum was barred by the doctrine of res judicata unless it was raised before the administrative law judge at the time of the initial hearing. In Gerrald, the Full Commission found that the doctrine of res judicata was not applicable because it was an affirmative defense and was not timely raised by the Second Injury Fund. Accordingly, the request for payment of a lump sum attorney fee was granted.

In Gwin, the Commission had found that a particular claimant was permanently totally disabled and awarded his attorney the maximum attorney fee. However, the award made no provision for the manner in which the attorney fee was to be paid. The carrier made payments to the claimant's attorney in quarterly installments and the attorney subsequently filed a petition requesting that his fee be paid bi-weekly. No request for a lump sum payment was

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made at that time. An administrative law judge entered an order directing that the attorney fee be paid on a bi-weekly basis. Approximately one year later the attorney filed another petition requesting that the balance of his fee be paid in a lump sum. The Court of Appeals in that case found that the petition was barred by res judicata. The court noted that the manner in which the fee was to be paid was barred by res judicata.

In support of his contention that the doctrine of res judicata does not apply, the claimant's attorney relies primarily upon the decision in Seward v. The Bud Avants Company, 65 Ark. App. 88, 985 S.W.2d 332 (1999). In that particular case, claimant was found to be permanently totally disabled and the maximum attorney fee was awarded to be paid "in accordance with A.C.A. §11-9-715, §11-9-716, §11-9-801, and WCC Rule 10". Following that opinion, the workers' compensation carrier became insolvent and the Arkansas Property & Casualty Insurance Guaranty Fund assumed the carrier's obligation. The Guaranty Fund requested a hearing to determine the amount of attorney fee awarded and

for a determination as to whether the claimant's share should be deducted from the weekly benefit that the Guaranty Fund was obligated to pay. One of the issues raised was whether this request was barred by res judicata. The Full Commission found that res judicata was not applicable because while the original opinion did order an attorney fee to be paid in a lump sum, it did not calculate a specific amount; therefore, the subsequent order determining the amount of fee and the way it was to be paid was a collateral matter which had not been previously litigated. The Commission's decision was appealed to the Arkansas Court of Appeals which affirmed the Commission's decision. In doing so, the court noted that the original opinion was not final and appealable as to the specific amount of the attorney fee. The court went on to note that the total fee due to claimant's attorney could not have been determined until the claimant was no longer receiving benefits. Therefore, the doctrine of res judicata did not apply.

In this particular case, we find based upon the decision in Seward that the doctrine of res judicata is not

applicable. Here, the original administrative law judge opinion filed June 21, 2005 ordered a maximum statutory attorney fee on all permanent total disability benefits in excess of the 45% previously accepted by the Second Injury Fund. However, the benefits to be paid claimant and consequently to claimant's attorney were only awarded until the claimant reached age 65 pursuant to the provisions of A.C.A. §11-9-522(f). The Court of Appeals' subsequent decision finding that A.C.A. §11-9-522(f) was unconstitutional increased the potential benefits and attorney fee due by the Second Injury Fund. Thus, the amount of lump sum attorney fee due from the Second Injury Fund could not properly be calculated until after the ruling from the Court of Appeals. With respect to this issue, we also note that in the Gerrald decision there was a specific order by an administrative law judge ordering payment of an attorney fee on a biweekly basis. It was after this specific award became final that claimant's attorney in that case requested a lump sum payment. For that reason, the Arkansas Court of Appeals found that the request was barred

by the doctrine of res judicata. In this particular case, the original June 21, 2005 opinion did not address the manner of payment to claimant's attorney and it could not have been determined at that time given the issue regarding the constitutionality of A.C.A. §11-9-522(f). Accordingly, we find that the doctrine of res judicata does not bar the claimant's attorney's petition for payment of a lump sum attorney fee.

What must be determined now is whether or not the claimant's attorney is entitled to a lump sum attorney fee. The statute regarding payment of a lump sum attorney fee is codified at A.C.A. §11-9-716 which provides that the Commission is authorized to approve lump sum attorney fees for legal services rendered in respect to a claim. The lump sum fees are allowed even though an employee is to be paid on an installment basis. The statute also indicates that any approved fee is to be discounted at a rate provided in A.C.A. §11-9-804.

Initially, the Second Injury Fund contends that there is no specific statutory authority authorizing a lump

sum payment of an attorney fee against the Second Injury Fund. While it is true that the courts have held that the term "employer" cannot be interpreted as to include the Second Injury Fund for purposes of awarding an attorney fee under the same provisions of §11-9-715, we note that the lump sum attorney fee statute codified at A.C.A. §11-9-716 does not indicate that it only applies to employers. The statute does not mention employers or any other respondent by name. To the contrary, it only indicates that the Commission is authorized to approve lump sum attorney fees in cases. In our opinion, however, this statute does not authorize lump sum attorney fees paid by the Second Injury Fund.

Ark. Code Ann. §11-9-715(2) (A) provides:

Whenever the commission finds that a claim against the Treasurer of the State, as custodian of the Second Injury Trust Fund, has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid from the fund, in addition to compensation awarded, and the fees shall be allowed only on the amount of compensation controverted and awarded from the fund.

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Under the provisions of Ark. Code Ann. §11-9-716, the Commission may approve lump sum attorney fees at a discounted rate provided for in Ark. Code Ann. §11-9-804. Ark. Code Ann. §11-9-716 states:

(a) The Workers' Compensation Commission is authorized to approve lump-sum attorney's fees for legal services rendered in respect of a claim before the commission.

(b) The lump-sum attorney's fees are allowable notwithstanding that the award of compensation to the injured employee is to be paid on an installment basis.

(c) Lump-sum attorney's fees, if approved by the commission, shall be discounted at the rate provided in § 11-9-804, as that provision may be amended from time to time.

Specifically, Ark. Code Ann. §11-9-804 provides:

Whenever the Workers' Compensation Commission determines that it is for the best interest of the parties entitled to compensation, and after due notice to all parties in interest of a hearing, the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at ten percent (10%) discount, compounded annually.

It is clear that Ark. Code Ann. §11-9-804 only includes liability of the employer. This statutory section allows the employer to discharge its liability by reducing future payments of compensation to present value. The employer is given the right to a hearing to determine whether or not the lump sum would cause "... a substantial adverse effect on the continuing economic viability of the employer...". The statute also requires the use of a mortality table to determine the employer's liability to the claimant.

Ark. Code Ann. §11-9-716, on the other hand, does not provide a hearing to the employer, nor does it consider the best interests of the parties. It merely requires that the Commission approve the lump sum payment and requires that the fee shall be discounted.

In this case, the Second Injury Fund has accepted the claimant as permanently and totally disabled. As a result, the claimant is entitled to receive benefits throughout his lifetime. The period of entitlement is infinite. The termination of the claimant's benefits cannot

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be calculated but depend on undeterminable events such as the claimant's death or return to gainful employment. As a result, the amount of payments the claimant will receive are undeterminable. It goes without saying that the amount of the claimant's attorney fee is also unascertainable. In Seward, the Court stated:

As long as the claimant is receiving benefits, the attorney is entitled to a fee in an amount not to exceed a statutorily specified percentage of the amount of benefits received by the claimant. Ark. Code Ann. §11-9-715(1)(B). Therefore, until the claimant is no longer receiving benefits, the total amount of the fee due to a claimant's attorney cannot be determined.

The Court refused to require the claimant to pay his one-half attorney fee for permanent total disability in a lump sum.

Ark. Code Ann. §11-9-715(a)(2)(A) is the only provision in the Arkansas Workers' Compensation Act which authorizes attorney fees to be paid from the Second Injury Fund and this section clearly does not allow a claimant to

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receive benefits after his death. Ark. Code Ann. §11-9-704(e) (1) states:

No compensation for disability of an injured employee shall be payable for any period beyond his or her death.

Ark. Code Ann. § 11-9-704(c) (3) specifically provides that "Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly." In Lawhon Farm Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998) the Supreme Court stated:

Strict construction means narrow construction. Arkansas Conference Seventh Day Adventists v. Benton City Board of Equalization, 304, Ark. 95, 800 S.W.2d 426(1990), and Thomas v. State, 315 Ark. 79, 864 S.W.2d 835(1993), we wrote that strict construction requires that nothing to be taken as intended that is not clearly expressed. The doctrine of strict construction is to use the plain meaning of the language employed. Holaday v. Fraker, 323 Ark. 552, 915 S.W.2d 280(1996). Even when statutes are to be strictly constructed, however, they must be construed in their entirety, harmonizing each subsection where possible. MenArk Pallet Co. v. Lindsey, 558 Ark. App. 309, 950 S.W.2d 468 (1997).

When we apply the principles of strict construction to the applicable statutory provisions of the Arkansas Workers' Compensation Act, we cannot find that the Second Injury Fund may be ordered to pay lump sum attorney fees. In Second Injury Trust Fund v. Furman, 62 Ark. App. 194, 972 S.W.2d 255 (1998), the Court stated that "... It cannot reasonably be contended that the terms 'employer' or 'carrier' include the Second Injury Trust Fund because the legislature specifically names the Second Injury Trust Fund when it speaks of that entity..." The Second Injury Fund is not named in Ark. Code Ann. §11-9-716 or in §11-9-804 nor can it be considered an employer. Therefore, we find that there is no statutory authority to award the claimant's attorney a lump sum attorney fee when the Second Injury Fund is responsible for permanent and total disability benefits. Accordingly, we reverse the decision of the Administrative Law Judge.

The next issue that must be addressed is the award of the attorney fee by the Full Commission on remand from the Court of Appeals. The respondent contends that it is not

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responsible for the attorney fee as it was not a party to the issue appealed by the claimant and the Second Injury Fund, i.e. the constitutionality of Ark. Code Ann. §11-9-522(f). In Furman, the Court stated that attorney fees cannot be awarded unless specifically provided for by statute. The Supreme Court specifically stated:

On reading this statute, it is clear that this subsection does not mention the Second Injury Fund, nor can it be construed so as to be included definitively within the terms "employer or carrier." We reject Furman's argument to interpret the statute to hold the Fund liable for attorney's fees on appeal in deference to our longstanding rule that attorney's fees cannot be awarded unless specifically provided for by statute. *Arkansas Okla. Gas Corp. v. Waelder Oil & Gas, Inc.*, 332 Ark. 548, 966 S.W.2d 259(1998).

We respectfully invite the General Assembly to consider this matter and enact such legislation as may be appropriate to address the discrepancy in section 119715, which currently provides for attorney's fees from the Fund at the hearing level, but makes no similar provision for such fees on appeal.

In Firestone Tube Company v. Potts, \_\_\_ Ark. App. \_\_\_, S.W.3d \_\_\_ (October 31, 2007), the Court of Appeals

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reversed and remanded a decision by the Full Commission after we assessed the attorney fee to the respondent employer/carrier. The Court found that there was no indication that the fees were or could be assessed against the employer. The Court stated "... only that they could not be assessed against the Fund." In the Potts case, the appeal was between the claimant and the Second Injury Fund. Likewise, in this case the respondent did not appeal the decision regarding the constitutionality of Ark. Code Ann. §11-9-522(f). The appeal was between the claimant and the Second Injury Fund. Therefore, the respondent is not responsible for the attorney fee awarded by the Full Commission on April 13, 2007. The Second Injury Fund is likewise not responsible.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

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Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. After a de novo review of the record, I find that the claimant is entitled to a lump sum attorney fee for fees owed to him by the Second Injury Fund. However, based on the Court of Appeals decision in Firestone Tube Co. v. Potts, \_\_\_\_ Ark. App. \_\_\_\_, S.W.3d \_\_\_\_ (October 31, 2007) which found that due to a discrepancy in Ark. Code Ann. §11-9-715, the Second Injury Fund could not be held liable for attorney fees on appeal, even if the Second Injury Fund was the sole instigator and losing party, I must respectfully concur with the majority's finding that the Second Injury Fund cannot be held liable for the \$500 attorney fee awarded to the claimant by the Full Commission on appeal.

The Supreme Court stated in Second Injury Trust Fund v. Furman, 62 Ark. App. 194, 972 S.W. 2d 255 (1998):

We respectfully invite the General Assembly to consider this matter and enact such legislation as may be appropriate to address the discrepancy

in Ark. Code Ann. §11-9-715, which currently provides for attorney fees from the Fund at the hearing level, but makes no similar provision for such fees on appeal.

Due to the highly inequitable nature of the result in this case, I must strongly agree with the Supreme Court that the legislature needs to address not only the issue of the Second Injury Fund's liability for attorney fees on appeal, but the issue of the Second Injury Fund's liability for lump sum attorney fees as well. I simply cannot fathom a legislature that would require claimants unfortunate enough to be injured twice at work to bear the costs of litigation, while claimants not involved with the Second Injury Fund are not.

Attorney's fees in Workers' Compensation cases are provided by statute in Arkansas as a matter of public policy to enable injured workers to obtain the services of an attorney in settlement of controverted claims. Aluminum Co. of Am. V. Neal, 4 Ark. App. 11, 626 S.W.2d 620 (1982). The Court held in Aluminum Co. of Am.v Neal, 4 Ark. App. 11, 626 S.W.2d 620 (1982) that the General Assembly enacted §11-9-

716 to remedy the problem of attorneys failing to receive full payment for their services to a workers' compensation claimant or beneficiary, where the attorney received his compensation installments on the same schedule that benefits were paid to the recipient but where the claimant or beneficiary died or remarried prior to the attorney's receipt of the total fees awarded to him. Aluminum Co. of Am. V. Neal, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

Furthermore, the Court held in International Paper Co. v. McBride, 12 Ark. App. 400, 678 S.W.2d 375 (1984), that Ark. Code Ann. §11-9-716 and Ark. Code Ann. §11-9-715 were intended to be read together as the legislature felt strongly that the commission should be able to award lump-sum attorneys' fees. International Paper Co. v. McBride, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

Here, I find that the claimant is entitled to a lump sum attorney fee paid by the Second Injury Fund. Ark. Code Ann. §11-9-716 does not indicate that it only applies to employers. The majority's reliance on Ark. Code Ann. §11-9-804 to find that Ark. Code Ann. §11-9-716 does not apply

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to the Second Injury Fund is in error. Ark. Code Ann. §11-9-804 is not an attorney fee statute, and while it outlines how an attorney fee can be paid in a lump sum at a discount, it has nothing to do with the issue of whether or not an attorney fee could be or should be paid by the Second Injury Fund.

For the aforementioned reasons, I must respectfully concur in part & dissent in part.

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PHILIP A. HOOD, Commissioner