

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402928

STEVE POTTS, EMPLOYEE	CLAIMANT
FIRESTONE TUBE COMPANY, EMPLOYER	RESPONDENT NO. 1
OLD REPUBLIC INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JANUARY 23, 2008

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

Claimant represented by the HONORABLE AARON L. MARTIN,
Attorney at Law, Fayetteville, Arkansas.

Respondents No. 1 represented by the HONORABLE BETTY J.
HARDY, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 represented by the HONORABLE JUDY W. RUDD,
Attorney at Law, Little Rock, Arkansas.

ORDER

In the above-styled matter, the Arkansas Court of
Appeals has reversed and remanded the Full Commission's
finding that Respondent No. 1 is responsible for an

attorney's fee. *Firestone Tube Co. v. Potts*, CA07-406 (Oct. 31, 2007). Pursuant to the remand from the Court of Appeals, the Full Commission finds that Respondent No. 1 is not responsible for the attorney's fee provided for in Ark. Code Ann. §11-9-715(b) (Repl. 2002). Nor is Respondent No. 2, Second Injury Fund, liable for the attorney's fee provided for in Ark. Code Ann. §11-9-715(b) (Repl. 2002). See, *Furman v. Second Injury Fund*, 336 Ark. 10, 983 S.W.2d 923 (1999).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs.

CONCURRING OPINION

In the present matter, an Administrative Law Judge awarded the claimant temporary total disability benefits to be paid to the claimant by Firestone Tube. The Administrative Law Judge also awarded wage-loss disability benefits to be paid to the claimant by the Second Injury Fund. Firestone Tube did not appeal the

Administrative Law Judge's order. However, the Second Injury Fund appealed the wage-loss award to the Full Commission, which affirmed the Administrative Law Judge. The Full Commission awarded an attorney's fee of \$500 to the claimant's attorney for prevailing on appeal, but the order was silent as to who was responsible for the fee. The Second Injury Fund filed a motion for clarification and reconsideration, arguing that the Commission erred in awarding wage-loss disability benefits, and asking the Commission to designate which party or parties is responsible for paying the attorney's fee. The Commission denied the motion to reconsider, and ordered the Second Injury Fund to pay the attorney's fee. The Second Injury Fund then filed another motion for clarification and reconsideration, contending that it should not be responsible for the claimant's attorney's fee. In response to that motion, the Commission entered an order requiring Firestone Tube and the claimant to equally pay the attorney's fee. It is from that order that Firestone Tube appealed, and the Arkansas Court of Appeals reversed and remanded the Full

Commission's finding that Firestone Tube should pay a portion of the claimant's attorney fee.

One of the purposes of the attorney fee statute is to put the economic burden of litigation on the party that makes litigation necessary. See Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W. 2d 776 (1996). In this case, it is undisputed that the Second Injury Fund, not Firestone Tube, is the party that appealed the Administrative Law Judge's award of wage-loss disability benefits, and, as the Second Injury Fund lost the issue on appeal, the Second Injury Fund, and not Firestone Tube, should pay a portion of the claimant's attorney's fee awarded by the Full Commission. However, as the Arkansas Supreme Court has held that Ark. Code Ann. §11-9-715 (b) (1) does not authorize attorney's fees to be paid to the claimant by the Second Injury Fund where a claimant prevails against the Fund in an appeal, I must concur with the Majority's finding in this case that the Second Injury Fund cannot be held liable for the claimant's attorney fee. See Furman v. Second Injury Fund, 336 Ark. 10, 983 S.W. 2d 923 (1999).

The unfortunate result of the Majority's finding is that the economic burden of the Second Injury Fund's un-successful appeal of the Full Commission's wage-loss determination has fallen on the claimant. The claimant won before the Administrative Law Judge. The claimant won before the Full Commission. However, due to a discrepancy in the law that allows the Second Injury Fund to appeal benefits awarded to claimants without the fear of being ordered to pay even a portion of the claimant's attorney's fee if the appeal is unsuccessful, not only has the claimant been forced to endure litigation he did not instigate, the claimant has been forced to pay an attorney fee on said litigation. Here, the claimant has been ordered to pay one-half of the attorney fee awarded by the Full Commission. As the Full Commission has ordered neither Firestone Tube nor the Second Injury Fund to pay the remaining one-half of the attorney fee, I must find that not only has the claimant been forced to bear the economic burden of the Second Injury Fund's litigation, the claimant's attorney has as well.

Furthermore, as the Court of Appeals has ordered the claimant and the Second Injury Fund to pay court costs to Firestone Tube for its successful appeal of the Full Commission's order requiring Firestone Tube and the claimant to equally pay the claimant's attorney's fee, it appears that not only does the claimant have to pay an attorney fee on litigation instigated solely by the Second Injury Fund, but also has to pay court costs on litigation instigated solely by the Second Injury Fund.

The Supreme Court directly notified the legislature in the Furman case that the statutory discrepancy contained in Ark. Code Ann. §11-9-715 (b) (1) should be corrected. Due to the highly inequitable nature of the result in this case, I must strongly agree.

For the aforementioned reasons, I must regrettably concur with the Majority Opinion.

PHILIP A. HOOD, Commissioner