

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511258

ALMA HUNTSMAN, EMPLOYEE	CLAIMANT
MECHANISMS, INC., EMPLOYER	RESPONDENT NO. 1
FEDERATED MUTUAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED AUGUST 25, 2009

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

Claimant represented by the HONORABLE FLOYD M. THOMAS, JR.,  
Attorney at Law, El Dorado, Arkansas.

Respondents No. 1 represented by the HONORABLE ERIC NEWKIRK,  
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY KING,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

Respondent No. 1 appeals an administrative law judge's  
opinion filed January 29, 2009. The administrative law  
judge found that the claim had been controverted and that  
the claimant's attorney was entitled to "maximum attorney's

fees.” The administrative law judge found that attorney’s fees were “owed in a lump sum.” After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge’s opinion as modified. The Full Commission finds that the respondents controverted the claim of permanent total disability. The Full Commission finds that the claimant’s attorney is entitled to a statutory attorney’s fee, but we do not affirm the finding that attorney’s fees are owed in a lump sum.

I. HISTORY

The parties have stipulated that Alma N. Huntsman, age 56, was injured in the course and scope of his employment on October 14, 2005. The parties stipulated that Respondent No. 1 accepted the claim as compensable and issued payment for the claimant’s medical and indemnity benefits, with the claimant’s indemnity benefits initially being paid at the rate of \$375.00 per week for temporary total disability benefits and \$281.00 per week for partial disability benefits.

\_\_\_\_\_The parties have stipulated that the claimant’s healing period ended on June 20, 2006, at which time he was assessed a 15% whole-person anatomical impairment rating. The

parties stipulated that Respondent No. 1 accepted the permanent anatomical impairment rating and issued payment of the entire anatomical impairment rating, commencing on June 20, 2006.

\_\_\_\_\_The claimant's attorney wrote to the Clerk of the Commission on October 12, 2007: "Enclosed please find Form AR-C on behalf of Alma N. Huntsman, Arkansas Workers' Compensation Commission Claim No. F571258. Please accept the filing of this claim for compensation on behalf of Alma N. Huntsman. It is for additional benefits, including permanent and total disability and attorney's fees."

The claimant's attorney wrote to the Clerk of the Commission on January 8, 2008: "Please set this matter for a hearing before an Administrative Law Judge on the question of Mr. Huntsman's entitlement to receive wage loss disability." The claimant's attorney prepared a Claimant's Response To Prehearing Questionnaire on February 11, 2008. The parties have stipulated that "following payment of the permanent anatomical impairment rating, claimant's counsel submitted a Form AR-C and Prehearing Questionnaire dated February 11, 2008, seeking wage-loss disability benefits."

The parties stipulated that Respondent No. 1 "agreed to voluntary mediation in anticipation of settling the claim, and never submitted prehearing pleadings prior to the mediation in connection with the claimant's claim for wage-loss disability benefits." The parties have stipulated that "the Commission issued its Notice of Mediation Conference on April 3, 2008, and a mediation was held on May 6, 2008. The mediation did not result in an agreement being reached by the parties." The parties stipulated that "following the unsuccessful mediation, Judge Hogan scheduled a prehearing conference for June 24, 2008, which was later changed to July 22, 2008, at the request of the parties."

Counsel for Respondent No. 1 corresponded with the administrative law judge on May 22, 2008: "Enclosed please find Respondents No. 1's Prehearing Questionnaire and accompanying exhibits for the above-referenced matter. Please note that the Respondents are sending correspondence to the Death & Permanent Total Disability Trust Fund under separate cover as Respondents No. 1 are accepting the Claimant as being permanently and totally disabled...."

A pre-hearing conference was held on July 22, 2008 and a pre-hearing order was filed on July 23, 2008. According

to the July 23, 2008 pre-hearing order, a hearing date was deferred because the parties had reached agreement on several issues, to wit:

- A. The parties are stipulating to a compensation rate of \$410.00/\$308.00 based on an average weekly wage of \$614.25.
- B. The healing period ended on June 20, 2006.
- C. Respondent No. 1 has accepted the claimant as permanently and totally disabled and will issue a check to the claimant to make up the difference between benefits paid at the rate of \$375.00/\$281.00 and the agreed upon rate of \$375.00/\$308.00 along with attorney fees.

The July 23, 2008 pre-hearing order included the following language: "This case has been returned to general files. No further action will be taken unless the Office of the Clerk of the Commission, Mrs. Dorothy Jackson, is notified to reassign this case to an Administrative Law Judge."

Federated Mutual Insurance Company issued a check to the claimant on July 25, 2008 in the amount of \$15,750.00. The check indicated that the payment covered "PTD -PERM TOTAL FROM 10-06-07 TO 07-25-08." Federated Insurance issued another check to the claimant on July 25, 2008 in the amount of \$3,970.27. The check indicated that the payment covered "LUMP SUM UNDERPAYMENT OF TTD \$1244.95 UNDERPAYMENT

OF PPD \$1822.50 UNDERPAYMENT OF PTD \$1470.00 LESS ATTORNEY FEE."

Federated Insurance issued a check to the claimant on August 11, 2008 in the amount of \$7,011.53. The check indicated that the payment covered "LUMP SUM CONVERSION OF PPD RATE TO PTD RATE DURING PPD AWARD PERIOD."

A pre-hearing order was filed on October 8, 2008: "At the conclusion of the October 7, 2008, prehearing conference, it was determined that the following should be completed prior to a decision on the record in lieu of a hearing on the issue of attorney's fees: 1. This claim has been diaried for the parties' stipulations and exhibit list on or before October 31, 2008."

The claimant's attorney informed the administrative law judge on October 31, 2008, "I have reviewed the proposed Stipulation offered by Mr. Newkirk. Mr. Huntsman is willing to enter into each of the stipulations set out by Mr. Newkirk." Counsel proposed a number of additional stipulations and wrote, "Should you find that the respondents did controvert wage loss disability, then I would request that the attorney's fees be paid in a lump sum pursuant to A.C.A. §11-9-804. Mr. Huntsman has a date of

birth of October 28, 1952, which makes him 52 years of age. According to A.C.A. §11-9-804(b)(2), a person age 56 has an average remaining lifetime in years of 25.14 years."

The claimant's attorney wrote to the administrative law judge on November 10, 2008 and stated in part, "I am in receipt of Eric Newkirk's letter of November 6, 2008. I checked with my clients and they tell me that the date on the first check they received after notification that Federated was agreeing that Mr. Huntsman was permanently and totally disabled was the date of July 25, 2008....I will be willing to modify my stipulation to reflect that no further indemnity benefits were paid by the respondents until July 25, 2008...."

An administrative law judge filed an opinion on January 29, 2009. The administrative law judge found that the claim had been controverted and that the claimant was entitled to "maximum attorney's fees." The administrative law judge found that "attorney's fees are owed in a lump sum." The respondents appeal to the Full Commission.

## II. ADJUDICATION

Ark. Code Ann. §11-9-715(Repl. 2002) provides:

(a) (1) (A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee....

(2) (B) (i) In all other cases 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 attorney for the claimant as follows: One-half ( $\frac{1}{2}$ ) by the employer or carrier in addition to compensation awarded; and one-half ( $\frac{1}{2}$ ) by the injured employee or dependents of a deceased employee out of compensation payable to them.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded....

(3) In any case where attorney's fees are allowed by the commission, the limitations expressed in the first sentence herein shall apply....

(e) The amendments made by the act of 2001 regarding attorney's fees contained in this section shall be effective with respect to benefits payable in connection with disability or death due to injuries occurring on and after July 1, 2001.

The real object of attorney's fee statutes is to place the burden of litigation expense upon the party which made it necessary. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976), citing *Globe & Rutgers Fire Ins. Co. v. Batton*, 178 Ark. 378, 10 S.W.2d 859 (1928); *Commercial Union Assurance Co. v. Leftwich*, 191 Ark. 656, 87 S.W.2d 55 (1935). When the denial of liability is clear and the claimant is compelled to employ an attorney to enforce

his claim, the statute is applicable. *Henning, supra*, citing *Batton* and *Leftwich, supra*. The Arkansas Supreme Court held in *Henning, supra*, at p. 708:

We reject the mechanistic construction of the act that would permit an employer, or carrier, to refuse compensation until after the employee has been forced to employ an attorney and then escape liability for the attorney's fees by formally advising the commission that it will not controvert the claim asserted by that attorney. To do so would put form above substance.....

In the present matter, an administrative law judge found that the claim had been controverted and that claimant's attorney was entitled to "maximum attorney's fees." The Full Commission affirms the administrative law judge's finding that the respondents controverted the claim for permanent total disability benefits. The respondents in the instant matter voluntarily paid medical and indemnity benefits for a compensable injury occurring October 14, 2005. The respondents paid out an anatomical impairment rating beginning June 20, 2006. The record indicates that these benefits ran out in October 2007. The claimant's attorney wrote to the Clerk of the Commission on October 12, 2007 and submitted a Form AR-C on behalf of the claimant. The claimant contended that he was entitled to permanent total disability and fees for legal services. The

claimant's attorney subsequently requested that the case be set for a hearing before the Commission. The record indicates that the respondents investigated the claim and participated in pre-hearing mediation. It is well-settled that a respondent's investigation of a claim does not automatically equate to controversion. *Henning, supra*. However, the respondents in the instant matter did not accept the claimant's October 2007 claim for permanent total disability benefits until approximately May 22, 2008. The claimant did not actually receive a check for permanent total disability until approximately July 25, 2008. There was a significant gap in compensable benefits paid to the claimant. A substantial gap in payment of benefits to a claimant is evidence for controversion by a respondent-carrier. The Court of Appeals has affirmed the Commission's finding of controversion when there was a delay in payment of just over two months. See *Southeast Ar. Human Development Center v. Courtney*, 99 Ark. App. 87, 257 S.W.3d 554 (2007). The delay in payment in the present matter was approximately nine months.

After a mediation conference did not result in an agreement between the parties, the administrative law judge

issued a pre-hearing order on July 23, 2008. That pre-hearing order stated, among other things, that the respondents had accepted the claimant as permanently and totally disabled and would issue the claimant a check. The Commission notes that the rate agreed to by the respondents included provision for "attorney fees." An agreement to pay a portion of attorney's fees is certainly evidence of controversion. The respondents also contend that there was no "award" of permanent total disability in the instant matter. Fees for legal services shall be allowed "only on the amount of compensation for indemnity benefits controverted and awarded." Ark. Code Ann. §11-9-715(a)(2)(B)(ii), *supra*. But the Commission is not to place form over substance. *Henning, supra*. We reiterate the following language found in the July 23, 2008 pre-hearing order: "Respondent No. 1 has accepted the claimant as permanently and totally disabled and will issue a check to the claimant to make up the difference between benefits paid at the rate of \$375.00/\$281.00 and the agreed upon rate of \$375.00/\$308.00 *along with attorney fees* [emphasis supplied]." The Full Commission finds that

the July 23, 2008 pre-hearing order is in substance an award of permanent total disability benefits. The record in the present matter demonstrates that the claimant would not have received compensation for underpayment or a check for permanent total disability benefits if he had not retained the services of a lawyer.

Respondent No. 1 contends that it never controverted any portion of the claim, "with the exception of the Claimant's indemnity rates." Yet there is case law holding that if a respondent controverts any part of a claim, then it has controverted the entire claim for purposes of attorney's fees. See *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). The case of *Osborne v. Bekaert Corp.*, 97 Ark. App. 147, 245 S.W.3d 185 (2006), cited by Respondent No. 1, is not applicable to the present matter. In *Osborne*, the Court of Appeals affirmed the Full Commission's finding that employer had not controverted the claimant's status of permanent total disability. The Court in *Osborne* noted that the weekly rate of compensation was not at issue, and that there was never a gap in payments owed to the claimant. In the instant matter, the weekly compensation rate was an issue. Further, there was

approximately a nine-month gap in payments to the injured claimant in the present matter. If the claimant had not employed an attorney to assist him, we find it reasonable to conclude that the claimant's entitlement to weekly benefits would have remained underpaid and the claimant would not have received permanent total disability benefits. The record in the present matter indicates that Respondent No. 1 made litigation necessary. See *Cleek, supra*.

Based on our *de novo* review of the entire record, the Full Commission finds that Respondent No. 1 controverted the claimant's entitlement to permanent total disability benefits. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (Repl. 2002). Counsel's attorney's fees shall be 25% of compensation for all indemnity benefits payable to the claimant. We do not affirm the administrative law judge's award of attorney's fees in lump sum. The Commission is not required to approve lump-sum attorney's fees. See Ark. Code Ann. §11-9-716; *Seward v. Bud Avants Co.*, 65 Ark. App. 88, 985 S.W.2d 332 (1999). The Full Commission in the present matter sees no compelling reason to award lump-sum attorney's fees. We therefore affirm the administrative law

judge's opinion as modified. For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I respectfully dissent from the majority opinion. Based upon my de novo review of the evidence, I find that respondent no. 1 did not controvert the claimant's claim for permanent and total disability benefits and the claimant's attorney is, therefore, not entitled to an attorney fee on that award.

The claimant sustained an admittedly compensable injury while working for respondent no. 1 on October 14, 2005. Respondent no. 1 paid medical expenses and temporary total disability benefits through June 20, 2006. On that date, the claimant was assigned a fifteen percent (15%)

permanent anatomical impairment rating to the body as whole which respondent no. 1 accepted and paid benefits through October 20, 2007.

On October 15, 2007, the claimant filed an AR-C requesting wage loss disability benefits. Respondents responded by resubmitting its AR-1 and -2 indicating that the claim was accepted as compensable. There is no evidence that claimant's attorney corresponded with respondent no. 1 regarding payment of benefits. Rather, claimant's attorney wrote the Commission on January 8, 2008, requesting a hearing on wage loss disability. It is specifically noted that claimant requested wage loss disability not permanent and total disability benefits in this letter. As one of the issues listed in claimant's pre-hearing filing was the correct calculation of claimant's average weekly wage, the parties agreed to mediate this issue. When an agreement could not be reached, the file was returned to adjudication.

On May 9, 2008, the administrative law judge issued a Pre-hearing Questionnaire Notice. On June 2, 2008, the administrative law judge notified the parties that a Pre-hearing conference was scheduled for June 24, 2008. It

was rescheduled on June 23, 2008, for July 22, 2008, at the parties request.

On July 10, 2008, respondent no. 1 filed their Pre-hearing Questionnaire stating: "After further investigation of the claim, Respondent's No.1 have accepted the Claimant as permanently and totally disabled..." In the contentions section of this filing, respondent no. 1 stated:

2. Respondents No. 1 have joined the Death & Permanent Total Disability Trust Fund via correspondence under separate cover. In the interim, permanent and total disability benefits are being issued to the Claimant, with the first payment being made in a lump sum in an effort to bring the Claimant "current" since the date of his last permanent anatomical impairment payment. From this point forward, Respondents No. 1 will pay all appropriate benefits until their maximum payout of \$75,000.00 has been reached.

3. Respondents No. 1 have paid the Claimant at the rate of \$375.00 per week for temporary total disability benefits and/or permanent total disability benefits, and Claimant's permanent partial disability benefits were paid at the rate of \$281.00 per week. In the event the Claimant is deemed to have a higher average weekly wage based upon the accompanying wage information, Respondents will immediately make up the underpayment but have in no way controverted the Claimant's entitled to such indemnity benefits.

At the Pre-hearing Conference held on July 22, 2008, the administrative law judge found that the claimant's proper compensation rate was \$410.00 per week for temporary disability benefits and \$308.00 per week for permanent partial disability benefits, instead of \$375.00 per week for temporary disability benefits and \$281.00 per week for permanent partial disability benefits. The administrative law judge filed a Pre-Hearing Order on July 23, 2008, which indicated that respondent no. 1 had "accepted the claimant as permanently and totally disabled and will issue a check to the claimant to make up the difference between benefits paid at the rate of \$375.00/\$281.00 and the agreed upon rate of \$375.00/\$308.00 (sic) along with attorney fees." The administrative law judge also notified the parties that she was returning the claim to general files since "the issues of the compensation rate and healing period were resolved."

Respondent no. 1 issued a check to the claimant who received it on or about July 25, 2008. A check to the claimant's counsel was also issued for his attorney fee.

The claimant then contended that he was owed a fee for the permanent and total disability benefits. He contended that those benefits were controverted therefore he

was owed an attorney fee. He also requested the fee be paid in a lump sum. Respondent no. 1 contended that they did not controvert the claim as being permanently and totally disabled. On October 8, 2008, the administrative law judge filed a Pre-Hearing Order. The issue was submitted on the record and an opinion was issued on January 29, 2009, finding that respondent no. 1 controverted the claimant and owed an attorney fee to the claimant's attorney.

Ark. Code Ann. §11-9-715 provides:

(a) (1) (A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

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). 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). 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). Additionally, the mere fact of a delay in the payment of benefits does not, in and

of itself, constitute controversion of those benefits, especially where the compensability of the injury has been accepted. See Walter v. Southwestern Bell Tel Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986).

In my opinion, a review of the evidence demonstrates that this claim was not controverted by respondent no. 1. This case is akin to the case of Osborne v. Bekaert Corp., 97 Ark. App. 147, 245 S.W.3d 185 (2006), wherein the Court of Appeals affirmed the Full Commission's determination that the respondent did not controvert a claimant's entitlement to benefits for permanent and total disability. In Osborne, the respondents took the deposition of the claimant and after the deposition the respondents accepted the claimant as permanently and totally disabled. No litigation was necessary. Similarly, in this case, respondent no. 1 accepted the claimant as permanent and totally disabled after mediation failed. It is of note that wage loss was not the only issue considered in mediation. There were other issues including average weekly wage considered. It is of further note that respondent no. 1 paid to the claimant's attorney an attorney fee for the difference in amounts of temporary total disability and

permanent partial disability it paid to the claimant and what was determined to be the correct compensation rates. Respondent no. 1 accepted the claimant as permanent and total in its pre-hearing filing, before the pre-hearing telephone conference. No litigation was necessary.

Respondent no. 1 accepted the claimant as permanent and total after the investigation was completed. As stated previously, investigation does not equate to controversion. See, Rose. In this case, there is absolutely no evidence that respondent no. 1 ever controverted any portion of this claim at any time, with the lone exception of the proper compensation rates. Respondent no. 1 attempted to resolve all the issues in mediation which the claimant's attorney initiated. The majority opinion references the delay between the filing of the AR-C and respondent's acknowledgment of permanent and total disability in their pre-hearing filing; however, I note that this delay was precipitated by claimant's request to mediate the average weekly wage issue. In my opinion, I find that this delay was merely a tactical maneuver on behalf of claimant's attorney to force the appearance of controversion.

Respondent's quick response to the AR-C with its AR-1 and -2

forms reflecting that the claim was accepted and its immediate acceptance of the claimant as permanently and totally disabled once discovery was complete and the pre-hearing questionnaire was filed clearly indicates that this claim was not controverted. Accordingly, I find that the claimant's attorney is not entitled to an attorney fee.

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner