

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107011 & F304582

CLEVELAND OSBORN, EMPLOYEE	CLAIMANT
ANDERSON ENGINEERING CONSULTING, EMPLOYER	RESPONDENT NO. 1
ONE BEACON INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
TRANSPORTATION INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED MARCH 30, 2010

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

Claimant represented by the HONORABLE KRISTOFER E.
RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL E.
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE FRANK B.
NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

In an opinion filed June 10, 2009, the Full Commission
found that Respondent No. 3 was not entitled to a statutory

offset for the claimant's Veteran's Administration benefits. The Arkansas Court of Appeals has reversed and remanded for additional findings of fact. *Second Injury Fund v. Osborn*, CA09-835 (Feb. 11, 2010). After reviewing the entire record *de novo*, the Full Commission again finds that Respondent No. 3 is not entitled to a statutory offset for the claimant's Veterans Administration benefits.

I. HISTORY

The claimant, age 62, testified that he sustained a back injury in 1982 while serving in the United States Army. The claimant testified that he received a disability rating from the Veterans Administration for his back and neck following discharge from the Army in 1984. The claimant sustained compensable injuries to his low back, elbows, and neck on June 1, 2001. The claimant sustained a compensable injury to his back on March 10, 2003. The claimant testified that he was not able to return to work after March 11, 2003. The claimant sustained a 3% permanent physical impairment as a result of the March 10, 2003 compensable injury.

The claimant was deposed on October 3, 2003. The claimant testified regarding his Veterans Administration

disability benefits: "When I first was discharged they gave me a 30 percent disability. It was 10 on my back, and 20 on my neck, or I think it was something like that. It was 30 percent together....I get \$600.00 a month." At a hearing held October 31, 2003, the claimant testified that he had a service-connected disability rating in the amount of 50%. The claimant testified that he was receiving \$600.00 per month "until I die." The claimant was deposed on August 21, 2007. The claimant testified at that time that his Veterans Administration disability rating was "100%." The claimant testified that he received \$2,000 per month.

A pre-hearing order was filed on March 19, 2008. The claimant contended, among other things, that he was permanently and totally disabled or in the alternative had sustained wage-loss exceeding his permanent anatomical impairment. Respondent No. 3, Second Injury Fund, contended that it acknowledged responsibility for the claimant's wage-loss disability. Respondent No. 3 contended that it had not controverted wage-loss disability benefits.

A hearing was held on June 20, 2008. At that time, counsel for Respondent No. 3 contended that the Second Injury Fund was entitled to a credit, pursuant to Ark. Code

Ann. §11-9-411, against Veterans Administration benefits received by the claimant for any wage-loss disability over 30%. The claimant's testimony at the hearing indicated that his VA benefits were approximately \$2,200.00 monthly.

An administrative law judge filed an opinion on September 17, 2008. The administrative law judge found, among other things, that the claimant had been rendered permanently and totally disabled. The administrative law judge determined, "The assertion of Respondent #3 to credit pursuant to Ark. Code Ann. §11-9-411 against the claimant's VA benefits is not persuasive....The claimant's VA benefits does not fall with the category outlined in the above provision. The request of respondent #3 is respectfully denied." Respondent No. 3 appealed to the Full Commission.

The Full Commission filed an opinion on June 10, 2009 which reversed the administrative law judge's finding that the claimant was permanently and totally disabled. The Full Commission found that the claimant proved he was entitled to wage-loss disability in the amount of 50%, and that Respondent No. 3 was liable for wage-loss disability in the amount of 50%. The Full Commission determined, "Respondent No. 3 is not entitled to an offset, in accordance with Ark.

Code Ann. §11-9-411, for the claimant's Veterans Administration benefits. The overriding purpose of Ark. Code Ann. §11-9-411 is to prevent a double recovery by a claimant for the same period of disability. *Henson v. General Electric*, 99 Ark. App. 129, ___ S.W.3d ___ (2007). The claimant's VA benefits are not related to the period of disability covered by Respondent No. 3 and are not subject to the offset provided for in Ark. Code Ann. §11-9-411."

Respondent No. 3 appealed to the Arkansas Court of Appeals. The claimant cross-appealed the Full Commission's award of 50% wage-loss disability. The Court of Appeals affirmed the Full Commission's wage-loss award but has remanded for additional findings of fact regarding the statutory offset.

II. ADJUDICATION

A. Effect of payment by other insurers

Ark. Code Ann. §11-9-411 (Repl. 2002) provides:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a

self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

In *Dollarway Sch. Dist. v. Lovelace*, 90 Ark. App. 145, 204 S.W.3d 64 (2005), the Court of Appeals affirmed the Commission's decision that the respondents in that case should be denied a credit for an injured worker's life-insurance proceeds. The Court held, "Our statutes are to be strictly construed and the plain language of this section includes no mention of life insurance, death or dependency benefits....Accordingly, we find no error in the Commission's denial of a credit." *Id.*

In another case, however, the Court affirmed the Commission's decision that the Fund should be granted a dollar-for-dollar credit pursuant to Ark. Code Ann. §11-9-411(a). See *Henson v. General Electric*, 99 Ark. App. 129, 257 S.W.3d 908 (2007). In addition to his workers' compensation benefits, the claimant in *Henson* received long-term disability payments and disability-retirement benefits. The Court held in *Henson*:

Appellees further claim that Ark. Code Ann. §11-9-411 is clear. First, appellees argue that it was the intent of the legislature to include all types of benefits paid for disability because the term "any" is a term of expansion rather than a term of

limitation. Second, the statute was meant to prevent a claimant from receiving a double recovery for the same period of disability. Third, the legislature included benefits "received by" the claimant, rather than "received from" a certain source. Appellees claim that it is therefore clear that if a claimant receives any type of disability benefit during a particular time period of disability, the legislature does not want the claimant to also receive workers' compensation benefits for that same time period. We agree and hold that the Commission did not err in finding that Ark. Code Ann. §11-9-411 applies to retirement-disability benefits, as the overriding purpose of §11-9-411 is to prevent a double recovery by a claimant for the same period of disability.

Finally, in *Potlatch Corp. v. Word*, 2009 Ark. App. 72, the Court of Appeals cited Ark. Code Ann. §11-9-411(a) and determined that an employee was not permitted to be put in a better position than had he not sustained a compensable injury. The Court in *Potlatch Corp.* remanded to the Commission for further proceedings regarding the employer's entitlement to an offset.

The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998). The Workers' Compensation Commission is charged with strictly construing the provisions of the law. Ark. Code Ann. §11-9-

704(c)(3) (Repl. 2002). Strict construction requires that nothing be taken as intended that is not clearly expressed. *Edens v. Superior Marble & Glass*, 347 Ark. 487, 58 S.W.3d 369 (2001). The doctrine of strict construction is to use the plain meaning of the language employed. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

In the present matter, the Full Commission finds that Respondent No. 3 is not entitled to a statutory offset for the claimant's Veterans Administration benefits. We find that had the legislature intended to include benefits received from the Veterans Administration as benefits enumerated in Ark. Code Ann. §11-9-411(a), the legislature would have done so. The plain meaning of the language in the statute does not include Veterans Administration benefits. In addition, the benefits the claimant received from the Veterans Administration were not employer-based benefits but were instead based on the claimant's service-connected disabilities. Based on our *de novo* review of the entire record, the applicable statutory and appellate authority, and the Court's mandate, the Full Commission therefore finds that Respondent No. 3 is not entitled to a

statutory offset for the claimant's Veterans Administration benefits.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

In our previous opinion we found that the Second Injury Fund was liable for 50% wage loss disability, but that it was not entitled to an offset in accordance with A.C.A. § 11-9-411 for claimant's Veteran's Administration disability benefits stating:

The overriding purpose of A.C.A. § 11-9-411 is to prevent a double recovery by a claimant for the same period of disability. Henson v. GE, 99 Ark. App. 129, ___ S.W.3d ___ (2007). The claimant's VA benefits are not related to the period of disability covered by Respondent No. 3 and are not subject to

the offset provided for in A.C.A. § 11-9-411.

In previously agreeing with the majority to reach this finding with regard to VA benefits, I relied upon our previous finding that the A.C.A. § 11-9-411 offset does not apply to VA benefits for this same reason in Boyette v. ConAgra Poultry Co., Full Commission Opinion filed 1-19-07 (F310205).

The Arkansas Court of Appeals reversed and remanded this claim for the sole purpose of making specific findings of fact with regard to the Second Injury Fund's request for offset against the VA benefits. Again the majority now finds that the Second Injury Fund is not entitled to an offset. However, after more specific consideration, I am not inclined to now agree with my previous decision. The record before us reveals that the claimant sustained a service related disability to his back and neck for which he initially received a 30% disability. The VA increased this to a 50% disability sometime in 1989. Claimant continued to receive VA disability benefits based upon this 50% disability until after his 2003 compensable

injury. Following this injury, the VA increased the claimant's disability to 100%.

Second Injury Fund liability is premised upon a combination of the claimant's most recent compensable injury and his pre-existing disability to produce his current disability. We have found that this combination has resulted in a 50% disability. Thus, this 50% wage loss disability takes into consideration the claimant's compensable injury and his condition for which he is receiving VA disability benefits. Moreover, the evidence reveals that the claimant's VA disability was increased from 50% to 100% following the claimant's compensable injury. The reasoning set forth in Boyette v. ConAgra, supra, that the VA disability benefits are not for the same condition or period of disability does not apply to the present claim. Therefore, I find that the claimant's is not only receiving a double recovery for his VA benefits when they were increased from 50% to 100% as a result of his compensable injury, but also for his wage loss disability of 50% which is derived from considering the claimant's last compensable injury and his pre-existing condition, which includes his VA disability. Accordingly, I must respectfully dissent from

the majority opinion as I now find that the Second Injury Fund is entitled to an offset against the claimant's VA disability benefits.

KAREN H. MCKINNEY, COMMISSIONER