

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E713762 & E412350

CHRIS W. BELL, EMPLOYEE	CLAIMANT
ARKANSAS GAME & FISH COMMISSION, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED JUNE 27, 2011

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

Claimant represented by the HONORABLE PHILIP M. WILSON,  
Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE TERRY D.  
LUCY, Attorney at Law, Little Rock, Arkansas.

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

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed March 7, 2011. The administrative law judge

found that Respondent No. 1 did not owe attorney's fees for the claimant's permanent total disability benefits. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion. The Full Commission finds that Respondent No. 1 did not controvert the claimant's entitlement to permanent total disability benefits, and that Respondent No. 1 does not owe an attorney's fee for permanent total disability benefits.

I. HISTORY

The parties stipulated that the claimant, now age 38, "experienced an injury event on July 6, 1994, while working for the Department of Parks and Tourism, which Public Employee Claims Division (PECD) accepted as compensable." The claimant reported pain in his low back after pulling on a large boat. Dr. Richard D. Peek diagnosed L5-S1 annular tear on July 10, 1994. The parties stipulated that Respondent No. 1 accepted and paid the claimant a 5% anatomical impairment rating subsequent to the "injury event" of July 6, 1994.

The parties stipulated that the claimant sustained a compensable injury while working for the Arkansas Game & Fish Commission on September 26, 1997. The claimant

testified that he injured his back, right leg, right knee, and left shoulder. The record indicates that Respondent No. 1, Public Employee Claims Division, accepted and paid medical treatment and temporary total disability benefits. The parties stipulated that Respondent No. 1 paid temporary total disability benefits beginning September 26, 1997.

Dr. Richard D. Peek performed an L3-4 diskectomy and right L5-S1 diskectomy on February 4, 1998. Dr. Peek performed a lumbar diskectomy and fusion on February 16, 1999.

Dr. Kenneth A. Martin performed an arthroscopy, chondroplasty, and lateral retinacular release of the claimant's right knee on July 20, 2000.

The parties stipulated that Respondent No. 1 paid temporary total disability benefits through February 1, 2002. The parties stipulated that Respondent No. 1 paid permanent partial disability benefits from February 2, 2002 through September 2, 2003. Dr. Peek performed a posterior lateral fusion and segmental instrumentation on September 3, 2003. The parties stipulated that Respondent No. 2 paid temporary total disability benefits beginning September 3, 2003.

Dr. Peek performed a repair of lumbar fusion and removal of segmental spinal instrumentation on April 23, 2005. Dr. Martin performed an arthroscopy and arthroscopic chondroplasty of the right patella on March 14, 2006. Dr. Peek performed an anterior lumbar discectomy and interbody fusion on April 9, 2007. Dr. David N. Collins performed surgery on September 30, 2008: "Resection superior medial angle, left scapula."

Dr. Peek diagnosed the following on January 2, 2009: "1. Failed back syndrome. 2. Multilevel fusion L3 to sacrum. 3. Status post shoulder reconstruction. 4. Diffuse osteoarthritis. 5. Inflammatory arthritis." Dr. Peek stated, "It is my opinion due to the totality of his care and overall medical condition that he is permanent and totally disabled from employment on an indefinite basis." Dr. Collins reported on January 5, 2009, "Christopher has recovered nicely following superomedial angle of the scapula resection. He has sustained permanent partial impairment as it relates to anatomic changes of the skin, subcutaneous tissue, muscle origin and insertions around the scapula. Impairment is equal to 5% to the upper extremity, equal to 3% to the body as a whole."

The parties stipulated that Respondent No. 1 paid temporary total disability benefits through January 5, 2009. The parties stipulated that the claimant was "permanently and totally disabled as of January 5, 2009" and that Respondent No. 1 paid permanent total disability benefits beginning January 6, 2009. A claims determination manager for Respondent No. 1 informed Respondent No. 2 and the other parties on January 15, 2009, "Based on Dr. Richard Peek's medical report dated January 2, 2009, we are accepting Mr. Bell as permanently and totally disabled. At this time, we need to know what the position of the Second Injury Fund is."

A pre-hearing order was filed on June 30, 2009. The claimant's contentions were, "1. Claimant contends he has not reached maximum medical improvement and is still in the healing period. 2. Claimant contends he had a 3% anatomical rating to the body as a whole which has not been paid. 3. Entitlement to attorney's fees." The June 30, 2009 pre-hearing order indicated, "Respondent No. 1's contentions. Respondent No. 1 needs to state its position within two weeks." The pre-hearing order indicated that the

issues to be litigated were "1. Healing period. 2. Impairment rating. 3. Attorney's fee."

A hearing was held on October 7, 2009. At that time, the claimant and Respondent No. 2, Second Injury Fund, contended that the claimant remained within a healing period. The claimant contended that he had sustained a 3% anatomical impairment rating to the shoulder, which Respondent No. 1 had not paid.

An administrative law judge filed an opinion on December 8, 2009. The administrative law judge found, among other things, that the claimant had sustained a 3% permanent impairment rating to his shoulder. The administrative law judge found that the claimant reached the end of his healing period for the compensable back injury on January 2, 2009, and that the claimant reached the end of his healing period for the compensable shoulder injury on January 5, 2009.

The claimant subsequently contended that the end of his healing period was January 5, 2009, and that he was entitled to temporary total disability benefits from the date of his injury until he reached the end of his healing period. The claimant requested "a late-payment penalty and attorney's fees on the award. The claimant relies on the arguments of

the Second Injury Fund that it does not have liability for the permanent and total disability benefits. The claimant further requests attorney's fees on the permanent and total disability benefits that Respondent No. 1 accepted."

Respondent No. 1 contended, among other things, that it had paid "all appropriate medical and indemnity benefits in this matter, that no benefits of any sort have been controverted or otherwise remain outstanding and that they consequently owe no attorney's fees or penalties in this matter." Respondent No. 1 contended that "the facts of this case give rise to Second Injury Fund liability for the claimant's permanent and total disability benefits and that they are thus entitled to reimbursement from the Fund for permanent indemnity benefits paid subsequent to January 5, 2009."

Respondent No. 2 contended, among other things, that it was not responsible for permanent total disability benefits.

An administrative law judge filed an opinion on March 7, 2011. The administrative law judge found, among other things, that the claimant was permanently and totally disabled as of January 5, 2009. The administrative law judge found that Respondent No. 1, rather than Respondent

No. 2, was responsible for the claimant's permanent total disability benefits. The administrative law judge found, "15. Attorney fees are not owed on the Permanent and Total Disability benefits."

The claimant appeals to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-715 (Repl. 1996) 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....

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

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). When the denial of liability is clear and the claimant is compelled to employ an attorney to enforce his claim, the statute is applicable. *Id.* Whether a claim has been controverted is a question of fact and is not to be determined by a mechanical approach. *New Hampshire Ins. Co. v. Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984).

An administrative law judge found in the present matter, "15. Attorney fees are not owed on the Permanent

and Total Disability benefits." The Full Commission affirms this finding. The parties stipulated that the claimant sustained compensable injuries on July 6, 1994 and September 26, 1997. Respondent No. 1 accepted responsibility and paid benefits for both compensable injuries. The claimant underwent several operations following the September 26, 1997 compensable injury. Dr. Peek opined on January 2, 2009 that the claimant was permanently and totally disabled, and Dr. Collins assigned an anatomical impairment rating on January 5, 2009. The parties stipulated that the claimant was "permanently and totally disabled as of January 5, 2009," and that Respondent No. 1 paid permanent total disability benefits beginning January 6, 2009.

The evidence in the present matter does not demonstrate that the claimant needed representation of legal counsel in order to receive permanent total disability benefits. Respondent No. 1 did not make litigation necessary in order for the instant claimant to be entitled to permanent total disability benefits. We recognize Respondent No. 1's contention that Respondent No. 2, Second Injury Fund, should be liable for permanent total disability. Respondent No. 1's contention that the Second Injury Fund should be liable

for benefits did not equate to controversion of permanent total disability in the present matter. The preponderance of evidence does not indicate that the instant claimant would not have received permanent total disability without legal representation.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that Respondent No. 1 did not owe attorney's fees for the claimant's permanent total disability benefits. The preponderance of evidence does not demonstrate that Respondent No. 1 controverted the claimant's entitlement to permanent total disability, and the preponderance of evidence does not demonstrate that the claimant required representation of legal counsel in order to receive permanent total disability.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

As I would award the claimant's attorney a fee on permanent and total disability benefits, I must respectfully dissent from the majority on this issue. I concur on all other issues. I find it highly unlikely that the respondent would have accepted the claimant as permanently and totally disabled without the valuable legal services provided to the claimant by his attorney. The Arkansas Workers' Compensation Law specifically provides that the Commission shall direct that a fee be paid to the claimant's attorney when a claim has been controverted in whole or in part. See, Ark. Code Ann. §11-9-715 (B) (i).

More specifically, Ark. Code Ann. §11-9-715 (a) 2 (B) provides:

...[W]henever the commission finds that a claim has been controverted, ...the commission shall direct that the 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.

Making the respondents liable for at least a portion of the attorney's fees serves the legitimate social purposes of discouraging oppressive delays in recognition of liability, deterring arbitrary and capricious denials of

claims, and insuring the ability of a necessitous employee to obtain adequate legal representation. See, Aluminum Company of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). Whether a claim is controverted is a fact question that must be determined from the circumstances of each particular case. Masonite Corporation v. Mitchell, 16 Ark. App. 209, 699 S.W.2d 409 (1985); Climer v. Drake's Backhoe, 7 Ark. App. 148, 644 S.W.2d 637 (1983); Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986). As evidence of the respondent's controversion of this claim, I point to the fact that the respondent required the claimant to submit to a deposition before accepting the claimant as permanent and total. The delay of a deposition would be unnecessary if the respondent were not controverting the claim. Based on this fact, I would award the claimant's attorney an attorney fee on the permanent and total disability benefits, which, by the necessity of taking a deposition, were controverted.

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PHILIP A. HOOD, Commissioner