

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708738

SEAN HORTON, EMPLOYEE	CLAIMANT
PLATINUM DRYWALL, INC., EMPLOYER	RESPONDENT
UNION STANDARD INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 14, 2011

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

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal from the decision of an Administrative Law Judge finding that respondents owe an 18% penalty for failure to pay timely benefits. At the hearing held August 11, 2010, the claimant contended that he was entitled to additional temporary total disability benefits from January 12, 2010, and continuing through a date yet to be determined as well as entitlement to an 18% penalty for failure to timely pay these benefits without controversion. Conversely, respondents contended that they accepted the claim as compensable, and have paid and are willing to

continue to pay temporary total disability and medical benefits with supporting documentation for such benefits. Respondents assert that claimant failed and/or refused to comply with or attend treatment visits, thus preventing respondents from obtaining verification of the need for continued benefits. After reviewing the entire record de novo, and without giving the benefit of the doubt to either party, we find that "owing to conditions over which [respondents] had no control, the installment could not be paid within the period prescribed." Therefore, we find that the decision of the Administrative Law Judge awarding the claimant an 18% penalty must be reversed.

Respondents appeal only from the award of the 18% penalty assessed for failure to pay timely benefits as well as any fee associated with this penalty. Arkansas Code Annotated § 11-9-802(b) states:

If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of

controversion is filed or an extension is granted the employer under § 11-9-803 or unless such non-payment is excused by the commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

The evidence reveals that temporary total disability benefits were paid through January 15, 2010. Claimant had an appointment with his treating physician, Dr. Edward Saer, scheduled on January 12, 2010. When respondents inquired of Dr. Saer's office regarding this scheduled appointment, they received written verification that the claimant did see Dr. Saer on that date. After claimant's attorney was notified of this information, he too contacted Dr. Saer's office seeking medical records from this visit and was advised that the claimant was not seen on that date. The evidence further reveals that Dr. Saer's office charged respondents \$35.00 for an office visit on January 12, 2010, but since its records showed that the claimant was not seen on that date, the doctor's office credited the respondents the \$35.00.

Prior to this allegedly missed appointment, the last medical report in respondents' possession was from a

November 5, 2009, office visit with Dr. Saer in which Dr. Saer noted that the claimant wanted to undergo surgery which was to be scheduled after the first of the year. Knowing that Dr. Saer intended to schedule surgery for the claimant after the first of the year, the January 12, 2010, appointment with Dr. Saer was scheduled for the claimant. When respondents attempted to obtain medical records from this appointment, they were advised in no uncertain terms that the claimant was not seen on that date. Based upon the claimant's failure to comply with the scheduled medical visit which was confirmed by both the claimant's attorney and Dr. Saer's office, respondents suspended benefits. At that time, respondents did not have any verification that the claimant remained within his healing period and intended to undergo surgery. Otherwise, knowing that Dr. Saer and the claimant had planned to schedule the surgery after the first of the year, claimant's failure attend the scheduled medical appointments for the purpose of scheduling surgery, would leave the claimant's recovery at a plateau or stabilized, in effect ending his healing period. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Thus, respondents were left

with no knowledge that the claimant intended to go forward with the surgery, and had no other way to verify that the claimant remained within his healing period. Clearly, the information provided by Dr. Saer's office and relied upon by respondents was outside of respondents' control.

In hindsight, it is now known that the claimant attended his appointment at Dr. Saer's office on January 12, 2010, but he was not seen by Dr. Saer. Claimant was seen by Dr. Saer's, assistant Nick. However, Nick did not generate any office notes regarding this January 12, 2010 visit. Moreover, surgery was not scheduled at that time, which would have placed all parties on notice that treatment was moving forward, when respondents inquired as to any pending appointments. Dr. Saer noted for the first time in his May 6, 2010, office notes that the claimant was seen by Nick on January 12, 2010. This information, however, was not relayed or provided to respondents until the day prior to the hearing on this matter. While the respondents admittedly stopped payment of benefits in this claim, such stoppage was done in good faith and was based upon information provided by the medical care provider. Temporary total disability benefits are not suppose to continue indefinitely, but only so long as the claimant remains within his healing period

and totally incapacitated from earning wages. Respondents' attempts to substantiate the continuation of the healing period is good claims practice. Unfortunately for this claimant, the medical care provider dropped the ball and provided inaccurate information to the respondents. The delay in timely payment of benefits was due to circumstances over which the respondents had no control. Therefore, this non-payment must be excused by the Commission and the assessment of an 18% penalty must be reversed. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I would award an 18% penalty.

Ark. Code Ann. § 11-9-802(b) states as

follows:

If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the employer under § 11-9-803 or unless such non-payment is excused by the commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

Here, the majority finds that the respondent does not owe a penalty due to conditions not within their control, i.e., poor communication with the doctor's office. I would note, however, that the respondents in this case had absolute control over the providers seen by the claimant. If they were having trouble communicating with Dr. Saer, they should have sent the claimant to another doctor. Furthermore, Dr. Saer discussed off-work status in the May

2010 visit and, as noted by the Administrative Law Judge, despite this fact, TTD was not being paid at the time of the hearing when it was held in August 2010. In my opinion, an 18% penalty is more than warranted in this case.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner