

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **G806325**

WILLIAM D. BERGTHOLD, Employee	CLAIMANT
CITY OF SILOAM SPRINGS, Employer	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, Carrier	RESPONDENT

OPINION FILED **AUGUST 3, 2023**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MARY K. EDWARDS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 13, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 1, 2023, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Entitlement to attorney's fees.

All other issues are reserved by the parties.

The claimant contends that "He is entitled to payment of attorney's fees for temporary total disability. The period of temporary total disability was a result of his surgery by Dr. Kelly. Additional

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treatment was controverted by the respondent and was the subject of a previous hearing. Claimant reserves all other issues.”

The respondents contend that “Claimant’s attorney is not entitled to an attorney’s fee. Claimant is currently treating with Dr. James Kelly. This case was previously litigated on the issue of additional medical treatment. Following the Opinion, respondents authorized treatment with Dr. Kelly. Dr. Kelly then recommended surgery. Respondents immediately authorized the surgery. Claimant’s temporary total disability period is due to the surgery performed by Dr. Kelly. Respondents contend that they never controverted the surgery recommendation. Therefore, claimant’s attorney is not entitled to a fee on the temporary total disability following the surgery or any other indemnity benefits that may arise therefrom.”

From a review of the entire record, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the arguments of counsel, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on June 1, 2023, and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. The stipulations by counsel made during oral argument are hereby accepted as fact.
3. Claimant's attorney is entitled to an attorney fee on temporary total disability benefits previously paid to claimant as a result of his wrist surgery in 2023.

FACTUAL BACKGROUND

Claimant suffered a compensable injury to his right upper extremity on August 23, 2018. After providing benefits to claimant for over two years, respondent took the position in 2022 that further

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medical treatment requested by claimant was not reasonably necessary. As a result, claimant's attorney filed a request for a hearing on claimant's entitlement to additional medical benefits, and in an Order entered on August 11, 2022, this Court found that claimant was entitled to additional treatment. That Order was not appealed, and claimant returned to Dr. James Kelly's care, which included surgery on his right wrist. While claimant was healing from the surgery, respondent resumed payment of temporary total disability (TTD) benefits.

Claimant's attorney believed she was due an attorney's fee on the indemnity benefits, and respondent withheld from claimant's TTD benefits the sum that would reflect one-half of the attorney's fees. The parties requested oral argument to set forth their positions on the respondent's responsibility for the other half of the attorney's fee, as they did not believe there were any material facts in dispute. After hearing their arguments and reviewing the documents, I concur that the material facts as set out in the previous paragraph are not in dispute.

ADJUDICATION

The question presented in this case is whether respondent is liable for one-half of the attorney's fee as per A.C.A §11- 9-715. The pertinent parts of that statute are:

(a)(1)(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. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section.

...

(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 (1/2) by the employer or carrier in addition to compensation awarded; and one-half (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.

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Respondent contends that because there was no award of temporary total disability benefits in this case in the 2022 order, and because it paid TTD benefits in 2023 during the post-surgery healing period without being ordered to do so, imposing the one-half of the attorney fee on those indemnity benefits is not appropriate. Claimant maintains that without the work his attorney did to secure his medical benefits in 2022, he would not have had the surgery and would not have been in a healing period to qualify for TTD.¹

This issue has been before both the Workers' Compensation Commission and the Arkansas Court of Appeals, and both have found that under similar circumstances, an attorney fee is appropriate, see *Walmart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W. 3rd 835 (2001). In *Brown*, the respondent initially accepted a claim and paid some compensation benefits. However, at a pre-hearing conference the employer controverted claimant's entitlement to temporary partial disability benefits and a hearing was scheduled. Approximately one month before the scheduled hearing, the employer indicated that it would accept the temporary partial disability and pay appropriate benefits, but refused to pay an attorney fee on the temporary partial disability benefits. The Court of Appeals affirmed the Commission's decision to award an attorney fee. In doing so, the Court stated:

The Commission interpreted the requirements of Section 11-9-715(a)(2)(B)(ii) to be that where an employer controverts an injured employee's entitlement to certain benefits, but later accepts liability prior to a hearing on the merits, the employee's attorney may still request a hearing for an attorney's fee on those controverted benefits. The Commission found that when there is no dispute that the employer controverted benefits but then paid the benefits on which an attorney fee is sought that the employee has established an award of those benefits for purposes of the employee's attorney seeking an attorney's fee under Ark. Code Ann. Section 11-9-715(a)(2)(B)(ii). The Commission found no requirement in Section 11-9-715(a)(2)(B)(ii) requiring that an award of

¹ Respondent's attorney conceded this was true in this exchange:
The Court:...if I had not issued an Order on August 11, 2022, directing that he can return to [Dr.] Kelly, then there would have been no surgery.

Ms. Edwards: I mean, probably not; no. (TR. 18)

controverted benefits must precede the employer's payment of benefits for the claimant's attorney to be entitled to a fee. We agree and hold that the Commission's findings are supported by substantial evidence.

The Court went on to state that it had long been recognized that making an employer liable for an attorney fee serves a legitimate social purpose such as discouraging oppressive delay in recognition of liability, deterring arbitrary or capricious denial of claims, and ensuring the ability of claimants to obtain adequate and competent legal representation. "If the fundamental purpose of an attorney fee is to be achieved, it must be considered that the real object is to place the burden of litigation expenses upon the party which made it necessary." *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W. 2d 529 (1998). The Court went on to note that if the claimant in *Brown* "had not employed counsel to assist her, it was reasonable to conclude that her claim for temporary partial disability benefits would not have been properly presented and protected." Likewise, in this case, if claimant's counsel had declined to assist him in approval of the surgery to his right wrist because there were no indemnity benefits from which she could be paid, it is reasonable to conclude that he would have never been entitled to temporary total disability benefits.²

Based upon the decision in *Brown*, I find that claimant's attorney is entitled to an attorney fee on the temporary total disability benefits which were paid as a result of claimant's wrist surgery.

ORDER

Claimant's attorney is entitled to an attorney's fee on temporary total disability benefits paid to claimant as a result of his wrist surgery in 2023.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$ 461.25.

² I note that the attorney in *Brown* did not have to prepare for and attend a hearing to be entitled to the attorney's fee; claimant's attorney appears to have done more work in this case to secure benefits for her client.

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IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE