

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H104759**

TIM J. HOLM, EMPLOYEE	CLAIMANT
CITY OF EUREKA SPRINGS, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE, INSURANCE CARRIER	RESPONDENT

OPINION FILED **DECEMBER 22, 2021**

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

Claimant represented by JASON M. HATFIELD, Attorney, Springdale, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 4, 2021, the above captioned claim came before the Workers' Compensation Commission in Springdale, Arkansas, for a hearing. A prehearing conference was conducted on August 19, 2021, and a prehearing order filed that same date. A second prehearing conference was conducted on September 20, 2021, with an amended prehearing order being filed on October 5, 2021. A copy of the second prehearing order, with modifications, has been marked as Commission's Exhibit No. 1, and with no objection, is made part of the record.

The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this case.
2. The employee/employer/carrier relationship existed on April 9, 2021.
3. Claimant sustained a compensable injury on April 9, 2021, in regard to his left wrist, which was accepted by respondent.
4. The compensation rates are \$541.00 for temporary total disability and \$406.00 for

permanent partial disability.

5. A 6% permanent partial impairment was assigned and provided to respondents sometime prior to September 8, 2021. That rating was accepted and is being paid by respondents.

The issues to be litigated are limited to the following:

1. Claimant's counsel's entitlement to an attorney's fee on the permanent disability benefits paid to claimant associated with the left shoulder injury.

All other issues are reserved.

Claimant contends that Respondents denied compensability of the left shoulder injury and that they failed to pay temporary disability benefits or medical expenses associated with the same. That denial caused claimant to pay for his medical treatment, use his sick pay and vacation time instead of receiving temporary total disability benefits while healing, and required claimant to retain an attorney to receive benefits. As such, respondents owe an attorney's fee on all indemnity benefits related to the left shoulder, which include temporary total disability and permanent partial disability benefits.

The respondents contend that while compensability was originally denied, based on additional medical evidence received, they have now accepted claimant's left shoulder injury as compensable and have paid past due temporary total disability benefits, along with an attorney's fee on those indemnity benefits. Respondents contend that the issue of permanent partial disability was not included in the previous Prehearing Order and was not an issue to be addressed at the scheduled hearing. All benefits other than medical and temporary disability entitlement were reserved. It is respondents' position that they have not controverted that portion of the claim. The compensability of claimant's shoulder was accepted prior to receipt of the permanent impairment rating was assigned. It is respondents' position that attorney's fees are not due under the Act.

The above stipulations are hereby accepted as fact. From a review of the record as a whole, including the medical reports and documents submitted as exhibits, and having heard testimony and observed the demeanor of the claimant, the following decision is rendered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing conference conducted on September 20, 2021 and contained in the prehearing Order filed on October 5, 2021, as well as the announced stipulations at the hearing on November 4, 2021, are hereby accepted as fact.
2. Respondent controverted claimant's entitlement to all benefits in regards to his left shoulder injury, necessitating claimant hiring an attorney to secure these benefits. Therefore, despite respondents' eventual acceptance of this claim, claimant's counsel is entitled to an attorney's fee on the permanent partial disability benefits due to claimant.

FACTUAL BACKGROUND

At the conclusion of the hearing, respondent requested an opportunity to brief the issues in this matter. The briefs of the parties are blue-backed and made a part of the record.

HEARING TESTIMONY

Claimant testified on April 9, 2021 he was involved in a high-speed pursuit that resulted in a crash. Claimant first reported an injury to his left wrist but upon returning to work three days later, noticed left knee pain and left shoulder pain. He reported the shoulder and knee pain to his assistant chief, Brian Jones. (TR.7) Claimant was asked to prepare a memo which was introduced as page one of claimant's exhibit 2. After the memo was provided to respondent Arkansas Municipal League, claimant spoke with Andrea at the Municipal League. (TR.8) Andrea requested to see claimant's medical records regarding a previous shoulder injury and those were provided to her. Claimant believed he

again spoke to Andrea who advised that respondent, Arkansas Municipal League, was unwilling to accept his shoulder injury as part of his workers' compensation claim. Claimant asked if he should hire an attorney for this and was told that it was at his discretion. (TR.9) Claimant hired Mr. Jason Hatfield as his attorney and an AR-C was filed around July 6, 2021. (TR.10) Between the time the claim was denied and the time that we had this hearing, claimant went to Dr. Heinzelmann at Ozark Orthopedics and had shoulder surgery on June 21, 2021. (CL.X.1, page 19) Claimant used his health insurance and paid what was not covered by his private insurance from his personal funds. Claimant used his personal sick time while he was recovering from the shoulder surgery. (TR.11-12)

Claimant believed that he was not going to receive any benefits for his shoulder claim if he had not hired an attorney. (TR.13) As of the time of the hearing, claimant was receiving bi-weekly payments for the impairment rating that he had received from Dr. Heinzelmann on his shoulder. Claimant understood that 12½% of the impairment rating indemnity benefits were being withheld by respondent Arkansas Municipal League at the request of claimant's attorney. Claimant believed his attorney had done a good job for him and was entitled to that fee. (TR.14)

On cross examination, claimant was asked to review the Prehearing Order filed on August 19, 2021 and agreed that permanency or claimant's entitlement to a permanent impairment rating was not listed in that Order. (TR.15) Claimant further agreed that the rating by Dr. Heinzelmann was issued on August 23, 2021, that the Municipal League received a rating by September 8, 2021 and the first check on that rating was issued to him on September 15, 2021. Claimant further agreed that once the rating was issued, he received no indication that the rating was going to be denied or otherwise not paid. Claimant recognized that he had not had a hearing on his entitlement for a rating, (TR.16) and since there had been no hearing, he agreed that there had been no award of a rating to him. Claimant concluded his testimony by conceding that he has now been paid temporary total disability on the time

he was off work that had accrued before the first Prehearing Order in this case. (TR.17)

I found the claimant to be an extremely credible witness; I do not have reason to doubt anything he said in the hearing.

REVIEW OF THE MEDICAL RECORDS

A detailed review of claimant's medical records is not necessary to decide the issue in this case regarding claimant's entitlement to an attorney's fee on the permanent partial impairment rating. These records demonstrate that claimant first went to Eureka Springs Hospital the day after the motor vehicle accident and was initially complaining of pain in his left wrist. The first medical record mentioning pain in the left shoulder was April 20, 2021. Claimant began a course of physical therapy at Optimum Therapy of NWA, which appears to have ended after an MRI of his left shoulder was conducted on May 14, 2021. Claimant then began seeing Dr. Heinzemann and shortly after first seeing him on June 1, 2021, underwent surgery to repair a rupture of a tendon in his bicep. Claimant was first released to one-armed duty and then to full work with no restrictions on August 12, 2021. Claimant underwent an impairment evaluation on August 23, 2021 and was assessed a total upper extremity impairment of 10%, which is equal to a 6% impairment to the whole person. (CL.X.1, page 31)

REVIEW OF THE NON-MEDICAL RECORDS

The non-medical records from claimant and respondents help establish the chronology of events that are relevant to the issues to whether claimant is entitled to an attorney's fee on his permanent partial impairment rating. From these documents, I believe what follows is the correct order of relevant events.

April 10, 2021: Claimant completed Form AR-N in which he said that the part of his body that was injured was "left hand" (R.X.2, page.1) On the Municipal Employee's Report of Accident,

claimant wrote “sore and painful left wrist.” (R.X.2, page.2)

April 17, 2021 (approximately): Claimant prepared an undated “To whom it may concern” memo, stating his left shoulder started hurting a couple of days after the accident, and he attributed the accident to the left shoulder issue. (CL.X.2, page.1)

June 4, 2021: Respondent filed an AR-2 Form accepting the claim as a medical only claim involving the claimant’s left wrist. (CL.X.2, page.2)

July 6, 2021: Claimant filed an AR-C Form, listing Mr. Jason Hatfield as his attorney and claiming injuries to his left upper extremity as a result of the collision of April 9, 2021. (CL.X.2, page. 3).

August 5, 2021: Respondents filed a response to the prehearing questionnaire in which it stated, “respondents contend claimant did not suffer a compensable left shoulder injury on 4-9-21.” (CL.X.2, page.4)

August 18, 2021: In its responses to Interrogatories and Request for Production of Documents, respondent asserted that it had determined “that the claim should be accepted as medical only for the claimant’s left wrist.” (CL.X.2, page.11) In response to Request for Production number eleven, respondents said “Andrea Sayre has knowledge of the claim after the work-related injury was reported, including acceptance of the claimant’s left wrist and denial of the claimant’s left shoulder.” (CL.X.2, page.17)

On August 19, 2021, a Prehearing Order was entered following a telephone conference with the attorneys for the parties. The parties stipulated that claimant suffered a compensable injury on April 9, 2021, in regard to his left wrist. The issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Whether claimant sustained a compensable injury in regard to his left shoulder.

2. Whether claimant is entitled to temporary total disability from April 9, 2021, to a date yet to be determined.
3. Whether claimant is entitled to medical treatment in regard to his left shoulder.
4. Whether claimant's left shoulder injury is associated with preexisting and underlying problems.
5. Attorney fees.

Under its contentions, respondents contended that “claimant did not suffer a compensable left shoulder injury on April 9, 2021.” (CL.X.2, pages.21-22)

September 8, 2021: A letter from respondent's attorney to claimant's attorney said “The respondents have decided to accept compensability of the claimant's left shoulder injury as a result of the 4-9-21 accident. They are going to go back and pay medical bills related to the same, including catching up TTD benefits. I have advised them to pay an attorney's fee on outstanding TTD and withhold your client's obligation for a fee from his check.” (Cl.X.2, page.25)

October 5, 2021: An Amended Order was filed following a second prehearing conference with counsel for the parties. The issues and contentions of the parties in that order are listed above (COM.X.1-4).

ADJUDICATION

As set forth above, the only issue to be decided is whether claimant's attorney is entitled to an attorney's fee on a permanent partial disability rating issued which respondents accepted after first unequivocally controverting claimant's entitlement of any benefits for his left shoulder injury.

In its post-trial brief, respondents took the position that the plain language of A.C.A. § 11-9-715 (a)(2)(B)(ii) dictated that “fees shall be allowed only on the amount of compensation controverted and awarded. (Resp. Brief, page 2, emphasis added by respondent). That might be a fair reading of

that statute if this was a case of first impression. However, the construction of a statute by the appellate courts becomes as much a part of the statute as the words of the statute itself, and change is a matter that addresses itself to the General Assembly, *E. C. Barton & Co. v. Neal*, 263 Ark. 40, 562 S.W.2d 294 (1978). As such, I am not free to disregard the Arkansas Supreme Court and Court of Appeals interpretations of A.C.A. § 11-9-715(a)(2)(B)(ii).

Respondent cited *Burton v. Chartis Claims, Inc.* 2014 Ark. App. 47 (2014), which stands for the proposition that intervening in a third-party lawsuit filed in circuit court by a claimant is not controversion of the workers' compensation claim, and *Bailey v. Shelter Distribution*, AWCC #G008793 (Sept. 15, 2014), which was a claim that was specifically never controverted in its entirety. Neither of these were applicable to the instant matter.¹

I am more persuaded by claimant's argument that respondent's initial denial of benefits for claimant's left shoulder injury is determinative of the outcome of the question before me. The decision to deny any benefits for the shoulder injury was made before claimant hired an attorney (CL.X.2, page.2), and continued through the first prehearing conference and order. I find *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998) and *Lee v. Alcoa Extrusion, Inc.*, 9 Ark. App. 228, 201 S.W.3d 449 (2005) govern this matter; from reading these cases (and others), I believe it is the denial of a claim before counsel is employed that is most relevant in determining if an attorney's fee is appropriate. "One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary," *Lee, supra*. Claimant's testimony was that he was told by the adjuster for respondent Arkansas Municipal League that it was not going to pay for his shoulder claim unless he hired an attorney, and so he did. As such, I find it was respondent's initial

¹ Respondent cited two cases that were not designated for publication; neither were considered as precedent as per Arkansas Supreme Court Rule 5-2 (c).

denial that made the litigation necessary, and thus an award of an attorney's fee to claimant's counsel is appropriate under the facts of this case.

ORDER

Claimant's attorney is entitled to an attorney's fee on the permanent partial disability benefits that are being paid to claimant for his left shoulder injury. Pursuant to Ark. Code Ann. § 11-9-715, this fee shall be 25% of the unpaid indemnity benefits, and shall be paid one-half by the respondent and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondents are responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$280.50.

IT IS SO ORDERED.

JOSEPH C. SELF
ADMINISTRATIVE LAW JUDGE