

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H002474**

RUBEN MANN, EMPLOYEE

CLAIMANT

STAR TRANS., LLC, EMPLOYER

RESPONDENT

**NATIONAL INTERSTATE INS. CO.,
INS CARRIER/TPA**

RESPONDENT

OPINION AND ORDER FILED MAY 28, 2021

Hearing conducted before the Arkansas Workers' Compensation Commission, Administrative Law Judge (ALJ) Mike Pickens, on March 2, 2021, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Andy L. Caldwell, Caldwell Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Jason Ryburn, Ryburn Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the Amended Prehearing Order filed January 22, 2021, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including, April 16, 2020, when the claimant sustained a compensable injury to his low back.
3. The claimant's average weekly wage (AWW) entitles him to the maximum weekly compensation rates for 2020 of \$711.00 for temporary total disability (TTD), and \$533.00 for permanent partial disability (PPD) benefits.
4. The Agreed Order of October 30, 2020, is a final order with respect to any and all issues addressed, litigated, and decided therein, and any such issues are *res judicata*, and the law of the case.
5. All parties specifically reserve any and all other issues for future determination and/or hearing.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 3-4). Pursuant to the parties' mutual agreement, the issues litigated at the hearing were:

1. Whether the claimant is entitled to ongoing TTD benefits after November 20, 2020.
2. Whether the respondents have "willfully and intentionally" failed to pay TTD benefits and the claimant's attorney's fee pursuant to the terms of the October 30, 2020 Agreed Order and, therefore, whether they should be held in contempt and subject to a fine and/or penalty pursuant to *Ark. Code Ann.* §11-9-706 (2020 Lexis Replacement), and *Ark. Code Ann.* §11-9-802(e) or (c).
3. Whether the claimant is required to attend an appointment the respondents scheduled (before the claimant requested and the Commission granted, his one(1)-time-only change of physician (COP) request to Dr. Samuel Overley) with Dr. Samuel Meredith, an orthopedic specialist in Marion, Arkansas.
4. Whether the claimant's attorney is entitled to a controverted fee on these facts.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 3-4; 21). At the hearing, the parties advised the ALJ they had resolved issue number 3. Therefore, both parties agreed to delete this issue from the prehearing order as an issue to be litigated and decided at the hearing. (Comms'n Ex. 1 at 2, T. 4-5). In its place the parties agreed to add the following issue to be litigated:

3. Whether costs should be assessed against the claimant for today's [March 2, 2021] hearing pursuant to *Ark. Code Ann.* Section 11-9-714.

(Comms'n Ex. 1 at 2; T. 4-5) (Bracketed material added).

The claimant contends he is entitled to ongoing TTD benefits after November 19, 2020, as well as payment of his attorney's fee. [At the hearing, the parties advised the ALJ on the record they had resolved this issue – save for the late payment/penalty and contempt allegations – prior

Ruben Mann, AWCC No. H002474

to the hearing.] The claimant contends further the respondents should be found in contempt of the Agreed Order filed October 30, 2020, and subject to the aforementioned statutory sanctions (*see* the “**ISSUES TO BE LITIGATED AT THE HEARING**” section, *supra*) including a fine, and penalty(ies) for the alleged late payment of TTD benefits. The claimant reserves any and all other issues for future litigation and/or determination. (Comms’n Ex. 1 at 2-3, T. 5-21) (Bracketed material added).

The respondents contend they have complied with the terms of the Agreed Order filed October 30, 2020, and, therefore, should not be held in contempt, and subject to a fine. In addition, the respondents contend that any alleged non-, or late payment of TTD benefits and the claimant’s attorney’s fee was not “willful and intentional”, consequently, they should not be deemed liable for any statutory penalty(ies). The respondents contend further the hearing was unwarranted and unnecessary, and is a waste of both the Commission’s and the parties’ time and money. Therefore, they contend the claimant should be required to pay for the costs of the hearing pursuant to *Ark. Code Ann.* Section 11-9-714. The respondents reserve any and all other issues for future litigation and/or determination. (Comms’n Ex. 1 at 3, T. 5-25).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto, as well as the parties’ post hearing briefs.

STATEMENT OF THE CASE

The parties submitted an Agreed Order to the ALJ, which the ALJ signed and caused to be filed on October 30, 2020. (Claimant’s Exhibit B; Respondents’ Exhibit 1 at 1-2). Thereafter, between November 6, 2020, and November 10, 2020, the claimant’s attorney sent emails to the

Ruben Mann, AWCC No. H002474

respondents' attorney stating he and the claimant had not yet received their checks for the TTD benefits and attorney's fee per the terms of the 30 October 2020 Agreed Order, and inquiring about the checks' status. (CX B). In an email dated November 17, 2020, the claimant's attorney advised the respondents' attorney his client had received his TTD check, but he still had not received his check for the corresponding controverted attorney's fee. The claimant's attorney went on to state: "The Order was entered over two weeks ago. I believe penalties are owed." (CX C at 3). In separate emails dated November 18, 2020, the respondents' attorney responded that, "802 applies only to awards", and he stated the respondents' position they did not owe a penalty since they had "30 days to appeal [the Agreed Order] and then the 15 days runs after that on a [sic] award." (CX D) (Bracketed material added).

By email of the same date, the claimant's attorney replied concerning the status of his check, and about the respondents' "position on the penalties." (CX D at 2). He then stated: "If your client pays the 20% [penalty] I won't file the Motion [for penalty(ies)]. Otherwise, I'm going to request 36% based upon their actions of the last several months. Let me know." (CX D at 2) (Bracketed material added).

On November 19, 2020, the claimant's attorney filed his Petition For Contempt And Penalties, which he explained further in an email to the ALJ and the respondents' attorney dated January 8, 2021. (CX F and G). On November 25, 2020, the respondents' filed their response to the claimant's petition, which included the respondents' motion for costs. In this response the respondents' attorney specifically cited both controlling statutes and caselaw supporting his clients' position with respect to the claimant's allegations. (RX1 at 5-8). The record contains

additional emails between the parties, and to the ALJ, from December 16, 2020, and January 8, 2021. (CX E at 1-2; and RX1 at 9-14).

The respondents' provided the claimant's attorney with a copy of their payment log from April 30, 2020, through January 7, 2021. (RX1 at 3-4). The respondents also made their claims adjuster, Mr. Charles Goodman, available for deposition via Zoom (due to the ongoing COVID-19 pandemic), and the claimant's attorney deposed Mr. Goodman on February 12, 2021, over two (2) weeks before the scheduled March 2, 2020, hearing. (Claimant's Exhibit 2).

Before the March 2, 2021, hearing commenced, the ALJ delayed the hearing for over 15 minutes, requesting that the attorneys confer and try to resolve the contempt issue. The parties were unable to do so. It was at this time that the claimant's attorney for the first time stated a new allegation which the claimant had never raised in his original motion, nor at any time prior to the hearing date, that issue being: the reason the claimant was now contending "the main issue" the respondents should be found in contempt was because they had never tried to schedule an appointment with Dr. Brophy as referenced in the 30 October 2020 Agreed Order. (T. 4-7). The claimant's attorney made this new, surprise allegation immediately after both he and the respondents' attorney had advised the ALJ on the record that, in lieu of an appointment with Dr. Brophy, they had agreed for the claimant to be examined by Dr. Samuel Meredith; that this agreed examination was scheduled for March 15, 2021; and, therefore, issue number 3 concerning whether the claimant was required to see Dr. Meredith had been resolved and should, therefore, be deleted as an issue to be litigated at the hearing. (T. 3-4).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2020 Lexis Replacement). The claimant has the burden of proving, by a preponderance of the evidence, that he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2020 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardee's*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002).

CLAIMANT’S ENTITLEMENT TO ONGOING TTD BENEFITS FROM NOVEMBER 20, 2020, THROUGH A DATE YET TO BE DETERMINED

The claimant’s attorney advised the ALJ on the record at the hearing that the respondents had paid all appropriate TTD benefits owed to date, leaving the only issue to be resolved at the hearing to be whether the subject TTD benefits “were timely and appropriately paid.” (T. 5). In addition to this on-the-record admission that the respondents had in fact paid all appropriate TTD benefits to date, the respondents’ pay log shows all TTD and attorney’s fee payments made from the inception of this claim through the hearing date. Moreover, the parties’ agreed the respondents would continue to pay ongoing TTD benefits through a date yet to be determined, which includes the attorney’s fee owed thereon. (RX1 at 4; T. 5) Therefore, this issue is moot.

ARK. CODE ANN. SECTION 11-9-802(c) or (e) PENALTY

Ark. Code Ann. Section 11-9-802(c) provides for a twenty percent (20%) penalty if any installment payable pursuant to an award of benefits is not paid within fifteen (15) days of its submission, “unless review of the compensation order making the award is had as provided in Sections 11-9-711 and 11-9-712” (pertaining to the finality of an ALJ’s and Full Commission’s “compensation order or award”, and a circuit court’s enforcement of a “Workers’ Compensation Commission...order or award,” respectively). (Note: Our courts have held that subsection (c) penalties do not apply to medical expenses or attorney’s fees. *Smith’s Store v. Kirker*, 6 Ark. App. 222, 639 S.W.2d 751 (Ark. App. 1982); *Model Laundry & Dry-Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (1980)).

Ark. Code Ann. Section 11-9-802(e) provides that, “if the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable

Ruben Mann, AWCC No. H002474

to the claimant.” It is long and well-settled in Arkansas workers’ compensation law – as the respondents’ attorney accurately explained to the plaintiff’s attorney via his email of November 18, 2020 – that pursuant to *Ark. Code Ann.* Section 11-9-711(a)(1), an ALJ’s “compensation order or award” does not become “final” until the expiration of the thirty (30)-day appeal period. And *see, Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (Ark. App. 1992).

Consequently, as the respondents correctly pled in their original response to the claimant’s patently premature petition for contempt and penalties filed November 19, 2020, they had a total of 45 days – 15 days from the date the 30 October 30 2020 Agreed Order became “final,” or until on or about December 14, 2020 – to begin paying the claimant TTD benefits, and his attorney the corresponding controverted fee in compliance with the specific terms of the Agreed Order. Respectfully, the applicable law and facts in this regard quite simply are beyond reasonable dispute.

The respondents’ payment log shows they issued the first TTD check in the amount of \$4,977.00 on 11/9/2020; and the first check to the claimant’s attorney for his corresponding controverted fee in the amount of \$1,777.50 on November 19, 2020. (RX1 at 4). However, the claimant filed his motion for contempt and penalties on November 19, 2020 – some 25 days *before* the respondents’ first TTD and attorney’s fee payments were even due pursuant to the Agreed Order. That is quite the proverbial quick trigger, especially in light of the indisputable applicable law and the facts of this case.

Consequently, I am compelled by the controlling law and facts of this case to agree with the respondents’ argument that there exists no credible evidence demonstrating they failed to timely

Ruben Mann, AWCC No. H002474

pay the claimant's TTD benefits, and the corresponding controverted attorney's fee on the TTD benefits that had accrued as of the dates at issue. The claimant has presented no credible evidence to the contrary. Additionally, there exists no credible evidence the respondents "willfully and intentionally" failed to pay TTD benefits and the claimant's attorney's fee pursuant to the terms of the 30 October 2020 Agreed Order. Therefore, I find the claimant has failed to meet his burden of proof in demonstrating he is entitled to a penalty pursuant to either *Ark. Code Ann.* Section 11-9-802(c) or (e).

I am compelled to point out that the respondents' attorney accurately stated the applicable law to the claimant's attorney in his emails of November 18, 2020, and in his November 25, 2020 response and motion for costs to the claimant's prematurely filed November 19, 2020, petition for contempt and penalties. (CX D; RX1 at 10, and 5-8). While the claimant's attorney was entitled to obtain a copy of the respondents' payment log, and to take their adjusters' deposition to ascertain the facts of the situation, after he did so the facts were, or reasonably should have been, readily apparent to him: the preponderance of the evidence reveals the respondents had timely issued and mailed checks for the TTD benefits and attorney's fee at issue in a timely manner in compliance with the 30 October 2020 Agreed Order. (RX 4; CX2 at 8, 12-13). An attorney is expected to know the law, and to advise his client of his rights and responsibilities accordingly. *Lewellen v. Supreme Court Comm. on Prof. Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003). As cited above, both *Ark. Code Ann.* Section 11-9-711(a)(1), and the court of appeals in *Johnson, supra*, plainly set forth the well-established and long-standing law with respect to the issue of when benefits are payable pursuant to an ALJ's order.

While the claimant attempted to establish by his own uncorroborated, self-serving testimony that the checks in question were or may not have been received by him within 45 days, I found his testimony in this regard to be blatantly incredible, and based on sheer speculation and conjecture. Firstly, it should be noted the claimant's responses to his attorney's questions concerning whether he received the subjects checks within 45 days of the filing of the 30 October Agreed Order infers the tacit acknowledgment of the legally controlling 45-day time period. Secondly, the claimant's testimony on both direct and cross-examination revealed he had absolutely no documenting corroborating when he did or did not receive the subject checks. His demeanor and responses to questions also demonstrably revealed he could not accurately or credibly testify which checks were mailed and/or received and on what dates. (T. 28-29). And since he had no documentation to support his demonstrably incredible testimony, I can give his uncorroborated, incredible, clearly self-serving and uncorroborated testimony as to when he did or may have received or may not have or did not receive checks any credibility. Moreover, again, based on his demeanor and responses to relevant questions on both direct and cross-examination, I find it highly unlikely and, therefore, highly incredible, the claimant possessed such a stellar memory so he could accurately recall exactly when he did or did not receive multiple checks and on what dates he did or did not receive them.

Finally, I find merit in the respondents' argument that the date the claimant may or may not have received the checks at issue certainly is not indicative of the date they mailed the checks: the respondents' payment log and Mr. Goodman's testimony are the best and most credible evidence in this regard. And it is wholly unreasonable to hold the respondents responsible for when the

Ruben Mann, AWCC No. H002474

claimant actually received the subject checks once they timely mailed them to him. Once the respondents timely mail the checks via United States Postal Service (USPS) First Class mail, they have absolutely no control over when the USPS actually delivers the checks or, for that matter, when the claimant actually retrieves his mail. I also take judicial notice that during the time period in question the USPS was experiencing a number of delivery problems due to the mail-in ballots associated with the recent United States presidential election, as well as the unprecedented increase in the volume of mail due to the holiday season and the consequences of the ongoing COVID-19 pandemic. *Ark. R. Civ. P.* 5(b)(2) provides that service of documents is presumed to be complete upon mailing. This same standard is reasonable and applies to the payment of workers' compensation benefits by check sent via USPS First Class mail.

CONTEMPT

Ark. Code Ann. § 11-9-706(b), the Act's contempt provision states:

If any person or party in proceedings before the commission disobeys or resists any lawful order or process, or misbehaves during a hearing, or so near the place thereof so as to obstruct the hearing or neglects to produce, after having been ordered to do so, any book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take oath as a witness, or after having taken the oath refuses to be examined according to law, or refuses to comply with any final order of an administrative law judge or the commission, or willfully refuses to pay an uncontroverted medical or related expense within forty-five (45) days after the respondent has received the statement, then the person or party, at the discretion of the administrative law judge or the commission, may be found to be in contempt of the commission and may be subject to a fine not to exceed ten thousand dollars (\$10,000).

For all the reasons set forth in the immediately preceding section of this opinion and order, I find there is no interpretation of the facts of this case that could lead a reasonable person to conclude the respondents are, or may be deemed to be, in contempt of the 30 October 2020 Agreed Order.

Ruben Mann, AWCC No. H002474

For the same reasons the claimant has failed to meet his burden of proof in demonstrating the respondents' are subject to either of the aforementioned penalties, it is abundantly clear they are not in contempt of the Agreed Order.

ASSESSMENT OF COSTS PURSUANT TO ARK. CODE ANN. SECTION 11-9-714

Ark. Code Ann. § 11-9-717 states:

(2) The signature of an attorney or party constitutes a certificate by him or her that: (A) He or she has read the claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper; (B) To the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (C) It is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

This provision of the Act essentially codifies the general good faith pleading requirements applicable to civil cases as set forth in *Ark. R. Civ. P.* 11. Moreover, *Ark. Code Ann.* § 11-9-717(4) provides:

If a claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper is signed in violation of this rule, the Workers' Compensation Commission, including administrative law judges, upon motion or upon their own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of a claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper, including a reasonable attorney's fee.

The claimant's attorney attached his signature to both the Claimant's Prehearing Questionnaire Response, and the subject Petition for Contempt and Penalties. It appears that when his discovery revealed facts that were inconsistent with these pleadings/petitions, he did not amend them to reflect either the applicable law or the facts as he found them to be, nor did he seek to

withdraw his petition for either penalties and/or contempt. Instead, he chose to proceed to a hearing with very little evidence, and no credible evidence, supporting the allegations in his petition for contempt and penalties, despite the respondents' attorneys correct statement of the applicable law in his email of November 18, 2020, and response to the claimant's petition. Indeed, practically immediately thereafter, on November 19, 2020, the claimant's attorney prematurely filed the petition for contempt and penalties after essentially "threatening" the respondents' attorney with a rather empty threat since it was not supported by either the applicable law or the facts. There is a difference between zealous advocacy and attempts to intimidate and coerce. While the former is certainly understandable and acceptable, most attorneys worth their salt – and ALJs – do not respond well to the latter.

Also, it must be noted the claimant's attorney raised for the very first time at the hearing the totally a new allegation that the respondents had refused or failed to set an appointment with Dr. John Brophy as had been referenced in the Agreed Order. The claimant offered no credible evidence, and only sheer speculation and conjecture, in support of what may only be called a surprise allegation. This allegation appears to have been an afterthought, or off-the-cuff, last-minute argument, as neither the respondents' nor the Commission had any notice of it, written or otherwise, prior to the claimant's attorney citing it as the "main issue" with regard to the contempt allegation at the outset of the hearing. This was essentially an ambush of both the respondents and the Commission. Since this issue was not timely or properly raised, I will not address it in this opinion and order other than to say it should not have been raised in this manner, without any prior written notice whatsoever to either the respondents or the Commission. An allegation of contempt,

as well as an allegation that penalties or sanctions are in order, are serious allegations and should not be made lightly by any party. I will not allow them to be made lightly in any hearing over which I am assigned to preside.

While I find both of the aforementioned issues troubling, and I do not expect to see any litigant or attorney make any contentions or allegations that are not made in good faith and based on the applicable law and the facts/evidence, I am not prepared to infer any nefarious motives on either the part of the claimant or his attorney, nor am I willing to find on the particular facts of this case that either the claimant and/or his attorney violated the provisions of *Ark. Code Ann.* Section 11-9-717 and should therefore be ordered to pay costs and attorney's fees pursuant to *Ark. Code Ann.* Section 11-9-717(4). However, I caution both parties herein, and all future litigants, as well as their attorneys to abide by the applicable law in this respect. If they fail and/or refuse to do so in the future, they do so at their own peril.

Respectfully, and for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.
2. The stipulations contained in the Amended Prehearing Order filed January 22, 2021, which the parties' modified and affirmed on the record at the hearing, hereby are accepted as facts.
3. The parties agreed on the record at the hearing they had resolved the issue regarding the claimant's contention he is entitled to additional and ongoing TTD benefits after November 20, 2020, through a date yet to be determined. Therefore, this issue is moot.
4. The claimant has failed to meet his burden of proof in demonstrating the respondents should be deemed liable for any penalty for the alleged non- or

late payment of TTD benefits as required by the Agreed Order filed October 30, 2020, pursuant to *Ark. Code Ann.* Section 11-9-802(c) or (e).

5. The claimant has failed to meet his burden of proof in demonstrating the respondents should be held in contempt of the Agreed Order filed October 30, 2020.
6. While the respondents' motions for costs and attorney's fees is noted, and is not without some merit on the facts of this case, the motion is denied. Each party shall bear their own costs and attorney's fees associated with the subject hearing.
7. The claimant's attorney is not entitled to a fee, other than that set forth in the Agreed Order filed October 30, 2020, on these facts.

If they have not already done so, the respondents shall pay the court reporter's invoice within twenty (20) days of their receipt of this opinion and order.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp