

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H306460

ALFRED GRASSO, Employee	CLAIMANT
CITY OF FORT SMITH, Employer	RESPONDENT
CENTRAL ADJUSTMENT COMPANY, Carrier/TPA	RESPONDENT

OPINION FILED NOVEMBER 18, 2024

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by DOUGLAS M. CARSON, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On October 28, 2024, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 18, 2024 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 the within claim.
2. Claimant sustained a compensable injury to his left shoulder on September 5, 2023.
3. Respondent has accepted and is paying permanent partial disability benefits based on a 2% rating to the body as a whole.

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

1. Claimant's entitlement to an attorney fee on the 2% impairment rating.

The claimant contends that the respondent controverted this claim in its entirety and that therefore all indemnity benefits in this case have been controverted. Claimant contends that his attorney is entitled to a fee regarding the permanent partial disability benefits in this case.

The respondent's contentions are set forth in its pre-hearing questionnaire which is attached to Commission Exhibit #1 as Exhibit #1.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, 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 September 18, 2024 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Respondent has controverted this claim; therefore, claimant's attorney is entitled to an attorney fee on the 2% impairment rating.

FACTUAL BACKGROUND

On September 5, 2023, claimant was employed by respondent as a roll-off driver. Claimant testified that while he was attaching a hook to a trash compactor he suffered an injury to his left shoulder. At some point the claimant reported this injury to

his supervisor and eventually sought medical treatment. Claimant's initial medical treatment consisted of an injection; the use of a shoulder mobilizer; and physical therapy.

Claimant was informed by respondent that his claim was not accepted as compensable. As a result, claimant hired Attorney Walker who filed a Form AR-C on claimant's behalf and requested a hearing.

Prior to a hearing being scheduled, claimant underwent an MRI scan which revealed a full thickness or near full-thickness rim rent tear of the supraspinatus tendon. Upon receipt of this MRI scan respondent accepted claimant's injury as compensable and paid for medical treatment as well as temporary total disability benefits. In addition, respondent also paid claimant's attorney a fee on the disputed temporary total disability benefits.

Claimant eventually underwent surgery on his left shoulder and was assigned a 2% impairment rating. Respondent accepted and paid this impairment rating, but did not pay claimant's attorney a fee on the rating.

Claimant has filed this claim contending that his attorney is entitled to an attorney fee on the 2% impairment rating.

ADJUDICATION

As previously noted, claimant initially contended that he suffered a compensable injury to his left shoulder on September 5, 2023. On September 27, 2023, claimant signed Form AR-N stating that he had injured his left shoulder on September 4, 2023 (the actual date of injury was September 5, 2023 since September 4, 2023 was Labor Day) while installing a hook onto a compactor box. Claimant also indicated that he had informed his

employer of this injury on September 19, 2023. During this period of time while claimant was receiving medical treatment he was informed by the respondent that it was not accepting claimant's injury as compensable. As a result, claimant hired Attorney Walker to represent him.

In a letter dated October 26, 2023 from Attorney Walker to the Commission, he filed Form AR-C alleging an injury to the left shoulder and requesting a hearing on compensation benefits. On that same day Attorney Walker also filed a pre-hearing questionnaire alleging a compensable injury and requesting payment of compensation benefits. On November 17, 2023, a pre-hearing conference was scheduled for December 6, 2023. In response to claimant's pre-hearing questionnaire, respondent filed a pre-hearing questionnaire alleging that claimant had failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left shoulder on or about September 5, 2023.

Prior to the pre-hearing conference being conducted, claimant underwent the aforementioned MRI scan and respondent decided to accept this claim as compensable. Respondent paid claimant temporary total disability benefits from September 25, 2023 through December 12, 2023 and paid Attorney Walker an attorney fee on those benefits. In addition, respondent filed an amended AR-2 accepting the claim based on new information received.

Initially, respondent contends that the Commission rules allow a respondent to file an amended AR-2 with respect to the acceptance of a claim. While the Commission rules do allow a respondent to file an amended Form AR-2, the mere filing of an amended AR-2 is not controlling as to the issue of whether respondent controverted claimant's

entitlement to compensation benefits.

Here, respondent clearly controverted the compensability of claimant's injury. As a result, it was necessary for him to hire an attorney who in turn requested a hearing. It was only after a pre-hearing conference was scheduled on this request that claimant underwent an MRI scan and based upon those MRI results respondent chose to accept the claim as compensable.

At the hearing there was much testimony submitted by the respondent with respect to why it chose not to initially accept the claim as compensable. However justified the respondent might have been in deciding to deny compensability at that point in time, the respondent did in fact deny compensability of claimant's claim which resulted in the necessity of him hiring an attorney. Even the respondent acknowledged that it controverted claimant's entitlement to compensation benefits by paying the attorney fee on the temporary total disability benefits.

Respondent also notes that at the time of the original hearing request claimant did not request permanent partial disability benefits; therefore, those benefits could not be controverted. However, at the time of the original filing a claim for permanent partial disability benefits would have been premature since claimant had not undergone surgery and had not been assigned an impairment rating.

Finally, respondent contends that because there was no "award" of permanent partial disability benefits in this case, an attorney fee is not appropriate pursuant to A.C.A. §11-9-704. However, the Arkansas Workers' Compensation Commission and more importantly the Arkansas Court of Appeals have found that under similar circumstances an attorney fee is appropriate. *Walmart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W.

3d 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. However, it refused to pay an attorney fee on the temporary partial disability. The Arkansas 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 §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. §11-9-715(a)(2)(B)(ii). The Commission found no requirement in §11-9-715(a)(2)(B)(ii) requiring that an award of 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's 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, 918 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 had not employed counsel to assist him in establishing compensability of his injury, he would have never been entitled to permanent partial disability benefits.

Respondent acknowledged that it did not request additional time to investigate the claim and that respondent did not inform claimant that it was investigating the claim and if it obtained additional information his claim would be reconsidered. Instead, claimant was simply informed by the respondent that this claim was not being accepted as compensable. As a result, claimant received no temporary total disability benefits but instead was required to take leave in order to obtain income. Claimant was thus required to obtain counsel to pursue his claim of compensability and workers' compensation benefits.

Based upon the decision in *Brown* and all of the evidence presented, I find that claimant's attorney is entitled to an attorney fee on the 2% permanent impairment rating assigned to claimant for his compensable injury.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that

his attorney is entitled to an attorney fee on the 2% permanent partial impairment rating paid to claimant as a result of his left shoulder surgery.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$437.95.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE