

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-1054

JIMMY G. BARK JR.

APPELLANT

V.

RHEEM OLD REPUBLIC
INSURANCE COMPANY,
and SECOND INJURY FUND

APPELLEES

Opinion Delivered March 11, 2009

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F312876]

AFFIRMED

M. MICHAEL KINARD, Judge

Appellant, Jimmy G. Bark Jr., appeals from a decision of the Workers' Compensation Commission finding that appellee Second Injury Fund (SIF) did not controvert his entitlement to certain benefits and that appellant is, therefore, not entitled to an attorney's fee on those benefits. We affirm.

Appellant sustained a compensable injury on November 20, 2003. Prior to a hearing on SIF liability and appellant's proper compensation rate, SIF accepted liability for permanent total disability benefits. Following the acceptance of the claim by SIF, counsel for appellant stated, in a letter dated February 21, 2005, that appellant would not pursue the issue of whether SIF had controverted appellant's entitlement to permanent disability benefits. At the hearing that followed, the only issues litigated between appellant and the employer were appellant's proper compensation rate and entitlement to an attorney's fee on the compensation rate. SIF did not participate in the hearing.

In an opinion filed March 24, 2005, the Administrative Law Judge (ALJ) found that appellant's compensation rate was \$261 per week. Appellant appealed to the full Commission, which found that the proper compensation rate was \$380 per week in an opinion filed February 9, 2006. This court affirmed the decision of the Commission in an unpublished opinion. *Rheem Mfg., Inc. v. Bark*, CA06-539 (Ark. App. December 20, 2006).

Subsequent to the opinion of the ALJ, but prior to our December 20, 2006 opinion, SIF began paying benefits to appellant in the amount of \$261 per week. Once this court's decision was issued, SIF began paying benefits in the amount of \$380 per week. SIF also issued a check for the difference between the \$261 per week it had been paying and the \$380 per week awarded. Appellant requested an attorney's fee on the amount of the underpayment by SIF from the Commission, contending that SIF had controverted his compensation rate. In an opinion filed on June 5, 2007, the ALJ found that appellant failed to prove that SIF controverted his entitlement to the correct compensation amount and that, as a result, SIF was not liable for an attorney's fee. In an opinion filed on May 16, 2008, the Commission affirmed and adopted the opinion of the ALJ. This appeal followed.

In reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms those findings if they are supported by substantial evidence, which is evidence a reasonable person might accept as adequate to support a conclusion. *Parker v. Comcast Cable Corp.*, 100 Ark. App. 400, 269 S.W.3d 391 (2007). This court will not reverse the Commission's decision unless it is convinced that fair-minded

people with the same facts before them could not have reached the same conclusions reached by the Commission. *Smith v. Country Market/Southeast Foods*, 73 Ark. App. 333, 44 S.W.3d 737 (2001).

The sole issue on appeal is whether SIF controverted appellant's entitlement to the proper compensation rate and is liable for an attorney's fee. We find that there is substantial evidence to support the decision of the Commission and affirm. The question of whether a claim is controverted is one of fact for the Commission. *Osborne v. Baekert Corp.*, 97 Ark. App. 147, 245 S.W.3d 185 (2006). The fundamental purpose of attorney's fee statutes such as Arkansas Code Annotated section 11-9-715 (Repl. 2002) is to place the burden of litigation expenses upon the party that made the litigation necessary. *Cleek v. Great S Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998). The mere failure of an employer to pay certain benefits does not, in and of itself, amount to controversion. *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

As noted above, the parties, at one point, were going to litigate SIF's liability for permanent disability benefits. However, prior to the hearing, SIF accepted liability for permanent disability benefits. At that point, appellant declined to litigate the issue of whether SIF had controverted his claim for benefits. Once SIF accepted liability for benefits, it made its position clear that it intended to abide by any final determination of appellant's compensation rate. Furthermore, SIF adhered to its position by paying appellant at the proper rate and compensating him for the underpayment shortly after this court issued its opinion determining the proper compensation rate.

It is clear that SIF is not the party that made any litigation over benefits necessary in this case. That party was the employer. At no point once SIF accepted liability was appellant forced to obtain or rely upon counsel in order to obtain benefits for himself from SIF. As the Commission correctly stated in its opinion, the litigation between appellant and the employer would have been necessary and would have proceeded regardless of any position taken by SIF. In addition, had there been no disagreement between appellant and the employer as to the proper compensation rate, none of the litigation that has occurred in this case to date would have been necessary. Therefore, the decision of the Commission that SIF did not controvert appellant's right to benefits, and that appellant is not entitled to an attorney's fee from SIF, is supported by substantial evidence.

Affirmed.

VAUGHT, C.J., and GLADWIN, J., agree.