

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F109692**

<b>THOMAS W. MCCALL, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>COCA COLA BOTTLING COMPANY, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CONSTITUTION STATE SERVICE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 3, 2003**

Submitted on the record in lieu of a full hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN.

Claimant represented by the HONORABLE KENNETH E. BUCKNER, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

This claim was submitted on the record in lieu of a full hearing to determine the claimant's entitlement to additional indemnity benefits and attorney's fees.

At issue is whether or not the claimant was paid at the correct compensation rate pursuant to Ark. Code Ann. §11-9-518.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on August 20, 2001 at which time the claimant sustained a compensable left hip injury in a motor vehicle accident. Medical expenses, temporary total disability benefits at a rate of \$393.00/\$295.00 from October 16, 2001 to March 10, 2003, and eight weeks of temporary partial disability benefits were paid.

The parties also stipulate the claimant began earning an hourly rate of \$12.70 seven weeks prior to the accident.

The claimant contends the compensation rate should be based on the contract of hire at the time of the compensable injury. The claimant contends the correct compensation rate is

\$410.00/\$308.00 the maximum for the date of injury, based on his earnings at \$12.70 per hour or  $\$4,344.35 \div 7 \text{ weeks} = \$620.62 \times 66\text{-}2/3\% = \$413.00$ .

The respondents contend the compensation rate should be based on an average of gross wages for 52 weeks preceding the injury, not just the seven weeks since the claimant's last pay raise. The respondents contend the claimant's average weekly wage was \$590.00, and the correct compensation rate is \$393.00/\$295.00.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits.

An AR-W form was submitted showing the fifty-two weeks of wages paid immediately before the injury. The data from the AR-W shows the claimant regularly worked a forty hour week with the exception of seven weeks. His rate of pay ranged from \$412.00 to \$508.00 weekly. Seven weeks prior to his injury, the claimant received a raise to \$12.70 per hour. He generally earned overtime with the exception of eleven weeks, however the hours worked varied greatly from fifteen minutes to seventeen and a half hours.

### **FINDINGS AND CONCLUSIONS**

This claim is governed by Ark. Code Ann. §11-9-518 which provides, in part:

Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time work week in the employment.

Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

The contract of hire at the time of the injury was \$12.70 per hour for a fourth hour week plus overtime which varied. This contract of hire had been in effect for seven weeks prior to the time of injury.

<u>REGULAR WAGES</u>	<u>OVERTIME</u>
$\$12.70 \times 40 = \$508.00$	\$280.99
	128.59

REG + OT = \$AWW	38.10
\$508.00 + 119 = \$627	0.00*
	204.79
	<u>33.34</u>
	\$ 833.45 ÷ 7 = \$119.06

\*This is a full work week but with no overtime.

Maximum for a 2001 injury is \$410.00/\$308.00.

I find the claimant is entitled to the maximum compensation rate for his injury date.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-carrier existed among the parties on August 20, 2001 at which time the claimant sustained a compensable injury. Benefits were paid based on an incorrect compensation rate of \$393.00/\$295.00. Temporary total disability benefits were paid from October 16, 2001 to March 10, 2003. Eight weeks of temporary partial disability benefits were also paid.
2. The correct compensation rate is \$410.00/\$308.00 based on an average weekly wage of \$627.00 pursuant to Ark. Code Ann. §11-9-518.
3. Respondents are directed to pay the difference between the corrected compensation rates to the claimant for temporary total disability and the corrected average weekly wage for temporary partial disability benefits previously paid pursuant to Ark. Code Ann. §11-9-501 and §11-9-520.
4. This claim for additional benefits has been controverted.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

**AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge