

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212938

SHERRY ELMORE,  
EMPLOYEE

CLAIMANT

NORTHEAST JONES OIL CO., INC.,  
EMPLOYER

RESPONDENT

FEDERATED INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 11, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE GREGORY R. GILES, Attorney  
at Law, Texarkana, Arkansas.

Respondents represented by HONORABLE NELSON V. SHAW,  
Attorney at Law, Texarkana, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the  
Administrative Law Judge filed June 13, 2003. The  
Administrative Law Judge entered the following findings of  
fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission  
has jurisdiction of this claim.
2. On October 25, 2002, the relationship of  
employee-employer-carrier existed among the  
parties.
3. On October 25, 2002, the claimant earned  
wages sufficient to entitle her to weekly  
compensation benefits of \$144.00.

4. On October 25, 2002, the claimant sustained an injury arising out of and in the course of her employment.
5. The claimant was temporarily totally disabled for the period beginning November 4, 2002, and continuing through the end of her healing period.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of October 25, 2002.
7. The respondents have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

The Full Commission notes that the respondents on appeal cite Ark. Code Ann. § 11-9-701, Notice of injury or death. Nevertheless, Ark. Code Ann. § 11-9-701(b)(2) provides, "Objection to failure to give notice must be made at or before the first hearing on the claim." The respondents did not cite Ark. Code Ann. § 11-9-701 at any point during the prehearing conference or at any time during the hearing before the Commission. The respondents have

therefore raised this statute for the first time on appeal to the Full Commission, which they explicitly cannot do.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

## DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on October 25, 2002. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

In my opinion, the evidence simply does not support a finding that the claimant sustained a compensable injury. The claimant contended that she sustained an injury while ringing beer on her shift on October 25, 2002. On the night of this alleged incident, the claimant was working with Estella Clark. Ms. Clark testified that the claimant did not tell her that she sustained an alleged injury that evening. However, the next day the claimant reported to Ms. Clark that she "might have hurt her back." Ms. Clark also recounted that the claimant said:

...she come in and said she was tired, she wasn't feeling too great and that she might have hurt her back the night before. But she also said that she was so tired because she was up all night having wild sex. She told me that.

The claimant continued her employment-related duties until November 2, 2002. The claimant did not miss any work from the date of the alleged injury until she did not return to work after she picked up her last paycheck on November 6, 2002.

Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury. Accordingly, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner