

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E914375

SHERRY L. (SHEPHERD) LASSITER, EMPLOYEE	CLAIMANT
CRACKER BARREL, EMPLOYER	RESPONDENT
FIDELITY & GUARANTY, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 22, 2003

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

Claimant represented by HONORABLE TIM CULLEN, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE WENDY S. WOOD, Attorney
at Law, Little Rock, 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 January 3, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. There was a compensable injury on November 9,
1999.
2. The compensation rate paid in this matter was
\$169.
3. The preponderance of the evidence provides
that the claimant's average weekly wage was
\$430 at the time of the injury.

4. The claimant is entitled to the difference in what was paid and what should be paid.
5. The claimant is not entitled to any temporary total disability benefits during the period when she drew unemployment benefits from March 9, 2002 through August 31, 2002.

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.

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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that claimant's average weekly wage was \$430.00. In my opinion, the claimant has failed to meet her burden of proof.

The claimant began her employment with the respondent as a server. She was not guaranteed 40 hours per week, nor that she would work in a certain position. She was progressively promoted, and on November 1, 1999, was

promoted to the position of shift leader. The claimant testified that she was clocked in as shift leader and was earning \$10.04 per hour at the moment she incurred her injury on November 9, 1999.

During the 52 weeks prior to her injury, the claimant worked 1,931.5 hours of straight time and 142 hours of overtime that was paid at time-and-a-half. She also received two weeks of paid vacation per year. Adding her regular, overtime and vacation hours, the claimant worked a total of 2,011.5 hours during the 52 weeks prior to her injury. She argued that if she had been paid at \$10.04 per hour during that time, her average weekly wage would be \$429.50.

On cross-examination, the claimant acknowledged that she worked in a variety of positions during the 52 weeks she worked prior to the injury. Wage records for the pay period covering November 5 through 12, 1999, include the days the claimant worked after her promotion to shift leader and before her injury on November 9. These records reflect that the claimant worked during that pay period as a waitress earning \$2.28 per hour, as a trainer earning \$5.15 per hour, as a server's assistant earning \$6.00 per hour, and as a shift leader earning \$10.04 per hour.

Arkansas Code Annotated §11-9-518 sets forth how weekly wages should be determined when computing compensation:

(a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The majority's decision, to calculate the claimant's average weekly wage at the highest hourly rate of pay received in the eight days prior to the accident, is patently unfair. In the 49 weeks prior to the claimant's injury, the highest hourly rate she earned at any position

was \$7.00 per hour. This fact alone demonstrates the inherent unfairness in calculating the claimant's average weekly wage based on the \$10.04 rate.

Section a(1) above does not require that compensation be computed based upon the hourly rate an employee was earning at the time of injury. Rather, it requires that it be computed based upon the contract in force at the time of the accident. The wage records from the week of the accident demonstrate that the claimant's "contract" mandated that she work in a variety of positions at a variety of wages. If the claimant had been injured during that same week while clocked in as a trainer and earning \$5.15 per hour, she surely would not be making the same argument she is today.

In my opinion, there are unusual circumstances presented by this case. Therefore, I find that §11-9-518(c) is applicable: "Because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, [therefore,] the Commission may determine the average weekly wage by a method that is just and fair to all parties concerned." The method used to determine the claimant's average weekly wage should be calculated by dividing the total earnings from the 52 weeks

prior to her accident by the total number of hours worked to earn those wages, to arrive at an hourly rate that would then be multiplied by the average number of hours worked by the claimant per week.

Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner