

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210713

ROBERT ROSS, EMPLOYEE	CLAIMANT
ADVANCE AUTO PARTS, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED AUGUST 16, 2004

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

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RANDY P. MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed March 11, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on September 6, 2002 at which time the claimant sustained a compensable back injury at a compensation rate of \$134.00. Medical expenses, temporary total disability benefits and a 10% rating to the body as a whole have been paid.

2. The claimant has proven by a preponderance of the credible evidence of record that he is permanently and totally disabled as a result of his compensable injury which is the major cause of his disability based on his age, education, work experience, permanent impairment and work restrictions.

3. 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.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the March 11, 2004 decision of the Administrative Law Judge, including all findings of

fact and conclusions of law therein, and adopt the opinion 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 must respectfully dissent from the majority's opinion finding that the claimant is permanently and totally disabled. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that the major cause of his permanent impairment is his compensable injury sustained on September 6, 2002.

The claimant suffers from numerous health related problems that are not related to his compensable injury. A.C.A. § 11-9-102(4)(F)(ii)(b) provides:

If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment. Major cause is defined as more than 50% of the cause.

The medical evidence reveals that the claimant sustained a 10% impairment rating to the body as a whole as a result of his compensable back injury. The claimant underwent a Functional Capacity Evaluation which revealed the following:

Mr. Ross demonstrated good general upper extremity mobility. He

demonstrated poor ability to work with materials at knee, waist, and chest, and overhead level without difficulty or complaint. Above knee height his body mechanics deteriorated and the testing was stopped by the evaluator. Mr. Ross demonstrated to be in very poor cardiovascular condition during this evaluation. His blood pressure and heart rate response to exercise and activity support this finding. Mr. Ross' blood pressure was recorded as high as 170/115 mmHg with a heart rate of 125 following a lifting activity. Mr. Ross was given ample opportunity to rest and allow his pressure to return to near normal before elements of the evaluation were continued.

After receiving the FCE results, claimant's treating physician released the claimant to return to work with restrictions of no lifting over five pounds and with alternating between sitting, standing, and lying down.

Gay Signoff, the vocational specialist who performed a vocational evaluation, noted that the claimant "feels that he is incapable of returning to the workforce due to a multitude of health problems." These problems consist of heart surgery in 1997, a stroke in 1997 after the heart surgery, arthritis primarily in the hands and arms, but also in other joints as well, vertigo, and bilateral carpal tunnel syndrome.

Claimant's heart problems in 1997 forced the claimant to sell his mechanics business and eventually seek employment with the respondents selling automotive parts. Thus, claimant's pre-existing condition is, in my opinion, at least 50% responsible for the claimant's present disability. Although the claimant was released to return to work with strict restrictions, the record is unclear as to whether these restrictions were imposed as a result of the claimant's compensable injury or his pre-existing condition. For instance, while claimant's treating physician restricted the claimant to no lifting in excess of five pounds, the Functional Capacity Evaluation revealed that the claimant "demonstrated functional strength and range of motion in the right upper extremity. He exhibited abilities consistent with being able to successfully return to full, unrestricted duty." Unfortunately, a detailed Functional Capacity report was not included in the record, thus rendering it impossible to determine without resorting to speculation the functional limitations posed by the claimant's compensable injury. In my opinion, the record only supports a finding that the claimant's compensable injury was one among several factors combining to produce the claimant's disability. Accordingly, I find

that the claimant has failed to prove by a preponderance of the evidence that his compensable injury is the major cause of his present disability.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner