

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202647

RUBEN MITCHELL, EMPLOYEE	CLAIMANT
SIEGEL ROBERTS OF ARKANSAS, EMPLOYER	RESPONDENT NO. 1
HARTFORD CASUALTY INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED MARCH 3, 2005

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

Claimant represented by the HONORABLE PHILLIP WELLS,  
Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL  
RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY  
PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY W.  
RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of  
the Administrative Law Judge filed October 11, 2004. In

said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On October 1, 2001, the relationship of employee-employer-carrier existed among the claimant and Respondents #1.
3. On October 1, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$410.00/\$308.00 for total/permanent partial disability.
4. On October 1, 2001, the claimant sustained an injury arising out of and in the course of his employment.
5. Appropriate temporary total disability benefits have been paid relative to the claimant's October 1, 2001, compensable injury.
6. The claimant's healing period ended December 27, 2002.
7. The claimant has a permanent physical impairment in the amount of 11% to the body as a whole as a result of the October 1, 2001, compensable injury.
8. When the claimant's age, education, work experience and permanent restrictions and limitations are considered the evidence preponderates that claimant has suffered a loss of earning capacity in the amount of 70% in excess of his anatomical impairment.
9. The claimant's present disability status is the product of the October 1, 2001, compensable injury alone. Respondent #2 has no liability in this claim.
10. The Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of October 1,

2001.

11. Respondents #1 have controverted the payment of permanent disability benefits in excess of the claimant's 11% permanent physical impairment.

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 October 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 respectfully dissent from the majority's opinion finding that the claimant was entitled to a 70% loss in wage earning capacity. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof. Accordingly, I find that he claimant has failed to prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits.

The claimant sustained an admittedly compensable injury on October 1, 2001. He ultimately underwent a surgical procedure for a herniated nucleus pulposus and received an 11% permanent impairment rating to the body as a whole. The claimant had a follow up MRI which indicated that there was no further treatment. A functional capacity evaluation indicated that the claimant was capable of light to medium levels of employment. Dr. John Brophy, the claimant's treating physician, opined that the results of the post-surgical MRI showed that there were no objective reason why the claimant could not return to work at full duty without restriction.

The evidence demonstrates that the claimant returned to work in a boll weevil eradication program. The claimant was driving a four-wheel drive vehicle looking for boll weevils in cotton fields. The claimant sustained a heart attack on April 28, 2004. It was after the heart attack that the claimant did not return to work. The claimant testified that he is not able to work now because of his heart condition.

The claimant had previously suffered a broken left collar bone while he was working as a police officer. The claimant was off for ten days and worked

light duty for six weeks after the surgery to repair his collar bone. He had no restrictions or problems as a result of that injury and made a full recovery. The claimant also suffered a fracture to his left arm that required surgical repair. The claimant had no limitations as a result of this injury and was able to return to work performing full duties.

The claimant was diagnosed with diabetes in 1992. He also suffered an injury in 1992 or 1993 to his right rotator cuff and underwent surgery. This was also a work related injury that occurred with a prior employer. The claimant went back to work as a truck driver and had no problems with his shoulder after this injury. The claimant had stints implanted due to a heart condition in 1992 and again in 2001. The claimant testified he had no limitations due to his heart condition before going to work for the respondent employer.

The evidence demonstrates that the claimant has a long and varied employment history. The claimant is a high school graduate and attended two years of college. He spent three years as a special forces officer in the military. He has been employed as a police officer for almost thirty years where he worked

as a detective in the areas of vice, intelligence and narcotics. He has also worked as a truck driver, both local and over the road, for twenty five years.

In my opinion, there is no evidence to establish that the claimant sustained any wage loss. The claimant's treating physician opined that there was no further indication for surgery when he released the claimant to return to work in December 2002. The claimant returned to work in a job driving a four wheel all terrain vehicle out in cotton fields checking for boll weevils. He was performing this job until he had his heart attack. The claimant testified that it was because of the heart attack that he was not able to go back to work.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he was entitled to any wage loss disability benefits. It is apparent that the claimant's current condition is due to his heart problems and not to his work related injury. Accordingly, I must respectfully dissent from the majority's award of wage loss disability benefits.

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KAREN H. MCKINNEY, Commissioner