

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608337

RONALD CAREY, EMPLOYEE	CLAIMANT
AYERS DRYWALL & INSULATION, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 27, 2009

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

Claimant represented by the HONORABLE LAURA MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, 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 November 18, 2008.

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 July 17, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On July 17, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$258.00 for total disability and \$194.00 for permanent partial disability.
4. On July 17, 2006, the claimant sustained a compensable injury in the form of a myocardial infarction or heart attack. Specifically, the claimant has proven the occurrence of an employment related accident on July 17, 2006, that was the major cause of the physical harm that was in the form of an occlusion of the second obtuse marginal coronary artery with a resulting myocardial infarction and that the employment related exertion producing or precipitating this accident was extraordinary and unusual in comparison to the claimant's usual work for the respondent, as required by Ark. Code. Ann. §11-9-114.
5. The medical services provided the claimant at the Hastings Indian Hospital and the Tahlequah City Hospital by and at the direction of the emergency room personnel, Dr. Gaurav and Dr. Jane McKinnon through October 25, 2006, represents reasonably necessary medical services for the claimant's compensable coronary injury, with the exception of any added expenses resulting from a bypass performed on the left anterior descending coronary artery, represents reasonably necessary medical services for the claimant's compensable coronary injury (sic), under Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these medical services subject to the medical fee schedule established by this Commission.
6. The claimant was rendered temporarily totally disabled as a result of the effects of his compensable coronary injury for the period of July 17, 2006 through October 25, 2006. The claimant

has failed to prove his entitlement to temporary total disability benefits, after October 25, 2006. Specifically, he has failed to prove that he continued within his healing period from the effects of his compensable coronary injury after that date.

7. The respondents have denied the occurrence of any compensable injury and have controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the controverted temporary total disability herein awarded.

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 November 18, 2008 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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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury in the form of a heart attack on July 17, 2006. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant was working for the respondent employer delivering drywall to an apartment complex on July 17, 2006. The claimant had worked for the respondent employer for approximately six months at that time. On that date, the claimant was picking up and carrying individual sheetrock panels from stacks by the side of the delivery truck and taking them to the individual apartments where they were to be installed. He was helped by another individual whom the claimant testified was not "a very big guy." The claimant testified that over the course of the day he sweated profusely and drank large amounts of water. He began to have trouble breathing and began to get weak. The claimant stated that he ultimately passed out and was revived when co-employees poured cold water on him. The

claimant was taken to Hastings Indian Hospital and was later transported to Tahlequah City Hospital. The claimant was diagnosed with a myocardial infarction heat stroke and ultimately underwent corrective bi-pass surgery on July 27, 2006.

The evidence demonstrates that the claimant has a longstanding history of hypertension and is a non-insulin dependent diabetic. He was a smoker, and in fact had only quit two months prior to the hearing. The claimant also had a history of alcohol and methamphetamine abuse which the claimant did not acknowledge but merely stated that he smoked marijuana. However, the claimant, on the witness stand, stated that he could not remember a lot of things. The claimant was also moderately obese and had a family history of coronary artery disease. The claimant had previous episodes of cardiac dysfunction which were supported by abnormal EKG findings.

The claimant contends that he sustained a compensable injury in the form of a heart attack on July 17, 2006. The respondents contend that the claimant did not suffer a compensable injury. In my opinion the claimant has failed to meet his burden of proof. Ark. Code Ann. §11-9-114, (Repl. 2002) provides as follows:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b) (1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

In order for the claimant to sustain a compensable heart attack or cardiovascular injury, he must show that the exertion exerted was extraordinary and unusual compared to his usual work or that there was some unusual and unprecedented incident that occurred that was the major cause of the physical harm. When I review the record, I cannot find that the claimant's work that day was unusual. It appears that the kind of

work the claimant was doing on that July day was exactly the kind of work that he had done previously.

The claimant was asked if the job was hard or easy and he replied, "it's a hard job. I mean, if you've done it for a while, its easier, but if you're a new guy, its really a hassle." The claimant confirmed that he never moved sheetrock alone and it was always a two-man job. The claimant was asked how much of his day was actually spent moving sheet rock and how much of it was spent doing other activities. The claimant testified as follows:

Q. Okay. You had also told me that you would go to work at 7:00 o'clock in the morning; is that right?

A. Yes.

Q. And then the other guys would get it loaded; then'd pull the orders and get everything on the truck for you; is that right?

A. Yes.

Q. So you would have to wait until the truck was ready to go out to the job site?

A. Yes.

Q. Okay. And this one, you couldn't remember exactly where it was, but you thought it was about 45 minutes to drive from Farmington where Ayers is located to the job site; is that correct?

A. I don't recall that.

Q. Okay. You had also told me that it takes about two and a half hours to unload a truck, once you were at the job site. Is that correct?

A. That's how long it takes to unload one?

Q. One load.

A. I'm not really sure of the time. I know it takes a while. It could be longer. I don't know; really don't know.

Q. Is two and a half hours about accurate?

A. I don't know. It could be four hours. I'm not sure.

Q. Let me ask you this: Would you normally do more than one load per day at a job site?

A. Yes.

Q. So during that time frame, you would be riding in the truck; is that right?

A. Yes.

Q. Before July 17th, you knew that working in the heat was hot and hard work; is that correct?

A. Yes.

Q. You knew to take your breaks and drink plenty of fluids; is that right?

A. Yes.

Q. You never worked in an air conditioner?

A. No.

Q. Or in an area with air conditioning; is that correct?

A. No.

Q. Everything was outside?

A. Not actually, we'd be inside, bringing the sheetrock from outside inside, or we'd be carrying it in.

Q. But none of the buildings where you brought the sheetrock into would have air conditioning?

A. No.

The claimant's supervisor, Mark Tiger, testified at the hearing that he had been working on the same truck with the claimant for approximately two months prior to the claimant's heart attack. He confirmed that it was hot on July 17th, just as it usually was in Arkansas:

Q. He had testified earlier that it was hot that day. Do you remember that?

A. Yes.

Q. What do you remember about the temperature?

A. Extremely hot. It was hot the day before and it was hot the days after, which is typical July weather in Arkansas. I'd say it was a little above average. And this year, we didn't see temperatures like we did that day. But it was hot. We was in one of those two-week dry spells, extremely hot situation.

Mr. Tiger further testified that it was a few degrees hotter inside than it was outside and that there was very little breeze. He explained that when ever his crew would go into a building where they were delivering sheetrock, they would go in and open the doors and windows and try to get a breeze going. The walls would already be up and the insulation would be in place when they would enter. If there was no wind, the conditions were "extremely hot." Mr. Tiger testified that this was normal and this was what his crew was used to doing. Mr. Tiger testified that on the date of the claimant's heart attack the crew was not able to use the boom truck to send sheetrock through one of the windows but this was not the first time that had happened. Further, he stated that the claimant did not deliver sheetrock to any air conditioned buildings.

The evidence demonstrates that the claimant had worked manual labor most of his life. In fact, the work that he was doing for the six months prior to the heart attack was heavy and hard manual labor as affirmed by Mr. Tiger. This was not a situation where the claimant had an office job and was suddenly asked to go outside on a hot July day in Arkansas and move some sheetrock. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that the work

he was doing on July 17, 2006, was extraordinary and unusual in comparison to his usual work.

It is of note, that the claimant had a pre-existing propensity for a myocardial infarction. The claimant had several risk factors for heart problems. He testified on direct examination:

Q. Were you a smoker?

A. Yes.

Q. And how much did you smoke each day?

A. Probably about a pack a day.

Q. And were you also diabetic?

A. Yes.

Q. And what sort of treatment were you getting for the diabetes?

A. Two pills a day.

Q. And how controlled was your diabetes?

A. My diabetes had been under control for at least ten to 11 years prior to that.

Q. And what did you yourself mean by "controlled"? It can mean different things to different people.

A. It means I take my medicine, I work. I didn't drink and didn't use drugs, and kept my readings pretty much under the fine limit that they wanted me to keep them.

Q. And had you been a drinker way, way back there?

A. Yes, ma'am.

Q. How long since you had been a drinker?

A. Years.

Q. Were you --

A. I have off and on quit it years and years.

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Q. Did you have anybody else in the family that has specifically had a heart attack?

A. No.

Q. How much did you weigh at the time?

A. Two-thirty, 225.

Q. The medical records talks about a history of family heart disease. Do you know what they are referring to?

A. No.

Q. Anybody in your family ever had blood pressure or anything?

A. My mother. She had high blood pressure. I have high blood pressure. And that's the only two I can think of. I don't know about my dad.

When pressed on cross-examination, the claimant provided more detail about his diabetic condition and family history:

Q. You've treated for the presence of diabetes since at least the 90s; is that correct?

A. Mostly my whole life. Diabetes in early '90s.

Q. What about high blood pressure?

A. It's been about 15 years or so.

Q. Is it true that your father died of complications from diabetes?

A. Yes.

Q. And your mother also has cardiovascular disease; is that right?

A. That would be the heart?

Q. Your heart; correct.

A. I don't know.

According to the medical records, the claimant was admitted to Tahlequah City Hospital on July 18, 2006, "with a history of hypertension and non-insulin diabetes and mild to moderate obesity, and a positive family history of coronary disease." His doctor opined that he had multiple risk factors for coronary artery disease. It should be noted that the claimant's surgeon is Dr. Jane McKinnon, the claimant's counsel's sister.

Dr. McKinnon provided an opinion that based upon "some objective medical findings," the claimant's work-related injury caused his need for treatment and resulting disability. She does not indicate what his objective medical findings were, nor does she identify what his actual injury supposedly was. It also appears that while Dr. McKinnon was provided with information about the claimant's hypertension, diabetes, and family history, she was not given any information about his drug and alcohol abuse, medication noncompliance, or prior cardiac dysfunction. As such, her opinion was not based upon a complete and accurate history and I give it very little weight. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id.

The evidence shows that the claimant has a long-standing history of severe depression and alcohol abuse. He has been treated at the W. W. Hastings Indian

Hospital and by Dr. Shalini Sangal for these problems. The claimant indicated in January of 2000 that he had been "clean and sober" at one time for a period of six years, but then his depression was worse. He admitted in February of 2001 that his drug problem was getting out of control. The records reflect that he went through amphetamine withdrawal the following month. The drug abuse kept him from working.

When asked about his drug abuse under oath, the claimant denied any illegal drugs except marijuana:

Q. This on page 38 of your deposition, and again that was taken August 29, '07. I had asked you, "Okay. What about illegal drugs; have you ever done any?" What was your response?

A. "Marijuana."

Q. I asked, "Is that all?" What was your response?

A. "No."

Q. And I asked you if you still smoke it. What did you say?

A. "No."

Q. "And when was the last time you did?"

A. "It's been a while."

Q. Is that accurate testimony?

A. I can remember; I remember that.

Q. Is that the truth?

A. Yes.

The claimant also denied any prior heart-related conditions or symptoms:

Q. Have you ever gone to the hospital, complaining of trouble with your chest, with chest pain?

A. No.

Q. What about trouble with dizziness or visual complaints?

A. No.

However, the medical records show that he was admitted to the hospital on July 18, 2002, for chest pressure, dizziness, sensitivity to light and visual changes. The claimant only admitted to the doctor that he smoked marijuana. The hospital admission form indicates that he was admitted due to an abnormal EKG, and he was noted to have moderate risks factors of "smoking, hypertension, diabetes and hypercholesterolemia." The claimant had not been taking his blood pressure or diabetic medications. He later returned to the hospital on August 2, 2002, with complaints of no energy and pressure on his chest. He had had chest pain, but it resolved by the time he got to the hospital.

In October of 2002, the claimant was hospitalized with suicidal thoughts; his mother indicated that the claimant had a drug problem, and she could not live with him. The claimant had not been taking medication for diabetes, hypertension, irregular heartbeat, or increased cholesterol. He was discharged with medication but then quit taking all medications two weeks prior to his next visit on November 23, 2002. In July of 2003, the claimant was again admitted for threats of suicide and again reported that he quit taking his medications. He indicated that he was doing methamphetamine occasionally and smoking marijuana five times a day or more. His drug screen was positive for amphetamines and methamphetamines.

On March 15, 2004, the claimant was seen for complaints of feeling weak and dizzy and for blurry vision. In October of 2004, he reported drinking a thirty-pack of beer and a pint of whiskey a day when he could afford it. Other medical reports from July of 2004 show that the claimant was "drinking daily, doing marijuana, speed, downers, pain killers" for a two month period; he had also been non-compliant with his medications. When asked how much illegal drugs he was using he said, "a lot." These admissions regarding his

drug and alcohol abuse were not shared with Dr. McKinnon, according to her medical records.

Further, there is evidence that the claimant was not feeling well the day or so prior to his heart attack and that he attributed his symptoms to his diabetic condition. Mr. Tiger testified.

Q. Now, did Mr. Carey ever talk to you about any physical condition he had before that date?

A. He spoke of his diabetes; he spoke of his father's diabetes. No. Other than, you know, he never mentioned he thought he was having a heart attack or nothing. He mentioned the diabetes, he mentioned allergies. It was just conversation. No, he never mentioned any medical conditions other than the diabetes.

Q. Did he ever complain to you about problems of not feeling well?

A. The day or a couple of days before the day in question, yes, he said he wasn't feeling good, he just wasn't feeling up to where he should have been.

Q. Did he have any idea what it was that was causing that?

A. No. I thought he said it was his diabetes.

It is evident that the claimant's heart condition was so far compromised by pre-existing problems coupled with years and years of alcohol and drug abuse that he was likely to experience a myocardial

infarction at any time. Even the slightest exertion could have induced a heart attack. The claimant chose a job where he was working in hot, physically demanding conditions every single day. The claimant was symptomatic prior to his heart attack on July 17, 2006. It is also noteworthy that Dr. McKinnon was not made aware of the claimant's prior abnormal EKG and medication non-compliance, nor was she made aware of his drug and alcohol abuse.

When I consider the fact the claimant had a pre-existing propensity for a heart attack, that he has years and years of alcohol and drug abuse, and the fact that the claimant's work that day was not unusual or extraordinary in comparison to his usual work, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable heart attack. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner