

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F809634

ALTON BROWN, EMPLOYEE	CLAIMANT
EASTERN TANK SERVICE, INC., EMPLOYER	RESPONDENT
AIG DOMESTIC CLAIMS, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 18, 2010

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Ft. Smith, 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 December 2, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 15, 2009, and contained in a pre-hearing order filed July 16, 2009, are hereby accepted as fact.
2. The claimant is entitled to wage los that would be equal to 15 percent permanent impairment to the body as a whole. This amount is separate and apart from the 15

percent permanent impairment to the body as a whole stipulated to by the parties.

3. The claimant's attorney is entitled to an attorney's fee in This matter is presently before the Full Commission on as set forth in the Arkansas Workers' Compensation Act.

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 December 2, 2009 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a 15% wage loss disability as a result of his compensable right shoulder injury. Based upon my de novo review of the entire record, without giving the benefit of the doubt

to either party, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury to his right shoulder on February 1, 2008. Initially, the claimant was treated by Dr. Jeffrey Evans and was diagnosed with Right Shoulder grade 1 acromioclavicular joint separation. When his shoulder failed to improve, the claimant sought treatment from Dr. Keith J. Bolyard with the River Valley Musculoskeletal Center. Dr. Bolyard obtained x-rays of the claimant's right shoulder, physically examined the claimant and concluded that he suffered from a chronic rotator cuff deficient shoulder. As claimant's rotator cuff was too far gone, Dr. Bolyard explained that it could not be repaired. Given the extent of damage to the rotator cuff, Dr. Bolyard further explained to the claimant that the tear did not happen with his work related fall. Dr. Bolyard's diagnosis was later confirmed by Dr. Evans, after Dr. Evans obtained an MRI of the claimant's right shoulder.

Prior to his compensable injury, the claimant injured his left shoulder and was limited in his ability to lift heavy objects. Claimant was able to settle that claim with his previous employer for \$33,000.00.

In affirming and adopting the decision of the Administrative Law Judge, the majority relies upon the claimant's loss of wages from \$19.50 per hour to \$16.00. However, this finding is incorrect. A thorough review of the record reveals that the claimant was earning \$18.50 per hour at the time of his injury and that he received a raise to \$19.50 per hour in July 2008, five months after his compensable injury. Claimant continued to earn \$19.50 per hour until he changed job duties in April of 2009. Thus, the evidence reveals that not only was the claimant capable of earning the same wages after his injury as he was at the time of his injury, the claimant was even given a raise of \$1.00 per hour five months after he was injured. Just as after his left shoulder injury with a previous employer, the claimant was capable of working as a diesel mechanic with the assistance of co-workers when any heavy or overhead lifting was required. This is clearly evident by the claimant's continuance of working as a diesel mechanic for over a year and receiving a significant raise after his compensable right shoulder injury. Moreover, claimant testified that he is no longer earning the overtime wages now that he has changed job duties, but this does not mean that he is not capable of continuing

to work overtime. In this regard, the claimant testified that the area where he currently works does not require overtime, but that is not to say that once the work load picks up, overtime will be required. There is no restriction placed upon the claimant limiting his ability or capability to work overtime. Accordingly, when I consider these factors, I cannot find that the claimant sustained a 15% decrease in his wage earning capacity.

With regard to the major cause argument, I am not persuaded that the claimant's compensable injury is the major cause of the 15% permanent anatomical impairment rating assigned to the claimant for his massive rotator cuff tear. As noted by Dr. Bolyard, given the extent of injury to the claimant's rotator cuff, the fall in the spring of 2008 could not have caused the tear. Consequently, since I am not persuaded to find that the major cause of the impairment is the claimant's compensable injury, it likewise follows that the major cause of any wage loss is not the compensable injury.

Therefore, for those reasons set forth above, I must respectfully dissent from the majority opinion.