

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F811533

NATHAN HALE, EMPLOYEE	CLAIMANT
AMERICAN SHEET METAL WORKS, INC., EMPLOYER	RESPONDENT
CINCINNATI INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 30, 2010

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

Claimant represented by the HONORABLE ANDY C. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North 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 May 18, 2010 and amended on June 4, 2010. 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. The employer/employee/carrier relationship existed on or about

November 10, 2008, when the claimant sustained a compensable injury.

3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical treatment for his back.
4. Based on the evidence, I find that the claimant's average weekly wage was \$603.88, which entitles him to temporary total disability benefits in the amount of \$403.00 per week from the date of his injury to a date yet to be determined. However, I do find that the respondents are entitled to a credit for checks cashed by the claimant which were meant for medical providers.
5. The respondents have controverted claimant's entitlement to additional temporary total disability benefits as a result of the underpayment of benefits paid by respondents. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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 June 4, 2010, amended 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's findings that the claimant's average weekly wage was \$603.88. Based upon my de novo review of the record, my calculations indicate that the claimant's average weekly wage is \$363.39.

A.C.A. § 11-9-518 (Repl. 2002) provides:

- (a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract for 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 the hourly wage by the number of hours in a full-time workweek in the employment.
- (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.
- (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 evidence demonstrates that the claimant did not have an employment contract that guaranteed a specific number of hours that the claimant would work each week. The payroll records provide that the claimant's hours per work varied from a low of 4.50 to a high of 47.50. The claimant was paid \$13.00 per hour for forty hours and a rate of \$19.50 per hour for any overtime hours. The payroll records in evidence indicate that the claimant was paid \$5648.50 for regular hours and \$165.75 for overtime hours for a total of \$5814,25 for the 16 weeks prior to his admittedly compensable injury. Therefore, the claimant's average weekly wage is \$363.39.

Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner