

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607944

MICHAEL LONG,
EMPLOYEE

CLAIMANT

CITY OF FORREST CITY,
EMPLOYER

RESPONDENT #1

ARKANSAS MUNICIPAL LEAGUE WCT,
INSURANCE CARRIER

RESPONDENT #1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND

RESPONDENT #2

OPINION FILED DECEMBER 14, 2010

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

Claimant represented by the HONORABLE ROBERT B. BUCKALEW
and HONORABLE CYNTHIA ESTES ROGERS, Attorneys at Law,
Little Rock, Arkansas.

Respondents represented by the HONORABLE J. CHRIS
BRADLEY, 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 June 10, 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 over this claim.
2. The stipulations agreed to by the parties are
hereby accepted as fact.

3. The claimant has proven, by a preponderance of the credible evidence, that he is permanently and totally disabled as the result of the compensable head injury sustained on July 16, 2006.
4. Respondents #1 have controverted claimant's entitlement to permanent total disability.
5. Respondent #2 has not controverted claimant's entitlement to permanent total disability benefits.
6. Although it is herein specifically determined that the claimant is permanently totally disabled, in the alternative, in the event claimant is less than permanently totally disabled, respondents #1 have controverted claimant's entitlement to all permanent partial disability benefits, both impairment benefits, as well as all wage-loss disability 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 10, 2010 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 opinion finding that the claimant has proven by a preponderance of the evidence that he is permanently and totally disabled. 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 is permanently and totally disabled.

In my opinion, a review of the evidence demonstrates that the claimant is unable to prove that he is entitled to any permanent anatomical impairment. There is no dispute that the claimant sustained a work-related injury. The claimant had a contusion fracture to his left orbital and required stitches to repair those injuries. The claimant now suffers from headaches, lack of concentration, facial numbness and sensitivity to light. The Administrative Law Judge awarded the claimant permanent and total disability based upon the finding in Singleton v. City of Pine Bluff 102 Ark. App. 305, 285 S.W.3d, 253 (2008). In Singleton, the Court found that the Guides to the Evaluation of Impairment (Guides) were merely guides to aid the Commission in assessing the degree of a claimant's disability. The Court stated, "If those guides do not contain an express method of rating

an injury that is compensable pursuant to Arkansas law, the Commission must adopt a reasonable method of doing."

In my opinion, the facts of this case are significantly different than in Singleton. The claimant's complaints in this case are of a headache. Headache is very subjective, and that pain alone cannot support an award of benefits, but must be accompanied by objective findings. In Singleton, the claimant's complaints of pain were supported by bullet fragments that were embedded in the claimant's foot.

Further, even if the claimant does have headache pain, there is no way the nature, intensity, and frequency can be determined by objective means. Dr. Wright sought to use objective means by using the questionnaire found in Table 18.4 of the 5th Edition of the Guides to the Evaluation of Permanent Impairment, properly noting that the 4th Edition of the **Guides** provided even less guidance. Methodology called for by the 5th Edition requires a questionnaire that is completed by the patient who answers questions making a numerical 1-10 response to questions regarding the severity of his pain, how pain limits or interferes with his activity and how pain affects his mood. The doctor then takes the patient's information and sums the

patient's numbers to calculate the total pain severity score, the total score for activity limitation divided by the number of questions and, lastly the score for total pain impairment attributable to mood state, also divided by the number of questions. Additional work is still required from the doctor, but the whole basis of the assessment is the patient's report of his pain and other perception subject to his exclusive voluntary control. It is currently impossible to objectively measure pain and impossible to provide a rating of impairment without the patient's complaints of pain.

It is of note that Dr. Wright, based upon the claimant's report, placed the claimant in Class 3, a moderately severe classification of impairment due to a pain disorder. Class 3 concerns the patient who can perform activities of daily living only with substantial modifications and is unable to perform many routine activities such as driving a car. At the hearing, the claimant testified that the day before the hearing he had driven from Pleasant Hill, Missouri, near Kansas City, Missouri to Forrest City, Arkansas, some 305 miles. In response to questioning whether he drove his granddaughter to school the claimant testified, "No, sir, she catches the school bus at our driveway. I drive

on a limited basis." Yet upon being shown pictures of himself with his granddaughter's book bag beside his car he recanted and claimed she did not ride the bus all the time and that he did not drive her all the time. The claimant testified that his wife, who was disabled, would give him the grocery list and he would get the groceries as she would go with him. Later, the claimant testified that he was the only one in his household who could drive. Where the claimant is the only driver in the household and he does drive, then it stands to reason that he can clean and groom himself, use a toilet, dress, eat and can get in and out of bed and a chair. There is no evidence that the claimant performs any of these activities with any major modifications. Though the claimant's responses to the doctor's questionnaire are not in evidence, in my opinion, for the doctor to opine that the claimant had sustained a Class 3 impairment, the claimant was not entirely truthful in his responses. Nor are observations of friends and former co-workers objective support, dealing as they do with "obvious imbalance when the claimant walked," that the claimant's reflexes were different after he had attempted to return to work, and, that the claimant exhibited obvious short-term memory loss. These

activities are all activities that come under the claimant's voluntary control. Here, there is not even a bullet fragment to support any change in the claimant's gait as there was in Singleton.

Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to permanent and total disability benefits. Accordingly, I must dissent from the majority's award of benefits.

The majority has also awarded attorney fees for controversion. In my opinion, this case does not amount to controversion. The respondents were not provided with a permanent impairment rating that allowed them to pay or controvert. The impairment that they were given was that the claimant was "moderately severe". This rating is not sufficiently specific. The respondents are obligated to pay a permanent impairment rating, but the claimant has the burden of proof to prove that the impairment rating provided was sufficiently specific in order to carry that burden of proof. In my opinion, the claimant has not done so and, therefore, the claimant is not entitled to an attorney fee.