

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G409832

JAMES A. BINKLEY,
EMPLOYEE

CLAIMANT

LITTLE ROCK AMBULANCE AUTHORITY,
EMPLOYER

RESPONDENT NO. 1

ARKANSAS MUNICIPAL LEAGUE WCT,
INSURANCE CARRIER/TPA

RESPONDENT NO. 1

DEATH & PERMANENT TOTAL
DISABILITY TRUST FUND

RESPONDENT NO. 2

OPINION FILED JUNE 17, 2021

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents No. 1 represented by the HONORABLE JARROD S.
PARRISH, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by the HONORABLE DAVID L. PAKE,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed November 25, 2020. The administrative law judge found that the respondents proved they overpaid permanent partial disability benefits to the claimant. The administrative law judge found that the claimant failed to prove he was entitled to a refund of monies his attorney paid in a third-party settlement.

After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the respondents did not prove they were entitled to a credit in the amount of \$5,139.95 to include a payment allegedly representing "disfigurement" in accordance with Ark. Code Ann. §11-9-524(Repl. 2012). The Full Commission finds that the claimant is entitled to a full reimbursement of \$8,333.33 paid to the respondents in an unauthorized third-party settlement.

I. HISTORY

James Aaron Binkley, now age 36, was formerly employed with the respondents as a paramedic. The parties stipulated that the employee/employer/carrier-TPA relationship existed at all relevant times, including December 16, 2014. The parties stipulated that the claimant's average weekly wage was \$1,057.81, which entitled him to "the 2014 maximum weekly indemnity rates of \$617.00 for temporary total disability benefits and \$463.00 for permanent partial disability benefits."

The parties stipulated that the claimant "was involved in a motor vehicle accident within the course and scope of his employment" on December 16, 2014. The claimant testified on direct examination:

Q. Mr. Binkley, it has been agreed that you were involved in a job-related accident in December of 2014. Will you briefly explain to us what happened that day.

A. I was on board the ambulance acting as a paramedic in Maumelle doing my regular 24-hours shift, and we received a call for a patient that had been electrocuted. Went and got the patient, got him in the back of the truck, and we were transporting to the hospital. I was standing up performing patient care on a patient who is in pretty bad shape, and while we were traveling down Maumelle Boulevard, a police officer, who was, I guess, doing something or looking the wrong way, didn't see us, pulled directly in front of our vehicle, and we T-boned him at about 55 miles an hour. I was standing up untethered in the back when the impact occurred, and I went headfirst into a refrigerator at 55 miles an hour.

The parties stipulated that the claimant "sustained compensable injuries to his brain, skull, right eye, and carotid artery" in the motor vehicle accident occurring December 16, 2014.

Dr. Barry D. Baskin provided an INDEPENDENT MEDICAL EVALUATION AND IMPAIRMENT RATING on June 29, 2015:

Mr. Binkley is referred to me by Stacy Mathis with JMS Consulting for an Independent Medical Evaluation and Impairment Rating pertaining to injuries he sustained in a motor vehicle accident 12/16/14. I have been provided medical records for review. I have discussed the case with Dr. Wendell Pahls. I have been asked to review the records, perform history and physical examination and then render opinions about his diagnosis, prognosis and impairment rating....

Mr. Binkley is a 30 year old gentleman from North Little Rock. He works for Metropolitan Emergency Medical Services as a paramedic. He was on the job when the ambulance he was riding in was involved in a motor vehicle accident. This happened December 16, 2014. Mr. Binkley was in the back of the ambulance when the ambulance hit another vehicle and he sustained severe blunt trauma. His injuries included a depressed skull fracture, subarachnoid hemorrhage, carotid artery dissection with pseudoaneurysm resulting in a stroke syndrome. He had traumatic brain injury, multiple facial bone

fractures, scalp laceration and loss of vision in the right eye due to blunt trauma. He had orbital rim fractures and damage to the optic nerve....

Mr. Binkley is a nice gentleman who has a severe motor vehicle accident 12/16/14. He was in the back of an ambulance and was unrestrained at which time the ambulance was T-boned by another vehicle and he sustained severe head trauma. He has had a traumatic brain injury with intraventricular (sic) hemorrhage. He also had a stroke from a right carotid injury and was noted to have a mild carotid dissection on the left. He has been left [with] residual clumsiness on the left. He has had some subtle cognitive deficits. He still has daily headaches. He has facial pain. He has a disfiguring scar on the right forehead. He had skull fracture with depression of the fracture. I believe he has reached maximum medical improvement. He is back at work. I believe this gentleman has significant impairment as a result of his trauma. Using the AMA Guides to the Evaluation of Permanent Impairment Fourth Edition, starting with the patient's visual deficit, on page 218-220, he has a 25% impairment to the visual system due to complete loss of vision out of the right eye. This is converted into a 24% whole person impairment. Turning to page 142, Table 2, Mr. Binkley does have some residual mental status/neurocognitive impairment. This is fairly mild. This would put him in a class I impairment, which would allow 8% to the whole person....Turning to his loss of sense of tastes and smell, on page 144 category 4.1F, he would have a 5% whole person impairment due to loss of the olfactory nerve function. Turning to page 229, facial fractures, he would have a class II impairment due to loss of supporting structure of part of the face with or without a cutaneous disorder. He does have the scar. He has residual deformity of the facial bone structure and the right orbital structure. His ENT maxillofacial plastic surgeon advised that he might have further problems with facial deformity as he ages. This would allow him a 10% whole person impairment....Turning to the combined values chart on page 322, his 24% impairment based on visual loss is combined with 8% whole person mental status impairment to yield a 30% whole person impairment. That 30% is combined with the 5% due to loss of his sense of taste and smell, which will give him a 34% whole person impairment.

That 34% is combined with 10% impairment to the whole person due to his class II facial fracture deformity which would give him a total of 41% whole person impairment.

Well over half of his impairment comes from the loss of vision in the right eye. He has made a fairly good recovery with regards to the stroke and brain injury. He may have residual cognitive problems as he ages....

I believe the patient is at maximum medical improvement. He will require at least annual follow up with a physical medicine and rehabilitation doctor. He is scheduled for further follow up with his ENT doctor regarding his facial fractures. He will likely require some follow up with his eye doctors as well. I would be happy to see him back on an annual basis and on a PRN basis if needed otherwise. This concludes my Independent Medical Evaluation on Mr. James Binkley. My opinions are given within a reasonable degree of medical probability based on my evaluation of the patient and review of the medical records....

The parties stipulated that the respondents “initially accepted Dr. Baskin’s 41% anatomical impairment rating.”

The claimant signed a “RELEASE OF ALL CLAIMS” on November 10, 2015: “That James Brinkley & his attorney, McDaniel Richardson & Calhoun, PLLC in full settlement for and in consideration of the sum of Twenty-Five Thousand and 00/100 \$25,000 the receipt and sufficiency of which is hereby acknowledged, does hereby remise, release and forever discharge Shane Graham, City of Maumelle and the Municipal Vehicle Program... from all liability arising out of an occurrence that happened on or about the 16th day of December, 2014 at or near Edgewood Drive, Maumelle, AR.”

On November 18, 2015, the Municipal Vehicle Program issued a check in the amount of \$25,000.00 to the claimant and the law firm McDaniel, Richardson & Calhoun. Attorney Dustin McDaniel corresponded with a representative of the Arkansas Municipal League on December 3, 2015:

This letter will confirm our telephone conversation yesterday. As you know, Mr. Binkley suffered a catastrophic injury while on the job working for MEMS Ambulance Service. Unfortunately, fault in the accident laid with a Maumelle police department vehicle. Due to sovereign immunity, Mr. Binkley's compensation was limited to the Arkansas Municipal League automobile policy of \$25,000. That money has been paid and is in my trust account. In order for me to distribute those funds, I need to also provide you with your subrogation interest. It is clear that Mr. Binkley was not made whole by the settlement. As you know, under Ark. Code Ann. §11-9-410, your interest in this settlement is limited to 1/3 of the recovery, or \$8,333.33. Of course, if there is any additional recovery, for instance there is a remote possibility of underinsured motorist coverage on the ambulance policy, the Arkansas Municipal League would retain subrogation rights on any such recovery as well. I intend to distribute money to Mr. Binkley next week....

The claimant signed a Form AR-L, CLAIMANT'S LUMP SUM REQUEST/RESPONDENT'S POSITION on July 7, 2016. A Legal Advisor with the Commission provided a LUMP SUM APPROVAL on July 11, 2016:

The claimant's application for a lump sum payment has been approved. The 100% disability rating to the eye, given to Mr. Binkley, entitles him to 105 weeks of benefits. 54.14286 weeks of benefits have accrued at the rate of \$617.00 per week, for a total of \$33,406.14. The Form AR-L reflects that \$33,318.00

of this has been paid, leaving a balance of \$88.14 to be paid without discount.

Additionally, when the present value multiplier for the remaining 50.85714 weeks, which is 48.22740, is multiplied by the weekly compensation rate of \$617.00, the amount owed for future PPD, discounted at 10% compounded annually, is \$29,756.30.

The 21% disability to the body as a whole, given to Mr. Binkley, entitles him to 94.5 weeks of benefits to be paid at the rate of \$463.00 per week. When the present value multiplier for the remaining weeks, subsequent to the above weeks, for the disability to the claimant's eye, which is 77.42551, is multiplied by the weekly compensation rate of \$463.00, the amount owed for future PPD, discounted at 10% annually, is \$35,848.01.

Please consider this letter your authorization to issue a lump sum payment of \$65,692.45 (88.14 + \$29,756.30 + \$35,848.01)....

Attorney Eddie H. Walker, Jr. corresponded with a representative of the respondent-carrier on July 22, 2019:

You will recall that there is an issue in this case in regard to whether the Arkansas Municipal League is entitled to one third of the third party settlement that was reached in this case before I became involved in the case.

My position is that Mr. Binkley was not made whole by the \$25,000.00 settlement; therefore, the Municipal League is not entitled to any of that \$25,000.00. Accordingly, I hereby request that the Municipal League refund to Mr. Binkley the money that they received in regard to the third party settlement.

Please let me know the Municipal League's position regarding this issue.

A pre-hearing order was filed on December 9, 2019. The parties stipulated that the claimant "seeks reimbursement of \$8,333.33 from Respondent No. 1 based on a third-party liability settlement." According to

the text of the pre-hearing order, the claimant contended, “The claimant contends that he has not been made whole by the settlement that was obtained regarding the third party settlement, and therefore, he is entitled to the entire \$25,000.00. The claimant contends that demand has been made on the respondent to pay the money to the claimant that the respondent received out of the third-party settlement and that since they have refused to do so, they have controverted the claimant’s entitlement to that money and accordingly owe an attorney’s fee. Claimant contends that he was terminated in August of 2019, that the termination was causally related to the effects of his injury, and that, therefore, he has sustained wage loss disability in an amount to be determined by the Commission. Claimant contends that he is entitled to an appropriate attorney’s fee in regard to any wage loss disability awarded. The claimant specifically reserves any and all other issues for future litigation and/or determination.”

The respondents contended, “Respondent No. 1 contends that to-date, they have paid all necessary medical and indemnity benefits for the claimant’s compensable injuries. Respondent No. 1 contends that claimant was terminated from his employment with the respondent-employer for cause, and that prior to termination, the claimant returned to work full duty without restrictions for his compensable injuries. Respondent No. 1 contends that the forty-one percent (41%) whole person impairment rating

assigned to the claimant on June 29, 2015, by Dr. Barry Baskin is contrary to law and must be modified to conform to Arkansas law. Respondent No. 1 contends that claimant is not entitled to wage loss benefits as he was able to return to work at his pre-injury capacity, and, but for his termination for cause, the claimant would have continued to receive wages from the respondent-employer. Respondent No. 1 reserves the right to amend and supplement their contentions after the completion of any necessary investigation and discovery.”

The respondents contended, “Right Eye Impairment. Respondent No. 1 contends that the June 29, 2015 impairment rating improperly rates Claimant’s right-eye injury as a whole person impairment. Claimant’s right eye impairment must be modified to reflect that it is a scheduled injury. Respondent No. 1 contends that Claimant is entitled to 105 weeks of temporary total disability benefits for loss of vision in his right eye. Given Claimant’s temporary total disability rate of \$617, he is entitled to \$64,785.00 for loss of vision in his right eye. Whole Person Impairment. Respondent No. 1 does not controvert Claimant’s entitlement to a five percent (5%) whole person impairment due to loss of the olfactory nerve function, or his entitlement to an eight percent (8%) whole person impairment due to mild residual mental status impairment. The combined value of these two (2) whole person impairment ratings gives Claimant

entitlement to a thirteen percent (13%) body-as-a-whole impairment rating. Given Claimant's permanent partial disability rate of \$463, he is entitled to \$27,085.50 for loss of olfactory nerve function and mild residual mental status impairment."

The respondents contended, "(a) Respondent No. 1 contends that, to-date, they have paid Claimant \$100,510.45 in permanent partial disability and facial disfigurement benefits. To the extent necessary, it is entitled to a credit in the amount of \$5,139.95 against any future compensation for an overpayment of permanent partial disability benefits. (b) As for Claimant's alleged entitlement to a refund of monies that Respondent No. 1 received out of Claimant's third-party settlement claim, Respondents No. 1 further asserts the affirmative defenses of laches, waiver, accord and satisfaction, and statute of limitations."

The respondents also contended, "Facial Disfigurement. Respondent No. 1 contends that the June 29, 2015 impairment rating improperly gives Claimant a permanent anatomical impairment rating for facial disfigurement in excess of the maximum imposed by statute. Claimant's facial disfigurement impairment rating must be modified to a maximum of three thousand five hundred dollars (\$3,500) in accordance with Ark. Code Ann. §11-9-524. Respondent No. 1 does not controvert Claimant's entitlement to the maximum of \$3,500."

The parties agreed to litigate the following issues:

1. The extent of the claimant's permanent anatomical impairment.
2. Whether the claimant is entitled to receive a refund of monies that Respondent No. 1 received out of the claimant's third-party settlement.
3. Whether Respondent No. 1 is entitled to a credit for an overpayment of disability benefits.
4. Whether and to what extent the claimant's attorney is entitled to a controverted fee based on the claimant's permanent anatomical impairment rating, and on the third-party settlement amount that Respondent No. 1 received.

A hearing was held on August 27, 2020. At that time, the claimant withdrew his contention that he was entitled to wage-loss disability benefits.

An administrative law judge filed an opinion on November 25, 2020.

The administrative law judge found, among other things, that the respondents were entitled to a credit for an alleged overpayment of permanent partial disability benefits. The administrative law judge found that the claimant failed to prove he was entitled to a refund of monies his attorney paid in a third-party settlement. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Anatomical Impairment

Permanent impairment is any functional or anatomical loss remaining after the healing period has been reached. *Johnson v. Gen. Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The Commission has adopted the

American Medical Association *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) to be used in assessing anatomical impairment. See *Commission Rule 34*; Ark. Code Ann. §11-9-522(g)(Repl. 2012). It is the Commission's duty, using the *Guides*, to determine whether the claimant has proved that he is entitled to a permanent anatomical impairment. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B)(Repl. 2012). Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2012). Medical opinions addressing impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B)(Repl. 2012).

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F)(ii)(a)(Repl. 2012). "Major cause" means "more than fifty percent (50%) of the cause," and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14)(Repl. 2012). Preponderance of the evidence means the evidence having greater weight or convincing force.

Metropolitan Nat'l Bank v. La Sher Oil Co., 81 Ark. App. 269, 101 S.W.3d 252 (2003).

An administrative law judge found in the present matter, “Respondent No. 1 has met its burden of proof in demonstrating it inadvertently overpaid PPD benefits to the claimant. Therefore, the law and the facts compel me to find Respondent No. 1 is entitled to a credit in the amount of \$5,139.95 toward any amount of future benefits the claimant may be awarded in this claim.” The Full Commission does not affirm this finding.

The parties agreed to litigate the following issue: “1. The extent of the claimant’s permanent anatomical impairment.” The parties stipulated that the claimant was involved in a work-related motor vehicle accident on December 16, 2014. The parties stipulated that the claimant “sustained compensable injuries to his brain, skull, right eye, and carotid artery” as a result of the work-related motor vehicle accident. Dr. Baskin provided an INDEPENDENT MEDICAL EVALUATION AND IMPAIRMENT RATING on June 29, 2015. Dr. Baskin assigned “a 25% impairment to the visual system due to complete loss of vision out of the right eye.” Dr. Baskin converted the 25% rating to “a 24% whole person impairment.” Dr. Baskin’s conversion of the 25% rating to “a 24% whole person impairment” was not correct, because the claimant’s compensable injury to his right eye was a scheduled injury in accordance with Ark. Code Ann. §11-9-

521(14)(Repl. 2012). Because the claimant's impairment to his right eye comes within the scheduled-injury category, the claimant is limited to the benefits scheduled in Ark. Code Ann. §11-9-521(14)(Repl. 2012). See *Multi-Craft Contractors, Inc. v. Yousey*, 2018 Ark. 107, 542 S.W.3d 155 (Ark. 2018).

The Commission may assess its own impairment rating rather than rely exclusively on a rating assessed by a physician. *Polk County, supra*. In the present matter, the Full Commission finds that the claimant proved he sustained a permanent scheduled anatomical impairment in the amount of 25% to the visual system as assessed by Dr. Baskin. The Full Commission finds that the claimant proved he sustained an 8% permanent impairment rating for impaired mental status and 5% due to loss of olfactory nerve function. We find that the claimant proved he sustained a 10% impairment to the whole person for facial impairment in accordance with the 4th Edition of the *Guides* at page 9/229, specifically, "Class 2: Impairment of the Whole Person, 5% to 10%. A patient belongs in class 2 when there is loss of supporting structure of part of the face, with or without a cutaneous disorder. Depressed cheek, nasal, or frontal bones constitute class 2 impairments." The Full Commission finds that the 10% rating for facial impairment in accordance with the *Guides* is separate and distinct from an award of facial disfigurement pursuant to Ark. Code Ann. §11-9-524(Repl.

2012). The Full Commission does not interpret Dr. Baskin's assessment of a permanent anatomical impairment to the claimant's face to be synonymous with a rating for disfigurement in accordance with Ark. Code Ann. §11-9-524(Repl. 2012).

The Full Commission finds that the claimant proved he sustained a 25% impairment to the visual system, an 8% impairment for impaired mental status, 5% impairment due to loss of olfactory nerve function, and 10% impairment to the whole person for facial impairment. The Full Commission finds that these ratings were consistent with the 4th Edition of the *Guides* and were supported by objective and measurable physical findings. We find that the December 16, 2014 compensable injury was the major cause of the claimant's permanent anatomical impairment. Finally, although Dr. Baskin incorrectly converted the 25% impairment to the visual system into a whole-body impairment, the Full Commission finds that Dr. Baskin's assessment of permanent anatomical impairment was otherwise stated within a reasonable degree of medical certainty as required by Ark. Code Ann. §11-9-102(16)(B)(Repl. 2012).

The parties stipulated that the employment relationship existed on December 16, 2014. The parties stipulated that the claimant's average weekly wage was \$1,057.81, which entitled the claimant to the 2014 maximum weekly indemnity rates of \$617.00 for temporary total disability

benefits and \$463.00 for permanent partial disability benefits. The parties stipulated that the claimant sustained a compensable injury on December 16, 2014, and the respondents initially accepted the 41% anatomical impairment rating assessed by Dr. Baskin on June 29, 2015. The respondents' exhibits indicate that they paid \$100,510.45 based on the 41% rating after a portion was appropriately discounted in accordance with the lump sum payment. The respondents state on appeal that they paid \$10,417.50 for the 5% rating for loss of olfactory nerve function and \$16,668.00 for 8% mental status impairment. The respondents also correctly state that, pursuant to the scheduled injury to the claimant's right eye, they were liable for 105 weeks of benefits in accordance with Ark. Code Ann. §11-9-521(14)(Repl. 2012). Pursuant to the \$617.00 total disability rate the claimant would be entitled to \$64,785.00 for his scheduled injury. The combined value of these ratings would be \$91,870.50.

However, the respondents also contend that they paid \$3,500 for "permanent facial or head disfigurement" in accordance with Ark. Code Ann. §11-9-524(Repl. 2012). Again, the Full Commission does not interpret any portion of Dr. Baskin's permanent impairment rating to be "compensation for facial or head disfigurement" as found in Ark. Code Ann. §11-9-524(Repl. 2012). Nor has the Full Commission awarded compensation for disfigurement in accordance with Ark. Code Ann. §11-9-

524(Repl. 2012). The respondents assert that they have paid \$100,510.45 in permanency benefits to date but contend that they actually owed the claimant only \$95,370.50 for permanent partial disability. The respondents therefore state that they are entitled to an “overpayment credit” in the amount of \$5,139.95. The respondents cite as authority Ark. Code Ann. §11-9-807(Repl. 2012) which provides, “(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.” However, there was no evidence in the present matter demonstrating that “both parties” intended that the alleged overpayment was “advance payments for compensation.” Therefore, the respondents did not prove they were entitled to a credit for alleged overpayment pursuant to Ark. Code Ann. §11-9-807(a)(Repl. 2012). *See Main v. Metals*, 2010 Ark. App. 585, 377 S.W.3d 506 (Ark. App. 2010). The Full Commission finds in the present matter that the claimant did not prove he was entitled to additional permanent anatomical impairment in excess of the ratings assessed by Dr. Baskin on June 29, 2015. Nor are the respondents entitled to a credit in the amount of \$5,139.95 to include a payment allegedly representing “disfigurement” in accordance with Ark. Code Ann. §11-9-524(Repl. 2012). The Full Commission finds that the respondents are also not entitled to a

credit in the amount of \$3,500 in accordance with Ark. Code Ann. §11-9-524(Repl. 2012).

B. Third-Party Liability

Ark. Code Ann. §11-9-410(Repl. 2012) provides, in pertinent part:

(a) LIABILITY UNAFFECTED. (1)(A) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party for the injury, but the employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.

(B) If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds ($\frac{2}{3}$) of the net proceeds recovered in the action that remain after the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his or her dependents....

(b) SUBROGATION. (1) An employer or carrier liable for compensation under this chapter for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for the injury or death. However, the employer or the carrier must notify the claimant in writing that the claimant has the right to hire a private attorney to pursue any benefits to which the claimant is entitled in addition to the subrogation interest against any third party responsible for the injury or death....

(c) SETTLEMENT OF CLAIMS. (1) Settlement of claims under subsections (a) and (b) of this section must have the approval of the court or of the Workers' Compensation Commission, except that the distribution of that portion of the settlement that represents the compensation payable under this chapter must have the approval of the commission.

An administrative law judge found in the present matter, "3. The claimant has failed to meet his burden of proof in demonstrating he is entitled to a refund of the \$8,333.33 his attorney in his third-party claim

against Maumelle and the MVP, Mr. Dustin McDaniel, voluntarily paid on his behalf to Respondent No. 1 in satisfaction of Respondent No. 1's subrogation lien pursuant to Ark. Code Ann. Section 11-9-410 when the claim was settled in November 2015, some five (5) years ago." The Full Commission reverses this finding. The Full Commission finds that the claimant proved he was entitled to a reimbursement of \$8,333.33 paid to the respondents.

The parties stipulated that the claimant "sustained compensable injuries to his brain, skull, right eye, and carotid artery" in a work-related motor vehicle accident which occurred on December 16, 2014. The claimant testified that the ambulance in which he was performing employment services crashed into a Maumelle police cruiser. The claimant signed a "RELEASE OF ALL CLAIMS" on November 10, 2015. The claimant settled with the City of Maumelle and the Municipal Vehicle Program for the amount of \$25,000. On November 18, 2015, the Municipal Vehicle Program issued a check in the amount of \$25,000 to the claimant and the law firm McDaniel, Richardson & Calhoun. Attorney Dustin McDaniel corresponded with a representative of the Arkansas Municipal League on December 3, 2015. Mr. McDaniel stated, among other things, "Due to sovereign immunity, Mr. Binkley's compensation was limited to the Arkansas Municipal League automobile policy of \$25,000. That money has

been paid and is in my trust account. In order for me to distribute those funds, I need to also provide you with your subrogation interest. *It is clear that Mr. Binkley was not made whole by the settlement* [emphasis supplied]. As you know, under Ark. Code Ann. §11-9-410, your interest in this settlement is limited to 1/3 of the recovery, or \$8,333.33.”

The Full Commission finds that the claimant proved he was entitled to a full refund of the \$8,333.33 his former attorney paid to the respondents in the third-party settlement. First, the record shows that there was no Court or Commission approval of the settlement in accordance with Ark. Code Ann. §11-9-410(c)(Repl. 2012). Court or Commission approval of claim settlements is statutorily required. *See John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d 866 (Ark. App. 1992). Moreover, the evidence demonstrates that the claimant was not “made whole” by the \$25,000 third-party settlement. The respondents do not contest counsel’s statement on December 3, 2015, “It is clear that Mr. Binkley was not made whole by the settlement.” Additionally, although the claimant does not contend he is entitled to wage-loss disability, the evidence plainly demonstrates that the claimant has sustained a long-term detriment to his ability to earn wages as the claimant advances in age. The claimant sustained a catastrophic compensable injury on December 16, 2014. As a result of the compensable injury, the claimant has suffered a complete loss of vision in

his right eye. The claimant has suffered an 8% anatomical impairment as a result of impaired mental status and neurocognitive deficits. He has sustained 5% permanent impairment due to reduction in his senses of taste and smell. The claimant has also sustained a 10% anatomical impairment due to “Class II facial deformity” as assessed by Dr. Baskin. The claimant has also suffered from chronic debilitating headaches as a result of the compensable injury and has undergone a complete replacement of his teeth as a compensable consequence of the injury. The evidence does not demonstrate that the claimant was “made whole” by the unauthorized third-party settlement.

The respondents contend that the claimant is estopped from receiving reimbursement because of “unclean hands” and laches. A party alleging estoppel must prove it strictly. *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972). The respondents did not prove that the claimant should be estopped from receiving reimbursement of \$8,333.33. The record does not show that the claimant at any time has exhibited “unclean hands” or has improperly placed the respondents at a disadvantage or prejudiced the respondents to their detriment. There is simply no evidence in the present matter supporting an application of estoppel, unclean hands, or laches.

After reviewing the entire record *de novo*, the Full Commission finds that the respondents did not prove they were entitled to credit for an alleged overpayment of permanent partial disability benefits. We specifically find that the respondents are not entitled to a credit in the amount of \$3,500 for facial disfigurement in accordance with Ark. Code Ann. §11-9-524(Repl. 2012). The record does not show that the claimant has received a rating for disfigurement, and the Full Commission has not awarded disfigurement pursuant to Ark. Code Ann. §11-9-524(Rep. 2012). The Full Commission finds that the claimant is entitled to full reimbursement of \$8,333.33 paid to the respondents as the result of an unauthorized third-party settlement. We direct the respondents to reimburse this amount to the claimant. The claimant is not barred from receiving a refund of \$8,333.33 based on the doctrines of estoppel, unclean hands, or laches. Ark. Code Ann. §11-9-715(a)(B)(ii)(Repl. 2012) provides that attorney's fees shall be allowed "only on the amount of compensation for indemnity benefits controverted and awarded." In the present matter, the Full Commission has not awarded indemnity benefits. Instead, we have ordered reimbursement of monies the claimant's former attorney paid in an unauthorized third-party settlement. Therefore, the claimant's attorney is not entitled to fees for legal services in the present matter.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

CHRISTOPHER L. PALMER, Commissioner

M. SCOTT WILLHITE, Commissioner