

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F206220**

<b>CURTIS DAVENPORT, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>DAVENPORT AUTO TRUCK STOP, EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>TRAVELERS INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED SEPTEMBER 1, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 4, 2004 at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Maumelle, Arkansas.

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

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to additional workers' compensation benefits.

On April 6, 2004, a pre-hearing conference was conducted in this claim from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects the stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit No. 1.

The contentions of the Second Injury Fund, hereinafter designated respondent No. 2, are not set forth in the Pre-hearing Order of April 6, 2004. Respondent No. 2 contends that if there was an

injury to the claimant's back it was only a temporary injury in the form of a strain; that the surgery which was performed and resulted in an anatomical impairment by Dr. Ricca, was not based on objective and measurable findings of injury.

In response to the contentions of Respondent No. 2, the claimant contends that he sustained a compensable back injury and that based upon the medical documents as well as the deposition of Dr. Ricca, the treating neurosurgeon who performed surgery in May 2002, that the injury sustained was based upon objective medical findings and that the workers' compensation injury was the major cause of his disc injury and the neurological surgery. Further, the claimant contends that the surgery and the impairment rating are based upon the appropriate legal standards to entitle him not only to the anatomical impairment, which has been paid, but also significant wage loss disability benefits.

The testimony of Curtis Davenport, the claimant, along with the September 6, 2003, deposition testimony of Dr. Gregory F. Ricca, coupled with medical reports and other documents comprise the record in this claim.

### **DISCUSSION**

Curtis Davenport, the claimant, with a date of birth of January 29, 1961, is a high school graduate with two years of post secondary education. Respondent-employer was a business owned by the claimant's father and for which the claimant worked performing mechanical duties. The claimant's employment history has consisted of mechanic work in the automotive repair service.

The credible testimony of the claimant reflects that it had always been his desire to be an automotive mechanic. Accordingly, the claimant worked at the shop of respondent as a child and while attending college. At the time claimant enrolled in college his course of study was directed toward courses in business in furtherance of operating the automotive shop. The claimant's

testimony reflects his interests and desire in automotive mechanics and working in the family business:

In the early days when we had mostly the truck repair shop there was several employees, more during the summer than in the winter months because we was washing trucks. And then it had changed back to more automotive repair. It was scaled down, at one time we had one other full time mechanic but for the past several years we occasionally had a helper during the summer but mostly me and my dad. (T 11)

While the evidence in the record reflects that the respondent-employer was in the nature of a family owned business, the business was owned by the claimant's father and mother. Daily operation of the business, to include completion of paperwork and running of the business was performed by the claimant's father and mother. The claimant was an employee of respondent-employer. The claimant testified regarding the type of work he performed for the respondent-employer prior to September 14, 2001:

More minor types of repairs, freight jobs, some tune ups, air conditioner work, axle, front end work, axle. We had gotten a little bit into the used car business and made repairs to cars that I had sold or was getting ready to sale, clean up cars.

\* \* \*

Yes and a towing business. The towing business had gotten to the point that, it started out a minor part of the business but it moved up to being probably half of the business, maybe even more at times. (T. 12)

The testimony in the record reflects that the claimant suffered numerous injuries prior to September 14, 2001, both work-related and non work-related. On July 4, 1980, while water skiing claimant suffered an injury to his right knee and ultimately underwent surgery for a torn medial collateral ligament under the care of Dr. Glenn Dickson, a Jonesboro neurosurgeon. On September

12, 1980, Dr. Dickson assessed a 5% permanent physical impairment as a result of the claimant's right knee injury. The claimant suffered residuals as a result of the injury to include stiffness after bending for a long period of time. On February 14, 1991, the claimant suffered a work-related injury to his left knee when a truck tire that he was working on fell against it. On March 4, 1981, claimant underwent arthroscopy relative to the left knee under the care of Dr. Dickson for a diagnosed torn medial collateral ligament. On April 24, 1992, while prying on a bar at work the claimant pulled his left elbow and shoulder such that the same required medical treatment, which was had under the care of Dr. Dickson.

On April 26, 1993, the claimant suffered a boxer's fracture to his fifth metacarpal. The claimant did not undergo surgery relative to the fracture, but rather allowed it to heal on its own. As a result of the fracture the claimant experience stiffness in the hand and the little finger ended up being crooked. The claimant noted that the injury did resulted in adversely affecting his grip. In March 1995 while pushing a heavy transmission at work the claimant developed pain in his right shoulder. The injury progressed to the point that the same resulted in impingement syndrome in the right shoulder for which the claimant underwent an anterior acromioplasty under the care of Dr. Dickson on September 14, 1995. In August 1996, the claimant underwent a surgical procedure relative to his left lower extremity under the care of Dr. Dickson, incision of exostosis. Further, on December 12, 1997, the claimant underwent surgery relative to his right upper extremity for a diagnosed lateral epicondylitis.

While the claimant underwent the above surgical procedures, many of which were work related, he resumed employment duties for respondent upon recovery from the procedures. On April 22, 1996, the claimant suffered an injury to his back while performing employment duties for

respondent. The claimant was referred by his treating physician, Dr. Ronald Jackson, to Dr. A. Roy Tyrer, Jr., a Memphis neurosurgeon. Following diagnostic studies the same revealed a large herniated L5 disc, at the right. On July 2, 1996, the claimant underwent surgery under the care of Dr. Tyrer for the diagnosed herniation. Following an August 23, 1996, visit the claimant was released to light duty work by Dr. Tyrer, and returned to the employment of respondent. On December 16, 1996 Dr. Tyrer opined that the claimant had reached maximum medical improvement and was assessed with an 8% permanent physical impairment to the body as a whole based upon the AMA Guidelines to Evaluation of Permanent Impairment, 4<sup>th</sup> Edition (CX1, p. 30).

Approximately three months prior to a July 29, 1998, visit to Dr. Tyrer claimant suffered another injury to his back while discharging employment duties. Initially the claimant obtained chiropractic treatment for the low back complaint, however, did not appreciate any improvement in his symptoms. The mechanics of the 1998 injury are reflected as having been sustained by the claimant as he was leaning over a car removing parts when he noticed a catch and discomfort in his back. Following additional diagnostic studies, the claimant's injury was diagnosed a herniated disc fragment from the L5 disc level on the right. The claimant was referred by Dr. Tyrer to Dr. Rodney Olinger, his neurosurgical associate, for a second opinion and the scheduling of surgery.

On August 20, 1998, the claimant underwent surgery under the care of Dr. Olinger for a right L5 recurrent disc herniation. A September 30, 1998 report of Dr. Olinger reflects, relative to the claimant:

We talked about wanting to get back to work. He has already had a second disc rupture. He is leery about doing heavy work in the future. He has spoken to his father about limiting his activities as a mechanic. At this point I told him that we will get him into a set of exercises and we will send him a low back book. I will see him in

about a month to consider a work strengthening program. (CX1, p. 43)

The testimony of the claimant reflects that following the 1998 low back surgery he modified his employment activity. The claimant testified regarding the impact of the back surgeries on his employment efforts:

I had to start really cutting back on the type of bending over under the hood of cars and tried to do, that was the reason I started trying to sell cars instead of working on them as much, I had to start culling jobs because I was unable to bend over under the hood. Like tuneups and water pumps and types of stuff on the engine that have to be done, the bending over part. I started buying and repairing cars, fixing up, cleaning up cars to sell. (T. 17)

The claimant noted that his employer accommodated him and allowed him to modify his activity and job duties:

Yeah, I just took a lot of breaks. I had a chair that I sat down in at work. I usually had a recliner that I could go in and sit down and take breaks in in the back part of the office and I wore a back brace the majority of the time. (T. 17-18)

The claimant further testified regarding the impact that the prior injuries had with respect to his employment activity and the physical requirements prior to September 2001:

I really had to cut back on the jobs that I was able to take in. I done a majority of the, I done all of the shop work. My day generally done the office work and made part of the wrecker calls and I generally made the service call type work. I had to limit that type stuff. When we made service calls on eighteen-wheelers I had to limit it to what I call cosmetic stuff. Stuff that would be fairly easy to get to, airline repair or something that wouldn't require being under the truck or crawling around a whole lot. I'd be limited on squatting down and getting under the trailer. The same thing in the shop or on a wrecker call. (T. 18)

On September 14, 2001, the claimant sustained an injury to his low back while performing

employment services which required medical treatment and a third surgical procedure in the form of a two level fusion. In describing the mechanics of the September 14, 2001 injury, the claimant testified:

I was working on a vehicle in the shop that had a blowed head gasket and was taking the intake and the heads off to have that repaired and bent over to pull one of those parts out. I'm not sure if it was the intake or the head but was pulling – lifting, tried to position myself to lift it out the best way that I could and I picked it up to sit it over in front of the truck and I had pain in my back and worked its way back down into my leg and hip again.

\* \* \*

Yeah, over a few days it got, actually was in my calf again like it did the other two times and was severe enough that it twisted my right foot inward. When I got up one morning to get ready to go to work I thought I stubbed my toe on something and as I looked down there was nothing there and my foot was turned in and downward because of drawing on my right leg, pain in my calf and my hip. (T. 18-19)

The claimant ultimately came under the care and treatment of Dr. Barry Hendrix for complaints growing out of the September 14, 2001 accident. Dr. Hendrix arranged for the claimant to undergo additional diagnostic studies, to include an MRI of his lumbar spine on September 17, 2001. (CX1, p. 1-2) On December 4, 2001, the claimant was seen by Dr. Gregory Ricca, a Jonesboro neurosurgeon, pursuant to a referral by Dr. Hendrix. Along with Dr. Ricca's care and treatment the claimant underwent epidural blocks. Also, the claimant was referred by Dr. Ricca to Dr. Calin Savu for a discogram. A March 21, 2002, report of Dr. Ricca, relative to an office visit of the claimant reflects:

Mr. Davenport returns for followup and continues to have marked low back pain. He tried radiofrequency neurolysis by Dr. Savu, which did not provide him with relief. He ultimately had diskography, which shows marked degenerative disk changes at L4-5

and L5-S1 with loss of disk space height at L4-5. There is extravasation of contrast both of these levels worse at L4-5. The patient had concordant reproduction of his pain 8-9/10 at L4-5. He did not have reproduction of his pain at L5-S1. (CX1, p. 6)

On May 23, 2002, the claimant underwent interbody fusion and instrumentation at L4-S1 under the direction of Dr. Ricca. (CX1, p. 7-10) On October 15, 2002, Dr. Ricca assessed the claimant's anatomical impairment at 14% to the body as a whole based upon the AMA Guidelines, Fifth Edition. (CX1, p. 15) Respondent No. 1 commenced the payment of permanent partial disability benefits to the claimant to correspond with the impairment rating.

The record reflects that approximately seven to eight weeks following the claimant's September 14, 2001 injury, his father, one of the owner operators of respondent-employer died. As a result of the residuals of his September 14, 2001, injury and surgery, the claimant was unable to perform his job duties in the employment of Respondent No. 1 at the same level and extent as he had prior to the injury. The credible evidence in the record reflects that the claimant attempted to continue the business such that the same would generate an income, however, was unable to do so. Modifications that the claimant instituted in regard to the afore include narrowing the scope of the business to only those activities that he could physically perform; securing the aid and assistance of friends and family members when making wrecker calls; and, even attempting to divide the business and sell one portion of it, the wrecker aspect. All the afore proved unsuccessful and unprofitable.

The credible evidence in the record reflects that the claimant has attempted to secure employment in the Paragould and Jonesboro areas. The claimant was able to earn wages while working light carpentry work for a friend, earning \$8.00 per hour. The claimant had to cease performing the work when the demands of even the light carpentry work became too severe for him

to continue. On one occasion the claimant performed a self contracting job of painting a rent house for an acquaintance. The claimant noted that the job was one in which he earned approximately a \$800.00. The claimant was able to work at his own pace and maintains that even that became a struggle for him.

The evidence in the record reflects that the claimant has placed an advertisement for recharging air conditioners in vehicles, however, has only had one customer to date. The claimant further presents credible testimony of following up on leads provided by the rehabilitation counselor, Ms. Gay Signoff, however, had been unsuccessful in securing employment. The claimant has also pursued employment efforts on his own, to include applying for a maintenance job at Black River Vo-Tech. The claimant did not secure the job.

The credible evidence in the record reflects that the claimant is limited in his ability to stand, walk, bend, squat, push, pull or lift significant weights. The claimant utilizes a TENS unit in an effort to address some of his symptoms and complaints in addition to medication, a heating pad, and a hot tub.

The evidence in the record reflects that the claimant was provided job leads by a vocational specialist, Gay Signoff with Rehabilitation Management, Inc. The claimant credibly testified that he in fact followed up on the leads provided to him by Ms. Signoff. The claimant denies that he was adverse to continuing his education as recited in one of the reports of Ms. Signoff. Evidence supportive of the claimant's denial was the fact that he sought employment with Black River Vo-Tech as a maintenance/custodian. The claimant cited as benefits or perks to the position included an insurance packet, the ability to take classes at the facility for free and to take classes at ASU at a substantial discount. (JX2, p. 6-15)

In addition to the medical reports relative to the claimant's prior injuries and treatment relative to same, the record contains the October 6, 2003 deposition of Dr. Gregory F. Ricca, the treating surgeon relative to the claimant's September 14, 2001 injury. During the course of his deposition, Dr. Ricca outlined his findings relative to his initial contact with the claimant, treatment provided to the claimant while under his care, to include diagnostic studies and the referral to Dr. Savu for discography. Finally, Dr. Ricca testified regarding objective findings relative to the claimant's September 14, 2001 injury, the May 23, 2002 surgical procedure, the basis for his permanent physical impairment as a result of the claimant's injury and surgeries. (JX1)

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, a review of the medical reports, and application of pertinent statutory provisions and case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 14, 2001, the relationship of employee-employer-carrier existed among the parties.
3. On September 14, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$233.00/\$175.00 for total/permanent partial disability benefits.
4. On September 14, 2001, the claimant sustained an injury arising out of and in the course of his employment. Appropriate temporary total, medical and permanent partial disability benefits, corresponding with claimant's anatomical impairment, have been paid by respondents No. 1.

5. Respondent No. 1 shall pay all reasonable hospital and medical expenses arising out of the injury of September 14, 2001.

6. The claimant's healing period ended October 15, 2002.

7. The claimant has a permanent physical impairment in the amount of 13% to the body as a whole.

8. When the claimant's age, education, work experience and other matters reasonably expected to affect his earning capacity are considered, he has suffered a loss of earning capacity or wage loss in the amount of 65% in addition to the anatomical impairment.

9. The claimant's current disability is the product of the combination of his prior permanent partial disability and impairment with the September 14, 2001, compensable injury, and for which Respondent No. 2 is liable, pursuant to Ark. Code Ann. §11-9-525(b).

10. Respondent No. 2 has controverted the payment of wage loss benefits.

### **CONCLUSIONS**

The present claim is one governed by the provisions of Act 796 of 1993 in that the claimant asserts entitlement to additional workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. It is not disputed, as between the claimant and Respondents No. 1, that on September 14, 2001, the claimant suffered an injury within the course and scope of his employment which required medical treatment, resulted in a period of disability, and for which he was assessed with a 14% anatomical impairment by his treating neurosurgeon on October 15, 2002. Respondent No. 1 accepted the claim as compensable and paid appropriate corresponding temporary total disability and medical benefits. Additionally,

Respondents No. 1 paid permanent partial disability benefits to correspond with the 14% impairment as assessed by Dr. Gregory F. Ricca relative to the claimant's September 14, 2001 injury.

The claimant maintains that in addition to the anatomical impairment growing out of the September 14, 2001 injury, he has suffered a loss of earning capacity or wage loss disability in excess of the rating. Respondents No. 1 contend that any loss of earning capacity or wage loss suffered by the claimant is the responsibility of the Second Injury Fund, Respondent No. 2, who has been made a party to this claim.

Respondent No. 2 maintains that if the claimant did in fact sustain an injury on September 14, 2001, it was only a temporary injury in the form of a strain. Respondent No. 2 maintains that there were no objective measurable findings of physical injury resulting from the September 14, 2001 work incident. Correspondingly, Respondent No. 2 maintains that the surgery performed by Dr. Ricca was done to correct the preexisting spinal condition and, as such there is no impairment rating as a result of same.

The evidence preponderates that on September 14, 2001, the claimant was discharging employment duties for respondent. On said date, the claimant suffered an injury to his back and later underwent surgery. While as between the claimant and Respondents No. 1, the parties have stipulated the compensability of the claimant's low back injury, Respondent No. 2 takes the position that the September 14, 2001, work incident does not represent an injury, or at the very most only a temporary injury in the form of a strain.

The claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. Georgia Pacific Corporation v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998). In the instant claim it is not disputed that a specific incident occurred for which the claimant

attributes his entitlement to workers' compensation benefits. An accidental injury is defined as one identifiable by time and place of occurrence caused by a specific incident. Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2001). In order for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that the injury caused physical harm to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Further, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). Arkansas Code Annotated §11-9-102(16) defines objective findings as those findings which cannot come under the voluntary control of the patient.

In the instant claim, the evidence preponderates that on September 14, 2001, the claimant suffered a compensable injury in his employment with respondent. In furtherance to the afore, the evidence reflects the presence of muscle spasms, which are objective findings. Additionally, the claimant underwent a discogram as performed by Dr. Savu pursuant to the referral of Dr. Ricca. The Arkansas Appellate Court has ruled that a discogram is clearly an objective test. Smith v. County Market/Southeast Foods, 73 Ark. App. 333 (2001).

The evidence clearly reflects that the claimant suffered permanent partial disability and impairment prior to September 14, 2001, as a result of both work related injuries and non-work related injuries. The claimant, who has a employment history consisting principally of mechanic work, had undergone two prior work related surgeries relative to herniated discs in his low back before the September 14, 2001, injury. Further, the evidence discloses that following the prior work related injuries the claimant had modified his employment activity with respect to the type of jobs that he could perform. The claimant characterized his activity relative to job duties as one of being

selective or culling the jobs he performed. Indeed, the evidence preponderates that as a result of the physical limitations on his employment activity the claimant had ventured of into the area of car sales with a corresponding reduction of heavy mechanical tasks.

In addition to the two prior low back surgeries, which resulted in anatomical impairment assessments, the claimant had also suffered a work-related injury and undergone surgery relative to his right elbow, right knee, and left shoulder and elbow. The claimant was restricted in the amount of lifting that he performed and in the amount of bending, stooping and pushing and pulling with respect to his employment activity.

On May 23, 2002, the claimant underwent surgery in the form of a two level fusion relative to his low back under the care of Dr. Ricca. The evidence in the record preponderates that the surgical procedure performed by Dr. Ricca was reasonable and necessary medical treatment to address the claimant's September 14, 2001, compensable injury.

Respondent No. 2's assertion that the surgery performed by Dr. Ricca on May 23, 2002, was done to correct a preexisting spinal condition is not persuasive. A review of the medical in the record reflects that the claimant underwent extensive conservative treatment subsequent to the September 14, 2001, injury before the referral to Dr. Ricca. Further, even after being referred to Dr. Ricca, the claimant underwent epidural injections and other treatment modalities before the surgical option was utilized in the treatment of the injury. During the course of his deposition Dr. Ricca was questioned extensively regarding his findings and treatment rendered to the claimant. In addition to identifying the objective findings of injury, Dr. Ricca noted, in his opinion, based upon a hypothetical provided, that within the reasonable degree of medical probability the September 14, 2001, injury aggravated the claimant's preexisting changes. (JX1, p. 51) Dr. Ricca also addressed

the findings relative to the claimant's lumbar spine and specifically L4-5 and L5-S1 discs.

In Maverick Transportation v. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals noted that an aggravation is a new injury resulting from an independent incident. In Farmland Insurance Company v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996), the appellate court noted that an aggravation of a preexisting condition by a specific work-related incident need not be the major cause of the claimant's disability in order to be compensable. The evidence preponderates that the claimant suffered a compensable injury on September 14, 2001, either in the form of a new injury or an aggravation of a preexisting condition, which required medical treatment to include a two level fusion of his lumbar spine. The medical treatment was reasonably necessary relative to the injury sustained by the claimant.

Dr. Ricca assessed the claimant's anatomical impairment at 14% to the body as a whole as a result of the two level fusion performed by him on May 23, 2002. Dr. Ricca acknowledged that he initially based the rating assigned the claimant utilizing the AMA Guidelines 5<sup>th</sup> Edition. During the course of his October 6, 2003, deposition Dr. Ricca had an opportunity to review the AMA Guidelines 4<sup>th</sup> Edition and addressed the anatomical impairment. (JX1) At this juncture it should be noted that Respondents No. 1 have paid corresponding permanent partial disability benefits to the claimant pursuant to the 14% impairment as assessed by Dr. Ricca. Whether the anatomical impairment sustained by the claimant as a result of the September 14, 2001, injury and May 23, 2002 two level fusion is 14% or 13%, is immaterial with respect to Respondent No. 2. The AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition reflects at Table 75 IV that a single level spinal fusion with or without decompression with residual signs or symptoms would warrant a 12% impairment. Further, for multiple levels operated on with residuals, medically documented pain and

rigidity with or without muscle spasm 1% is added per level. The evidence preponderates, based upon application of the Guide, with respect to the spinal fusion, the claimant has suffered a residual anatomical impairment of between 13 and 14% to the body as a whole.

In order to establish Second Injury Fund liability the following requirements must be met:

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to the injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. Mid State Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1998).

In Second Injury Fund v. Furman, 60 Ark. App. 237, the Arkansas Court of Appeals concluded that under Act 796 of 1993 the Workers' Compensation Act did not change the guidelines for Second Injury Fund liability as reflected in Arkansas Code Annotated §11-9-525(b)(3) and (4).

In the instant claim, the evidence preponderates that the claimant suffered a compensable injury on September 14, 2001, as defined in Arkansas Code Annotated §11-9-102(4)(A)(i). Further, the medical preponderates that prior to the September 14, 2001, compensable injury, the claimant had permanent partial disability and impairment. The claimant had undergone two surgeries relative to his low back prior to the September 14, 2001, compensable injury with the same resulting in impairment ratings. Further, the claimant had undergone surgery relative to both of his knees, his left elbow and right shoulder, and hand. The evidence reflects that as a result of the afore injuries, the claimant had modified his employment activity to include being selective in mechanical jobs performed and reducing the mechanical work he performed for respondent. Finally, the evidence preponderates that the disability and impairment of the claimant suffered prior to September 14, 2001, combined with the most recent September 14, 2001, compensable injury to produce his current

disability status.

The evidence reflects that while claimant was able to perform some mechanical work and operate the wrecker prior to September 14, 2001, subsequent to the compensable injury the same was all but eliminated. The claimant's earnings since his compensable injury has been limited to light construction work provided by friends and associates.

The evidence preponderates that the claimant has actively sought employment since his September 14, 2001 compensable injury and released from same by his treating physician on October 15, 2002. Nevertheless, the claimant has been unsuccessful in his efforts to secure employment. The claimant has cooperates fully with the vocational specialist provided by Respondents No. 1. The evidence is clear that the claimant is limited in the amount of standing, bending, and sitting that he can do as a result of his disability and impairment culminating in the September 14, 2001, compensable injury. The claimant is restricted in engaging in heavy manual labor. The claimant's prior disabilities, to include the injuries and surgeries to his extremities, both upper and lower, impact his ability to earn wages and foreclose certain fields of employment to the claimant. The claimant is not able to engage in sustained physical activity for an eight hour period. The claimant is required to take medications, utilize a TENS unit, and take periodic breaks in order to accomplish some relief for the symptoms in his back.

It is therefore my opinion, after a thorough consideration of all the evidence in the record, that when the claimant's age, education, restrictions and limitations are considered, that in addition to the anatomical impairment growing out of the September 14, 2001, compensable injury he has suffered a loss of earning capacity in the amount of 65%. Respondent No. 2 has controverted the claimant's entitlement to wage loss disability benefits.

**AWARD**

Respondent No. 2 is hereby ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$175.00 to correspond with the claimant's loss of earning capacity of 65% to the body as a whole as a result of the September 14, 2001, compensable injury. Said sums accrued shall be paid in a lump without discount.

Respondents No. 1 are hereby ordered and directed to pay all reasonably related medical, hospital, nursing, and other apparatus expenses growing out of the claimant's compensable injury of September 14, 2001.

Maximum attorney's fees are herein awarded to the claimant's attorney the Honorable Phillip Wells, on the controverted portion of this award pursuant to Arkansas Code Annotated §11-9-715 as amended by Act 1281 of 2001 to be paid by Respondent No. 2.

This award shall bear interest at the legal rate pursuant to Arkansas Code Annotated §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

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ANDREW L. BLOOD  
Administrative Law Judge