

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F100707**

<b>CLINT D. JASON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>CLINT JASON LOGGING, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AMERICAN INTERSTATE INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED AUGUST 31, 2004**

A hearing was conducted on May 14, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Batesville, Independence County, Arkansas.

Claimant was represented by Bill H. Walmsley, Attorney at Law, Batesville, Arkansas.

Respondent was represented by Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On May 14, 2004, the above-captioned claim came on for a hearing at Batesville, Arkansas. A prehearing conference was held on March 2, 2004, and a Prehearing Order was filed on that same date. A copy of the Prehearing Order will be made a part of the record when this Opinion is filed.

The parties agreed to four stipulations; the first three are set forth in the Prehearing Order and were confirmed as modified by the parties at the hearing, while the fourth stipulation was agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.

2. Claimant sustained a compensable low back injury on January 9, 2001.

3. Respondent paid \$14,660.77 in medical benefits and \$12,516.00 in temporary total disability benefits.

4. Respondent controverts this claim beyond those benefits previously paid.

At the May 14, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. As modified at the start of the hearing, and as agreed upon by the parties, the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable head and neck injury on January 9, 2001.

2. Whether Claimant is entitled to reasonably necessary medical treatment in connection with his head and neck injury.

3. Whether Claimant sustained a recurrence of his compensable low back injury in January of 2002.

4. Whether Claimant is entitled to additional medical treatment for his compensable low back injury.

5. What was Claimant's average weekly wage.

6. Whether Respondent is entitled to a credit for an alleged overpayment of indemnity benefits.

7. Whether Claimant is entitled to additional temporary total disability benefits from September 26, 2001 to November 27, 2001.

8. Whether Claimant is entitled to temporary partial disability benefits from November 28, 2001 to November 14, 2003.

9. Whether Claimant is entitled to a 10% permanent impairment rating and

attendant benefits.

10. Whether Claimant is entitled to wage-loss disability benefits due to his low back injury.

11. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he injured his head and neck on January 9, 2001, in the same incident involving his admittedly compensable low back injury, so that he is entitled to medical benefits to treat his head and neck. He also contends that he sustained a recurrence of his compensable low back injury on January 21, 2002, necessitating additional medical treatment. As to indemnity benefits, Claimant argues that he is entitled to greater than the minimum payment. He notes that Respondent previously paid temporary total disability benefits at the rate of \$338.00 per week, and argues that Respondent has either waived the right to challenge the indemnity rate or is estopped from denying the rate. Claimant seeks temporary total disability, temporary partial disability, permanent impairment, and wage loss benefits as set forth above.

Respondent argues that there are no objective findings of a head and neck injury, so that Claimant is not entitled to medical benefits. Respondent contends that Claimant has degenerative disk disease and that the January 21, 2002 incident aggravated Claimant's condition. Respondent challenges Claimant's right to indemnity benefits based on anything greater than the minimum rate allowed by law, and further seeks a credit for indemnity benefits previously paid. Respondent argues that temporary total disability benefits properly stopped on September 25, 2001; that temporary partial disability benefits are not due since Claimant was released to go back to his regular job on that day; and that Claimant made more working for Stone County than he ever made logging.

## DISCUSSION

### **A. HEAD AND NECK INJURY**

On January 9, 2001, Claimant was engaged in logging activities despite a substantial amount of ice on the ground. After assisting in towing a loaded truck out of the woods, Claimant stepped backwards and slipped on a patch of ice. Claimant's brother, Charles Jason, testified:

[H]e backed up, a little bit of sloping ground. When he did, his feet flew out from under him and down he went.

.....

[I]t looked to me like the first thing that struck the ground was his lower back, then his shoulder and head.

Claimant's father also testified that Claimant's body struck the ground from his hips up, including his head. Claimant recalled that his low back struck the ground first and that he could "distinctly remember my head hitting the ground because I remember being disoriented after I had fell [sic]."

The testimony and medical records document that, from that moment on, Claimant has almost constantly complained of back, head, and neck pain. His father recalled that Claimant complained of his back, neck, and head hurting after he fell. Claimant remembered that he "had a tremendous headache that night" and that his neck "was sore and stiff." Several doctors' notations record complaints of head and neck pain. However, Claimant conceded that an MRI of his neck was "normal."

The medical records indicate that Claimant was originally seen by Dr. James Zini. His notations record Claimant's complaints of head and neck pain, but do not note objective findings. Dr. Zini referred Claimant to Dr. Edward Saer, who examined Claimant

on June 12, 2001. Although Claimant reported headaches and pain “as well as a feeling of muscle spasm, primarily in the neck,” Dr. Saer did not find any appearance of spasm. He entered an impression of “[p]robable cervical and lumbar strains/sprains.” In a July 3, 2001 follow-up visit note, Dr. Saer reviewed the films from a cervical MRI with Claimant and his father, and noted that “[t]he study is basically normal.” Dr. Saer further opined: “I think he has had a soft tissue injury to his neck. I do not think he is going to need any surgery.”

Dr. Saer referred Claimant to Dr. Yeshwant Reddy, who examined Claimant on September 24, 2001. Upon examination of Claimant’s cervical spine, Dr. Reddy recorded that it was “[n]ormal except for some tenderness. Upper extremity neurological examination is normal.” He further noted: “This gentleman’s cervical spine is purely myofascial. He does not need any further treatment.” Claimant complained of headaches during an October 18, 2001 follow-up visit. Dr. Reddy again noted that Claimant’s MRI of his cervical spine was “normal,” and entered an impression of “[l]eft trapezial myofascial pain causing headaches.”

To be compensable, an injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). Claimant must sustain his burden of proving the elements of a compensable injury by a preponderance of the evidence. See Ark. Code Ann. §§ 11-9-102(E) and 11-9-704(c)(2).

I find that Claimant has not sustained his burden of establishing a compensable injury by objective findings. While I do not doubt Claimant’s complaints of head and neck pain, the record does not reflect any objective findings in support of an

injury to Claimant's head and neck. Claimant's complaints of pain, tenderness, and spasm-like sensations come within his voluntary control; no medical records reflect a finding of spasm or any other objective indication of an injury to his head and neck. Therefore, Claimant's claim of a compensable head and neck injury must fail for lack of proof in the form of objective findings.

**B. ENTITLEMENT TO MEDICAL BENEFITS-HEAD AND NECK INJURY**

The preceding finding concerning the compensability of Claimant's alleged head and neck injury on January 9, 2001, disposes of his claim for medical benefits in connection with this head and neck injury. An employer shall provide medical benefits as may be reasonably necessary in connection with an injury received by an employee. See Ark. Code Ann. § 11-9-508(a). Here, Claimant's proof failed to establish a compensable injury to his head and neck. Therefore, no medical benefits are due.

**C. RECURRENCE OF LOW BACK INJURY**

The parties stipulated that Claimant sustained a compensable low back injury on January 9, 2001. As noted above, Claimant has suffered low back pain since that date. Claimant testified that he experiences pain all of the time and that "it's constant."

Dr. Reddy's initial evaluation note dated September 24, 2001, recorded Dr. Reddy's intent to return Claimant to some kind of light duty with restrictions. These restrictions included not lifting weights above twenty-five pounds and no constant lifting, bending, or twisting. Dr. Reddy believed Claimant "will not be able to work as a logger but should be able to drive his truck." Claimant testified: "He released me to go back to light duty logging, is the way I understood it."

On November 27, 2001, Claimant began working for the Stone County Road Department. In January of 2002 a storm passing through Stone County blew some saplings or trees across a road. At his foreman's request, Claimant and another employee went to move the trees out of the road. Claimant used a small chain saw resulting in increased pain in his back. He kept working, and was not taken off work by a doctor as a result of this episode. He testified that it took "[r]oughly a week or so for the stiffness to subside."

Claimant estimated that the chain saw that he used in logging weighed anywhere from eighteen to twenty-five pounds; he estimated that the County's chain saw "might weigh 10." When asked if he knew from his previous logging experience that using a chain saw could hurt him, Claimant replied: "A 20 pound chain saw; yes. But I wouldn't think a 10 pound chain saw, running 10, 15 minutes to cut a tree out of the road, is going to affect it; no."

A series of treatment notes relate to Claimant's January, 2002 incident. An entry dated "1/2/2" reports Claimant "states that he operated chain saw for several hours at work and aggravated back pain"; this entry notes myospasm intense enough to make it difficult to adjust Claimant's spine. An entry dated "1/14/02" states: "Placed patient on work restrictions for two weeks to help prevent aggravation of condition. [Claimant] states does very well after treatments but if forced to work chainsaw or shovel feels immediate LBP." An entry for "1/16 /02" notes "[s]harp LBP today, after operating hvy equipment." An entry for "1 /25 /02" again notes the presence of myospasm and that Claimant "reports activities at work aggravate his LBP and H.A. condition." (I do not consider usage of the term "aggravate" in these entries to be intended as a legal characterization of this incident.)

At some point Claimant's work restrictions were amended. At the hearing he testified that his restrictions on performing his job duties with the Stone County Road Department are "I cannot lift over ten pounds, or 15 pounds. I can't do any kind of lifting, shoveling, anything with chain saws." Claimant confirmed that his pain is back to the level he experienced prior to his use of the chain saw in January, 2002.

Claimant contends that his January, 2002 incident is a recurrence of his earlier compensable low back injury; Respondent contends that Claimant aggravated his underlying degenerative disk disease.

The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the Claimant which is unreasonable under the circumstances.

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 167-68, 969 S.W.2d 677, \_\_\_ (1998) (citations omitted). Claimant has the burden of proving a causal connection between the primary compensable injury and the subsequent disability by a preponderance of the evidence. See Bryant v. GNB Tech., Full Workers' Compensation Commission Opinion filed March 17, 2003 (F108243).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that his January, 2002 episode is causally connected to his primary low back injury of January 9, 2001 and is therefore a "recurrence." As reflected in the medical records and by Claimant's testimony, his complaints of pain in his low back were constant following his initial compensable injury. Compare Carter, 62 Ark. App. at 168, 969 S.W.2d at \_\_\_ ("The Commission found appellee's testimony that he did not re-injure his left knee

... to be credible. Appellee's knee was already causing him pain which intensified during the stress test."). Claimant already suffered pain in his low back; his January, 2002 incident only intensified that pain. The medical entries for January, 2002 quoted above confirm a connection between the first compensable low back injury and the subsequent January, 2002 episode.

Further, I find that there is insufficient proof of an independent intervening cause. The restrictions imposed by Dr. Reddy in September, 2001 included not lifting more than twenty-five pounds; Claimant testified that the chain saw he used for the Stone County Road Department weighed less than this amount. Thus, Claimant's January, 2002 incident occurred within his restrictions. That Claimant's activity triggered the subsequent disability while Claimant worked within his doctor's restrictions indicates that the activity was not "unreasonable under the circumstances," and thus not an independent intervening cause. Compare Broadway v. B.A.S.S., 41 Ark. App. 111, 848 S.W.2d 445 (1993) (the claimant's failure to wear a splint despite his doctor's advice constituted an independent intervening event).

#### **D. ENTITLEMENT TO ADDITIONAL MEDICAL BENEFITS-LOW BACK INJURY**

Claimant testified that he has a number of unpaid medical bills and that most of them relate to his back. Claimant's original January 9, 2001 low back injury was stipulated to be compensable; his subsequent January, 2002 disability was a recurrence of this original injury. As previously noted, an employer shall promptly provide medical treatment or benefits as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. § 11-9-508(a).

I find that Claimant has sustained his burden of proving by a preponderance

of the evidence that he is entitled to additional medical treatment for his compensable low back injury and subsequent recurrence. Claimant's need for treatment stems from his admittedly compensable low back injury or its subsequent recurrence. He testified that some of his medical bills relate to this low back injury. Therefore, Respondent is liable for those medical bills related to the original compensable low back injury or the recurrence.

#### **E. AVERAGE WEEKLY WAGE**

At the time of his January 9, 2001 compensable low back injury, workers' compensation insurance premiums were withheld from Claimant's payments from Ozark Timber at the rate of fifty cents per ton of logs. Charles Jason testified that he and Claimant were working under contract with Ozark Timber, not as employees. Claimant testified that for the year 2000, his contract with Ozark Timber extended from late September through December; during that time, Ozark Timber withheld \$983.00 from its payments to Claimant for workers' compensation premiums.

The Claimant's 2000 U. S. Individual Income Tax Return was entered into evidence as part of Respondent's Exhibit Number 1. Attached to this document is a Schedule C, "Profit or Loss from Business (Sole Proprietorship)." These documents reflect gross income of \$43,667.00 and expenses of that same amount. However, Claimant conceded that it was not accurate to say his expenses matched his gross income to the penny. In particular, with regard to \$15,910.00 reflected as depreciation on Schedule C, Claimant agreed that he did not pay that amount to anyone, but instead kept it. Charles Jason verified the reasonableness of Claimant's other expenses.

Claimant and his brother both testified to their receipt of cash income in 2000. Claimant testified that he received \$4,000.00 under a contract to cut cedar and \$2,500.00

cutting timber for his cousin. Claimant conceded that he did not report this cash income on his 2000 income tax return.

Claimant testified that he tried to bring home at least \$500.00 to \$600.00 a week. Charles Jason testified that he and Claimant had the same income in 2000, between \$500.00 and \$600.00 a week. Claimant's father, J. A. Jason, occasionally picked up checks for Claimant and his brother in the year 2000. He recalled checks as high as \$900.00 a piece, and he agreed that Claimant averaged more than \$400.00 a week.

The witnesses agreed that logging is not an activity that can be pursued fifty two weeks out of the year. Charles Jason testified that "a good year would be 40 weeks." J. A. Jason, who "logged off and on about all [his] life," estimated that an average year of logging would be "[t]hirty-eight; 40 weeks, would be lucky." Claimant recalled that in 2000, he worked "[p]robably anywhere from 38 to 40" weeks.

Respondent paid Claimant temporary total disability benefits for thirty-seven weeks at the rate of \$338.00 per week. Claimant testified that he did not tell Respondent to pay him at that rate; that no one told him that he wasn't receiving the correct amount of benefits between January 10, 2001 and September 25, 2001, when these benefits were paid; and that no one ever asked for a refund of benefits paid. Respondent now challenges Claimant's right to indemnity benefits greater than the minimum rate allowed by law; Respondent seeks a credit for indemnity benefits previously paid. Claimant argues that Respondent has either waived the right to challenge the rate or is estopped from denying the rate. Claimant's affirmative defenses should be considered first.

#### 1. Waiver

In an opinion finding that a respondent did not waive its right to object to a doctor's

care and treatment by previously paying some of his charges, the Commission stated:

The Full Commission has held repeatedly that a respondent should not be penalized for voluntarily paying compensation benefits. Simply because respondent inadvertently or mistakenly paid some doctor's charges, does not constitute the waiver.

Harris v. Hanson's Industries, Full Workers' Compensation Commission Opinion filed August 29, 1994 (D903792). Here, Respondent paid temporary total disability benefits at the rate of \$338.00 per week, and now questions whether Claimant is entitled to more than the minimum rate. The record does not reflect an intent by Respondent to relinquish or abandon its right to raise this issue. Therefore, I find that Respondent has not waived its right to question Claimant's compensation rate.

## 2. Estoppel

Estoppel arises when one party changes his position to his detriment as the result of the conduct of another. Nordin v. Big Mac Tank Trucks, Full Workers' Compensation Commission Opinion filed July 7, 1998 (E500623 and E111402). Estoppel will apply if the following criteria are met:

1. The party to be estopped must know the facts;
2. He must intend that his conduct shall be acted upon or must act so that the party asserting the estoppel has the right to believe that the other party so intended;
3. The party asserting the estoppel must be ignorant of the true facts; and
4. The party asserting the estoppel must rely upon the other party's conduct to his injury.

Long v. Youth Home, Inc., Full Workers' Compensation Commission Opinion filed December 4, 1998 (E615714 & E615715).

I find that estoppel does not apply in this case. Claimant was not ignorant

of the true facts: he was aware of his income which would form the basis for properly calculating his average weekly wage. Further, Claimant failed to prove how he relied upon Respondent's conduct to his injury. The record simply reflects that Respondent made initial payments at a certain rate, Claimant accepted those payments, and Respondent now raises a challenge to the correctness of that rate. The record does not demonstrate that Claimant changed his position to his detriment as a result of Respondent's conduct.

### 3. Average Weekly Wage

Determination of Claimant's average weekly wage should be guided by Hunt v. Lovett, Full Workers' Compensation Commission Opinion filed September 16, 1996 (E218307). The Hunt claimant was a self-employed timber cutter paid by the ton who filed a 1040 Schedule C "Profit or Loss from Business (Sole Proprietorship)" each year to determine his business income. As in this case, the Hunt claimant reported certain authorized business expenses, which were deducted from his gross income to ascertain his net profit. He worked forty-two and one-half weeks in 1992, the year of his injury. The Commission determined that the Hunt "[c]laimant's average weekly wage cannot be fairly determined using the formulas in Ark. Code Ann. § 11-9-518(a)(1) or (a)(2)."

In the present claim, after a de novo review of the entire record, we find that the fairest and most just method of calculating the claimant's average weekly wage is to reduce the claimant's 1992 gross earnings by an amount equal to business expenses paid during the period, including depreciation, and divide that figure by 42 ½ weeks.

In characterizing the Hunt claimant's depreciation as a proper expense, the Commission noted that "[n]either party has presented any evidence suggesting that the depreciation expense calculated under federal law ... deviates from the depreciation expense actually incurred by the claimant's logging business."

I find that Claimant's average weekly wage cannot be fairly and justly determined under Ark. Code Ann. § 11-9-518(a); therefore, pursuant to § 11-9-518(c), I will follow the Commission's method as set forth in Hunt. Further, I find that the most credible evidence concerning Claimant's income is his year 2000 individual income tax return with the Schedule C attached. Claimant's compensable injury occurred January 9, 2001, so that Claimant's income tax return for 2000 constitutes a contemporaneous record of Claimant's income for the year almost immediately preceding his injury.

Unlike the situation in Hunt, I find that Claimant's depreciation expense reflected on his Schedule C in the amount of \$15,910.00 should not be deducted from his gross income. Claimant's testimony indicates that the \$15,910.00 is more appropriately characterized as net income than a depreciation expense. The other business expenses listed on Claimant's Schedule C should be deducted from his gross income for the purpose of determining his average weekly wage.

Applying the Commission's method in Hunt, I find that Claimant's 2000 gross earnings of \$43,667.00 should be reduced by business expenses of \$27,757.00; the resulting \$15,910.00 should be divided by thirty-eight weeks. This produces an average weekly wage of \$419.00.

#### **F. CREDIT FOR OVER-PAYMENT OF INDEMNITY BENEFITS**

Respondent asserts that Claimant has been over-paid indemnity benefits, so that any future benefits are subject to a credit equal to the amount of over-payment. In Hunt, supra, after determining the claimant logger's average weekly wage, the Commission found "that the respondents are entitled to a credit to the extent that disability compensation has been paid to the claimant at a rate based on an average weekly wage

exceeding \$258.38.” This credit was to be applied “against future benefits.”

Based upon the Commission’s guidance in Hunt, I find that Respondent is entitled to a credit against future benefits payable to Claimant, to the extent that Respondent paid disability compensation for thirty-seven weeks at a rate based on an average weekly wage that exceeded \$419.00. Stated another way, the figure for weekly temporary total disability benefits based upon an average weekly wage of \$419.00 is \$279.00. See Ark. Code Ann. § 11-9-519(a). Since \$279.00 is less than \$338.00 (the weekly rate at which temporary total disability benefits were actually paid to Claimant), then Respondent is entitled to a credit for the weekly difference multiplied by thirty-seven weeks against any future indemnity benefits payable to Claimant.

#### **G. TEMPORARY TOTAL DISABILITY BENEFITS**

Claimant seeks temporary total disability benefits from September 26, 2001 to November 27, 2001. Respondent paid Claimant temporary total disability benefits through September 25, 2001, the day Dr. Reddy returned Claimant to work with restrictions. Claimant actually returned to work on November 27, 2001, when he began working for the Stone County Road Department. Claimant testified that between Dr. Reddy’s release and November 27, 2001, he did not believe he was physically able to work. He also believed that Dr. Reddy’s restrictions limited the number of jobs available to him in Stone County, Arkansas.

Dr. Reddy’s September 24, 2001 initial evaluation note states:

I would like to return him to some kind of light duty while we are performing the interventions in conjunction with physical therapy. The restrictions involve not lifting weights above 25 pounds and no constant lifting, bending or twisting. In other words, he will not be able to work as a logger but should be able to drive his truck. I will release him to work as of tomorrow

[September 25, 2001].

Dr. Reddy's October 18, 2001 follow-up visit note states that Claimant "is working hard on trying to find some kind of employment." Dr. Reddy also recorded Claimant's statement "that in Stone County there is not much employment and he will do his best."

Ark. Code Ann. § 11-9-519(a) provides for payment of total disability benefits. In cases controlled by this statute, temporary total disability is not based on the claimant's healing period, but is instead awarded where the claimant is incapacitated because of injury to earn the wages he was receiving at the time of the injury. County Mkt. v. Thornton, 27 Ark. App. 235, 241, 770 S.W.2d 156 (1989). Thus, the claimant's incapacity to earn wages must be based upon his injury, and not a mere inability to find employment. See Leslie v. Sanyo Mfg. Corp., 13 Ark. App. 59, 61, 679 S.W.2d 222, \_\_\_ (1984).

I find that Claimant's incapacity to earn wages from September 26, 2001 to November 27, 2001 stemmed from his inability to find employment, rather than his injury. Dr. Reddy's October 18, 2001 note, a contemporaneous record, is telling: Claimant told Dr. Reddy that he "is working hard on trying to find some kind of employment" but "that in Stone County there is not much employment and he will do his best." These statements indicate that Claimant's injury did not cause his incapacity to earn wages during this time period; rather, the problem stemmed from the local job market. Claimant did not complain to Dr. Reddy about his restrictions; instead, Claimant complained about the availability of jobs. Therefore, Claimant failed to sustain his burden of proving that temporary total disability benefits are payable for this time period.

#### **H. TEMPORARY PARTIAL DISABILITY BENEFITS**

Claimant seeks payment of temporary partial disability payments from

November 28, 2001 to November 14, 2003. However, as discussed immediately above, Claimant sought temporary total disability benefits from September 26, 2001 to November 27, 2001. By raising a claim for temporary total disability benefits, Claimant also raised the issue of his eligibility for temporary partial disability benefits from September 26, 2001 to November 27, 2001. See Palazzolo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994). As the Arkansas Court of Appeals noted, “when a claimant alleges that he is temporarily totally disabled, an employer should expect that the claimant may be eligible in the alternative to temporary partial disability benefits.” Id. at 135, 877 S.W.2d at \_\_\_\_\_. Thus, this opinion will consider Claimant’s eligibility for temporary partial disability benefits from September 26, 2001 to November 14, 2003.

As noted above, Dr. Reddy returned Claimant to work on September 25, 2001, to perform light duty with restrictions. Claimant began working for the Stone County Road Department on November 27, 2001 making \$280.00 per week; at the time of the hearing, Claimant’s gross pay was \$356.00 per week. Claimant works a regular forty hour week. On November 14, 2003, Dr. Kevin Collins declared that Claimant was at maximum medical improvement.

Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. Arkansas State Highway & Transp. Dep’t v. Breshears, 272 Ark. 244, 246-47, 613 S.W.2d 392, \_\_\_\_ (1981).

The healing period continues until the employee is as far restored as the permanent character of his injury will permit. If the underlying condition causing the disability has become stable and if nothing further in the way of treatment will improve that condition, the healing period has ended.

Traylor v. Clyde Traylor, Inc., Full Workers' Compensation Commission Opinion filed May 19, 1997 (E121246) (citations omitted). If temporary partial disability benefits are due, the employee shall be paid sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his wage-earning capacity after the injury. Ark. Code Ann. § 11-9-520.

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary partial disability benefits from September 26, 2001 to November 14, 2003. Claimant did not reach maximum medical improvement until November 14, 2003, so he was within his healing period during this time. Further, Claimant sustained a decrease in his capacity to earn wages due to his compensable low back injury. As determined above, Claimant's average weekly wage prior to his compensable injury was \$419.00. I find that Claimant's earning capacity upon his release to return to work on September 25, 2001 was \$280.00 per week, Claimant's rate of pay when he began work for the Stone County Road Department. Thus, the record reflects that Claimant initially sustained a decrease in his capacity to earn the wages he was receiving at the time of his compensable injury from \$419.00 per week to \$280.00 per week.

Claimant is thus entitled to temporary partial disability benefits pursuant to the formula contained in Ark. Code Ann. § 11-9-520. For the purposes of the formula, the average weekly wage of \$419.00 should be utilized. In determining Claimant's wage-earning capacity after the injury, the parties should utilize Claimant's weekly wages from the Stone County Road Department. Claimant testified that for his first three months of employment he earned \$280.00 per week; he also testified that this amount had increased

by the time of the hearing. Thus, the parties should not use Claimant's initial wage of \$280.00 throughout this period, but should instead determine Claimant's weekly wages on a week-by-week basis to reflect the increase in Claimant's wage-earning capacity over time.

## **I. PERMANENT IMPAIRMENT RATING**

Claimant was asymptomatic prior to his compensable low back injury. He testified that he had never hurt his low back prior to his January 9, 2001 compensable injury. Claimant's testimony and the medical records demonstrate that Claimant has been constantly symptomatic since the date of his injury. For example, many of the initial medical records document that the doctor observed spasms upon examining Claimant.

On September 24, 2001, Dr. Reddy wrote that one finding from an MRI dated February 16, 2001 "could be indicative of an acute annular tear" at L5-S1. Dr. Reddy stated in a letter to Dr. Zini dated September 25, 2001: "[Claimant] seems to be having symptomatic L3-4 degenerative disk disease, in addition to an annular tear at L5-S1." However, in his follow-up visit note dated October 18, 2001, Dr. Reddy stated: "I did explain to [Claimant] in no uncertain terms that the neck pain is related to the myofascial pain and his back pain is related to L3-4 and L5-S1 disc disease. Both of these conditions do not qualify him for any kind of disability."

Claimant reported to Dr. Robert Valentine on April 5, 2003, complaining chiefly of neck and back pain. Upon examination of Claimant's lumbar spine, Dr. Valentine noted "[t]here is some spasm present. There is tenderness to palp[itation] over the L5 spinous process." Among others, Dr. Valentine recorded impressions of "L5/S1 disc protrusion compatible with patient's back pain and exam" and "[p]ossible L5 and

potentially L4 radiculopathy, left.”

Claimant presented to Dr. Kevin Collins on November 14, 2003 for an independent medical examination. Dr. Collins examined Claimant after reviewing certain items in his medical records. He noted: “Lumbar spine has increased paraspinal muscle spasms.” Under the heading “Assessment/Plan,” Dr. Collins included the following:

The only rateable injury I can see on this gentleman would be the L4-5 disc tear with EMG evidence of radiculopathy, which are both very objective. He would qualify for 10% impairment rating based on Page 110 on the Guides to the Evaluation of Permanent Impairment, Fourth Edition, Table 72, DRE Lumbosacral Spine Impairment Categories 3.

MMI would be as of today’s date, 11-14-03, almost three years out from his incident.

A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski v. Family Cleaners & Laundry, Full Workers’ Compensation Commission Opinion filed March 3, 2004 (E711809). There are three requirements necessary to establish an entitlement to benefits for a permanent anatomical impairment. See id. First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). “Major cause” means more than fifty percent (50%) of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, 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). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Ark. Code Ann. § 11-9-522(g); Workers’ Compensation Commission Rule 34.

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to an award of permanent physical impairment and attendant benefits. I specifically find that Claimant's compensable injury of January 9, 2001 was the major cause of his impairment. Claimant was asymptomatic prior to his compensable injury; since then, his symptoms have been constant. Findings of spasms upon examination of Claimant further demonstrate that his compensable injury was the major cause of his impairment. While there is some proof of degenerative disk disease, there is no proof that this disease was symptomatic prior to the compensable injury.

I also specifically find that Dr. Collins' determination of the existence and extent of physical impairment is supported by objective and measurable findings, in the form of a disk tear with EMG evidence of radiculopathy. It should be noted that, in the paragraph in which he assigns an impairment rating, Dr. Collins makes reference to a tear at "L4-5." This must be a typographical error. Prior medical records refer to an annular tear at L5-S1; elsewhere in his independent medical examination report, Dr. Collins notes "[p]atient with L5-S1 annular tear with EMG evidence of L5 radiculopathy."

Finally, I specifically find that Dr. Collins clearly made use of the Fourth Edition of the Guides in qualifying Claimant for a 10% impairment rating to the body as a whole. Upon a review of the Guides and the record, I find that Claimant is entitled to a 10% impairment of the whole person rating, pursuant to Table 72 on Page 110 of the Guides. It should be noted that Dr. Collins did not assign his rating based upon Claimant's degenerative disk disease or upon his complaints of pain.

## **J. WAGE-LOSS BENEFITS**

Claimant seeks wage-loss disability benefits due to his compensable low

back injury. The wage-loss factor is the extent to which a compensable injury has affected the Claimant's ability to earn a livelihood. Cumbie v. Bost Human Development Services, Full Workers' Compensation Commission Opinion filed July 19, 2004 (E913515).

In determining wage-loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors.

Id.; see Ark. Code Ann. § 11-9-522(b)(1).

At the time of the hearing Claimant was thirty years of age. He attended two years at Ozarka Technical College and possessed a Certificate of Completion in automotive technology, and had worked for an automobile dealership for approximately two and one-half years as a line mechanic. Claimant's October 18, 2001 statements recorded by Dr. Reddy, quoted above, indicate that Claimant is interested in pursuing employment and has a positive attitude in looking for work. The medical evidence supports Claimant's testimony that he is in constant, daily pain; having observed Claimant at the hearing, I find his testimony concerning his constant pain to be entirely credible. Despite evidence of spasms, an annular tear, and radiculopathy, Claimant is at maximum medical improvement, indicating that his restrictions and pain will be continuing. These factors have certainly affected his ability to make the income he previously enjoyed as a self-employed logger. After considering all relevant wage-loss factors, I find that the Claimant has established a decrease in his wage earning capacity equal to 10% to the body as a whole. He is entitled to benefits for this decrease in his wage earning capacity.

#### **K. ATTORNEY'S FEE**

Since Claimant's injury occurred prior to July 1, 2001, his attorney's fee is

governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. See Estridge v. Waste Management, Full Workers' Compensation Commission Opinion filed July 12, 2004 (E500479); compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). Respondent stipulated to controverting this claim beyond those benefits previously paid, \$14,660.77 in medical benefits and \$12,516.00 in temporary total disability benefits. Thus, I find that, with regard to those benefits awarded in this Opinion, Claimant is entitled to the maximum statutory attorney's fee allowed pursuant to Ark. Code. Ann. § 11-9-715 (Repl. 1996).

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant sustained a compensable low back injury on January 9, 2001.
4. Respondent paid \$14,660.77 in medical benefits and \$12,516.00 in temporary total disability benefits.
5. Respondent controverts this claim beyond those benefits previously paid.
6. Claimant did not sustain his burden of proving a compensable head and neck injury on January 9, 2001, because the record does not reflect proof of objective findings in support of such an injury.
7. Because Claimant did not prove a compensable head and neck injury, Respondent is not liable for medical benefits in response to Claimant's head and neck complaints.
8. Claimant did sustain his burden of proving that his January, 2002 episode

was a recurrence of his earlier compensable low back injury. A causal connection between the original injury and the later episode is established by Claimant's constant complaints of pain in his low back and by the medical records. Since Claimant was working within a doctor's restrictions when the January, 2002 episode occurred, it does not constitute an independent intervening cause.

9. Claimant is entitled to additional reasonably necessary medical treatment or benefits in connection with his original compensable low back injury and his recurrence. Claimant's need for treatment stems from either his admittedly compensable low back injury and the recurrence.

10. Respondent did not waive the right to challenge Claimant's compensation rate; there is no proof of intent to relinquish or abandon this right on Respondent's part. Further, since Claimant knew the true facts concerning his income and did not demonstrate reliance on Respondent's conduct to Claimant's injury, Respondent is not estopped from raising this challenge.

11. I specifically find that Claimant's average weekly wage cannot be fairly determined under Ark. Code Ann. § 11-9-518(a), and that the Commission's Hunt v. Lovett opinion provides a fair and just alternative method. The most credible evidence of Claimant's income is his 2000 U. S. Individual Income Tax Return with the Schedule C attached. By treating Claimant's depreciation expense as income (based on the testimony in the record), deducting the remaining expenses from his gross income, and then dividing the resulting figure by thirty-eight weeks, I find that Claimant's average weekly wage is \$419.00.

12. Respondent is entitled to a credit for overpayment of temporary total

disability benefits to the extent that the rate of the previous payments, \$338.00, exceeds \$279.00, the proper temporary total disability rate based on an average weekly wage of \$419.00. The difference between \$338.00 and \$279.00 shall be multiplied by thirty-seven weeks to arrive at the total credit due.

13. Claimant is not entitled to temporary total disability benefits. His incapacity to earn wages from September 26, 2001 to November 27, 2001 stemmed from his inability to find employment rather than his injury.

14. Claimant is entitled to temporary partial disability benefits from September 26, 2001 to November 14, 2003. His healing period did not end until November 14, 2003. Within that time period, he suffered a decrease in his capacity to earn the wages he was receiving at the time of his injury (his average weekly wage of \$419.00). Specifically, his wage-earning capacity after his injury was \$280.00 per week. Claimant should therefore receive benefits pursuant to the formula in Ark. Code Ann. § 11-9-520, with his wage-earning capacity adjusted to the extent his weekly wage from the Stone County Road Department increased.

15. Claimant is entitled to a permanent impairment rating of 10% to the body as a whole. His compensable injury is the major cause of his impairment, as reflected by his symptoms and the medical records after the injury. The existence and extent of the impairment is established by objective findings of a disk tear with EMG evidence of radiculopathy. The proper edition and table of the Guides were used to arrive at the impairment rating of 10% to the body as a whole.

16. Upon consideration of all relevant wage loss factors, I find that Claimant established a decrease in his wage earning capacity equal to 10% to the body as a whole,

and that he is therefore entitled to wage-loss disability benefits.

17. Claimant's attorney is entitled to the maximum statutorily prescribed attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 1996).

**AWARD**

Respondent is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

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DFA/ml