

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E913010**

**BILL D. KRANTZ, EMPLOYEE**

**CLAIMANT**

**WEYERHAEUSER CO.,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED JULY 21, 2004**

Hearing before Administrative Law Judge J. Mark White on June 3, 2004, in Hope, Hempstead County, Arkansas.

Claimant represented by Mr. Orvin W. Foster, Attorney at Law, Mena, Arkansas.

Respondent represented by Ms. Judy Robinson Wilber, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On June 3, 2004, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on February 23, 2004, and a Prehearing Order was entered that same day. A copy of the February 23, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/self-insured employer

relationship existed at all relevant times, including October 11, 1999; that on October 11, 1999, the claimant sustained a compensable injury to his back; and that Respondent accepted the October 11, 1999, injury as compensable and paid some medical and indemnity benefits.

The parties agreed that the issues to be presented were whether additional medical treatment, including the surgery by Dr. Arthur, was reasonably necessary in connection with the 1999 compensable injury; the end of the claimant's healing period and whether the claimant is entitled to additional temporary total disability benefits; permanent impairment; whether the claimant is permanently and totally disabled; determination of the claimant's average weekly wage and corresponding compensation rate; and controversion and attorney's fees. At the end of the hearing, in light of the dispute as to the claimant's compensation rate, the parties agreed to add as an issue underpayment of temporary total disability benefits. The issue of the liability of the Second Injury Fund was reserved.

The claimant contends that he sustained a back injury while in the employ of the respondent on October 11, 1999; that he was treated initially by Dr. Allan C. Gocio and later Dr. James Arthur; that due to his injury he is unable to return to gainful employment; and that he is entitled to payment of his medical bills, additional temporary total disability benefits, an assessment of permanent injury,

permanent partial disability or permanent total disability, along with attorney's fees and all other benefits to which he is entitled.

Respondent contends that the claimant's 1999 work injury temporarily aggravated his pre-existing lumbar degenerative condition; that he reached MMI no later than September, 2000, and TTD benefits were terminated at that time; that neither Dr. Schlesinger nor Dr. Moore recommended surgery; that the claimant refused to undergo the FCE recommended by Dr. Schlesinger; that the claimant voluntarily retired from the respondent on August 31, 2000, and was awarded Social Security disability benefits; that the respondent was prepared to offer the claimant work within any FCE restrictions; that the claimant sought unauthorized medical treatment from Dr. James Arthur, who performed surgery on September 26, 2000, without the respondent's prior knowledge; that Dr. Arthur's treatment was to correct pre-existing degenerative problems that could not have been caused by the 1999 soft tissue injury; and that the claimant underwent a previous fusion by Dr. McConkie in 1980, creating potential Second Injury Fund liability.

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

After reviewing the record as a whole, to include medical reports, tax records, documents and other matters properly before the Commission, and having

had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that the back surgery and related treatment by Dr. Arthur was reasonably necessary in connection with his compensable injury.
4. The claimant has proven by a preponderance of the evidence that he was within his healing period until six months after his surgery, that is, until March 26, 2001.
5. The claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages during his healing period.
6. The claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date those benefits were terminated, September 26, 2000, until the end of his healing period, March 26, 2001.

7. The claimant has proven by a preponderance of the evidence that he has sustained permanent anatomical impairment of 5%.
8. The claimant has proven by a preponderance of the evidence that he is unable, because of his compensable injury, to earn any meaningful wages in the same or other employment.
9. The claimant is therefore permanently and totally disabled as of March 26, 2001, the end of his healing period.
10. The claimant has proven by a preponderance of the evidence that he earned an average weekly wage of \$812.19 at the time of his accident.
11. The claimant is therefore entitled to the maximum compensation rates.
12. The claimant has proven by a preponderance of the evidence that he is entitled to payment of additional temporary total disability benefits to cover the respondent's underpayment of those benefits from October 11, 1999, through September 26, 2000.
13. The respondents have controverted this claim in its entirety.

## DISCUSSION

### I. History

The claimant seeks benefits for a compensable injury to his low back sustained on October 11, 1999. He had experienced low back problems prior to this incident; the respondents produced medical records demonstrating back complaints as early as 1972. In 1980, the claimant began to experience back pain which he attributed to “wear and tear” from operating bulldozers. Dr. McConkie performed a fusion surgery in 1980 or 1981. After that surgery, the claimant testified, he had no more problems with his low back until his 1999 compensable injury.

On October 11, 1999, the claimant was using a dozer to demolish a bridge. He testified that the dozer’s blade slipped out from under a bridge abutment, jarring the dozer and almost knocking the claimant out of it. The claimant said the incident “jerked my back when I went out, you know, it was terrible right then but – eventually the pain kind of went down but I never did get rid of the pain. From then on it was always in pain.”

The claimant promptly reported the accident to his supervisor and sought treatment from Dr. Matthew Hulsey. The record does not contain Dr. Hulsey’s reports from 1999, but the claimant testified that Dr. Hulsey reviewed x-rays of his back and referred him to a neurosurgeon, Dr. Allan Gocio. Dr. Gocio first saw the

claimant on October 26, 1999; he noted spasms and recorded complaints of pain in the back, hips and legs bilaterally. Dr. Gocio diagnosed "mech. back pain - strain" and prescribed medication. He continued to treat the claimant, and on April 13, 2000, a lumbar myelogram and CT scan was performed, revealing "severe stenosis - over growth of fusion L45 level & L34 level - minimal disc protrusions." Dr. Gocio recommended surgery; his handwritten notes appear to call for a laminectomy at L3/4, removal of the 1980 hardware, and decompression. He noted that the claimant "doesn't want fusion."

The respondent sent the claimant to Dr. Jim J. Moore for an independent medical evaluation on May 2, 2000. Dr. Moore agreed with the diagnosis of spinal stenosis, and agreed that surgical decompression was "a viable recommendation." Dr. Moore was indecisive as to whether the 1980 hardware should be removed. He did opine that the 1999 injury was a "soft tissue injury" that could be expected to heal within six to twelve months of the injury. Nonetheless, he also opined that the 1999 injury "did aggravate the pre-existent spinal stenosis."

When Dr. Gocio moved to Missouri, Dr. Hulseley referred the claimant to another neurosurgeon, Dr. James Arthur. Dr. Arthur evaluated the claimant and agreed with Dr. Gocio that surgery was appropriate, though he thought the claimant could wait a couple of years, until he was eligible for Medicare, to have the

surgery.

The respondent then sent the claimant for another independent medical evaluation, this time with Dr. Scott Schlesinger. In a July 24, 2000, letter, Dr. Schlesinger opined that no surgery was necessary, though he noted that "I do not do lumbar fusions." Dr. Schlesinger further opined that the 1999 injury was a soft tissue injury which aggravated the pre-existing condition and that the claimant could return to work. Dr. Schlesinger recommended a functional capacity evaluation (FCE) which the claimant refused. Respondent contends it would have made work available to the claimant within any restrictions determined by an FCE.

The claimant and his wife both testified that the respondent denied the surgery recommended by Dr. Arthur. As a result, the claimant had the surgery on September 26, 2000, and paid for it with his private health insurance. Dr. Arthur testified in his deposition that the claimant had three problems in his back: segmental instability in the lumbar spine; lumbar spondylosis, which he described as "arthritis in the lumbar spine;" and lumbar canal stenosis. He testified that a previously asymptomatic lumbar stenosis could be made symptomatic by trauma; that segmental instability could be caused by trauma; and that spondylosis is caused by "life." Dr. Arthur performed basically two procedures in the claimant's surgery: a fusion and a decompression. He testified that as a result of the hardware used in

the 1980 surgery, the claimant had developed “flat back syndrome,” a straightening of the normally curved spine. The fusion Dr. Arthur performed corrected this pre-existing condition, and the decompression corrected the segmental instability caused in part by the compensable injury. He testified that he could not have performed the decompression alone without first performing the fusion. Both Dr. Arthur and the claimant described the surgery as a success.

## **II. Adjudication**

### **A. Medical Treatment**

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). The treatment at issue herein is the surgery performed by Dr. James Arthur on September 26, 2000. Dr. Arthur performed both a decompression and a fusion on the claimant’s lumbar spine.

Back surgery was first recommended by Dr. Allan Gocio on April 12, 2000. On May 2, 2000, the respondent sent the claimant to Dr. Jim J. Moore for an independent medical evaluation. The respondent contends that Dr. Moore

recommended against surgery, but this does not appear to be the case. Dr. Moore agreed the claimant had lumbar stenosis, adding, "Surgical decompression is a viable recommendation for lumbar stenosis." Yet, in a subsequent letter he states, "I would not think that a disk approach at L3/4 would necessarily be proper to recommend." Whether Dr. Moore's use of the phrase "disk approach" specifically refers to part or all of Dr. Gocio's surgical recommendation is not clear. Moreover, Dr. Moore's use of the equivocal phrase "would [not] necessarily be proper" adds to the confusion. Reviewing his letters in their entirety, I take Dr. Moore's opinion to be that decompression surgery was a viable recommendation, but that an additional fusion, or a removal of the hardware from the 1980 surgery, was inadvisable.

Dr. Gocio subsequently moved to Missouri, and the claimant began to treat with Dr. Arthur. When Dr. Arthur recommended surgery, the respondent sent the claimant for another independent medical evaluation, this time with Dr. Scott Schlesinger. In letters of July 24, 2000, and September 29, 2000, Dr. Schlesinger opined that the claimant needed neither surgery nor any further treatment.

Dr. Arthur performed surgery on September 26, 2000, and in his deposition he described the surgery as successful. The claimant testified at the hearing that his pain was "a lot better" after the surgery. The claimant's wife likewise testified that

the claimant “could get around better” after the surgery. It is well established that success of a treatment is a relevant factor to be considered in determining whether a treatment was reasonably necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

The record is plain that the surgery was a success, and that three of the claimant’s physicians thought some form of surgery to be a reasonable option. These facts lead me to conclude that Dr. Schlesinger’s opinion as to the claimant’s condition and need for treatment was, quite simply, wrong. Moreover, Dr. Schlesinger states in one letter that he does “not do lumbar fusions,” suggesting that his expertise in this matter may be questionable in comparison to that of Dr. Moore or Dr. Arthur. Therefore, I give Dr. Schlesinger’s opinions in this matter comparatively little weight. The Commission is authorized to accept or reject medical opinion and to determine its medical soundness and probative force. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001).

Even if the surgery was reasonably necessary, it must still be shown that the surgery was necessary in connection with the compensable injury. There is no dispute that the claimant had pre-existing back problems. This fact does not bar compensation; even if it is demonstrated that a preexisting condition is also a causal factor, the claimant has met his burden of proof so long as he proves that the work

injury combined with or aggravated the preexisting condition to bring about the need for the treatment. *General Elec. Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998). When an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999).

There is no question that the claimant's compensable injury aggravated his pre-existing condition. The respondent has stipulated that the claimant's 1999 injury was compensable, and Drs. Arthur, Moore and Schlesinger have all opined that the injury aggravated his pre-existing spine problems. The question, then, is whether the compensable injury brought about the need for the surgery, and whether the surgery was a consequence "naturally flowing from" the compensable injury. I find that it was.

As noted above, I give Dr. Schlesinger's opinion little weight. Dr. Moore initially opined that the claimant's 1999 injury was a "soft tissue injury superimposed upon pre-existing process." However, in a subsequent letter Dr. Moore opined that "the soft tissue injury of 10-99 did aggravate the pre-existent spinal stenosis." Neither Dr. Moore nor Dr. Schlesinger opined as to whether the 1999 injury contributed to the claimant's need for surgery. Dr. Arthur, on the other

hand, testified in his deposition that the need for surgery was due to a combination of the 1999 injury, pre-existing problems, and degenerative disc disease. There is no evidence in the record to show that the claimant would have required this surgery if his compensable injury had not occurred.

The claimant, his wife and his doctor credibly testified that the surgery was a success. Drs. Gocio and Arthur recommended surgery, both a decompression and fusion. Dr. Moore recommended decompression surgery but was equivocal as to a fusion. Drs. Moore and Schlesinger admitted that the 1999 compensable injury aggravated the pre-existing back problems, and Dr. Arthur testified that the 1999 compensable injury both aggravated the pre-existing condition and contributed to the need for surgery. Given this evidence, I find that the claimant has proven by a preponderance of the evidence that the back surgery and related treatment by Dr. Arthur was reasonably necessary in connection with his compensable injury.

In making this finding, I recognize that the surgery also corrected a long-standing problem, flat back syndrome, that was entirely attributable to the claimant's prior back surgery and unrelated to his 1999 compensable injury. I find that this was only an incidental result of the claimant's need for surgery. Dr. Arthur testified that he performed a fusion prior to performing decompression, and the fusion procedure is what corrected the flat back syndrome. But Dr. Arthur also

testified that he could not have performed the decompression procedure, the treatment needed for the compensable injury, without performing the fusion first. Therefore, even though it had the incidental effect of correcting an unrelated problem, the compensable injury combined with the claimant's pre-existing condition to make necessary both the fusion and the decompression.

I also recognize the following portion of Dr. Arthur's deposition, on a question by the respondent's counsel:

Q. So the surgery that you performed would not have in any way been to alleviate problems he had as a result of that soft-tissue injury in '99?

A. That's right.

It must be remembered that in context, it is clear that Dr. Arthur, Dr. Moore and Dr. Schlesinger agreed there were two components to the claimant's 1999 injury: a soft tissue injury, and an aggravation of the pre-existing lumbar problems. The two cannot be one and the same; an injury to soft tissue is not the same as an injury to the spine. Therefore, it matters not that the surgery did not address the soft tissue injury; the evidence clearly establishes that the surgery was to remedy the aggravation of the claimant's pre-existing spine condition by his 1999 compensable injury, and all of the neurosurgeons who examined the claimant agreed this aggravation was a result of his 1999 compensable injury.

Finally, I note in passing the respondent's contention that it had no advance notice of Dr. Arthur's surgery and that the surgery was "unauthorized." At the hearing, the respondent introduced no evidence whatsoever to support these contentions. In fact, the respondent's own documentary exhibit shows that the case management nurse hired by the respondent was aware of the proposed surgery at least a week beforehand. The claimant and his wife credibly testified that the respondent denied the proposed surgery, and the respondent presented no evidence to contradict this testimony. Whether the respondent was aware that the claimant was going to have the surgery in spite of its controversion is of no legal relevance.

### **B. Temporary Total Disability Benefits**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Because I find that the claimant's surgery and related treatment was

reasonably necessary in connection with his compensable injury, it follows that the claimant's healing period did not end prior to his surgery. Dr. Arthur testified that the claimant was within his healing period for six months after the surgery. Nothing in the record contradicts this opinion. Therefore, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period until six months after his surgery, or until March 26, 2001.

Drs. Moore, Gocio and Arthur agreed that the claimant was unable to work prior to the surgery, and Dr. Arthur opined that the claimant was unable to work after the surgery. Dr. Schlesinger thought the claimant was capable of working, but as noted above I give his opinion little weight. No other physician has opined that the claimant was capable of working during his healing period. I find that the claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages during his healing period.

Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability benefits from the date those benefits were terminated, September 26, 2000, until March 26, 2001, the end of his healing period.

### C. Permanent Impairment

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Any finding of permanent impairment must be supported by objective and measurable physical or mental findings. ARK. CODE ANN. § 11-9-702(c)(1)(B).

Dr. Arthur opined in his deposition that the claimant has sustained permanent anatomical impairment of 15% to the body as a whole. However, it appears that Dr. Arthur evaluated the claimant using the *AMA Guides to the Evaluation of Permanent Impairment*, 5<sup>th</sup> Edition. The Commission has instead adopted the 4<sup>th</sup> Edition of the *AMA Guides* for use in determining permanent impairment. Even if Dr. Arthur used the 4<sup>th</sup> Edition, it is apparent from his deposition that he relied in part on the claimant’s range of motion. Range of motion tests are not objective findings for the purposes of measuring impairment to the spine. ARK. CODE ANN. § 11-9-102(16)(A)(ii). For these reasons, the impairment rating assigned by Dr. Arthur is invalid.

The Commission is authorized to accept or reject medical opinion and to determine its medical soundness and probative force. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d 544 (2001). The Commission is further empowered to translate the medical evidence into a finding of permanent impairment using the *AMA Guides*. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001); *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Therefore, having rejected Dr. Arthur's assigned impairment rating, I will assign an impairment rating relying upon the *AMA Guides*, 4<sup>th</sup> Edition. The claimant has had a spine operation; there is no evidence of loss of motion segment integrity. Though the claimant complains of radicular symptoms, I can find no objective evidence of radiculopathy in the record. Therefore, after consulting Tables 70 and 72 of the *AMA Guides*, 4<sup>th</sup> Edition, I find that the claimant has proven by a preponderance of the evidence that he has sustained permanent anatomical impairment of 5%.

#### **D. Permanent and Total Disability**

The claimant contends that he is permanently and totally disabled. "Permanent total disability" is the "inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment." ARK. CODE ANN. § 11-9-519(e). The claimant bears the burden of

proving that he is unable to earn meaningful wages in any employment. *Id.*

Dr. Arthur testified to the claimant's work capabilities as follows:

Q. And when you marked that he was disabled on the 2-26 report, you mentioned that that was basically because of the type of work that you believed was available to him at Weyerhaeuser?

A. Well, or anywhere.

Q. Or anywhere.

A. Just based on his training and his educational background, I felt like he was disabled.

...

Q. But do you believe also that there is not any type of work that he could do or that there's no work out there – any type of gainful employment he could have at this point?

A. I mean there may be some things that he could – there may be some things he could do if he didn't have to work but part-time. I think a full-time job's kind of out for him with his back.

Q. And you say that you believe the surgery was successful. So what type of problems is, or was he having at the time that you last saw him? Were they the same problems or apparently they had gotten some better?

A. Right. His pain had improved. The pain he was having at rest had gotten better. He simply wasn't doing very much, so he wasn't stressing his back, but he was comfortable at rest.

As noted above, Drs. Arthur, Gocio and Moore had opined prior to the surgery that the claimant was incapable of working. Dr. Moore wrote on May 2, 2000, "At the present time I do not think the patient is a candidate for any working activity especially as he must change position frequently to offer any relaxation of his symptoms." Dr. Schlesinger had opined the claimant could return to work, but as noted above I give his opinion little weight. The record contains no evidence of any medical opinion offered after the claimant's surgery suggesting that he is capable of working. I note that the respondent has not sought another FCE exam of the claimant since his surgery.

The claimant is 60 years of age with only a high school education. He has no specialized job training or other education. He is now receiving Social Security disability benefits. While the claimant and his wife did receive some income from farm activities after his injury, there is no credible evidence in the record to show that the claimant himself materially, regularly or physically participated in these farm activities. His activity appears to have been little more than piddling. Any income realized by him from his farming business was from the sale of poultry and cattle, not from wages produced by his own physical labor. The respondent points to a shoulder injury inflicted on the claimant by a cow, implying that the claimant had been actively working, but I found the testimony of the claimant and his wife

credibly explained the injury. I found their testimony to be credible in that it was plausible, internally consistent and consistent with one another. Beyond this incident, and one isolated mention of chainsaw use, the record contains no evidence that the claimant is capable of, or has actually engaged in, meaningful work activity. He testified that he is “just not able to” engage in gainful employment. He continued, “My back is - it doesn’t bend and it hurts all the time and I’m not able to do it.” He testified that he does not know of any job he is qualified to do other than the work he has done for the respondent.

Given this evidence, I find that the claimant has proven by a preponderance of the evidence that he is unable, because of his compensable injury, to earn any meaningful wages in the same or other employment. I therefore conclude that the claimant is permanently and totally disabled as of March 26, 2001, the end of his healing period.

#### **E. Compensation Rate**

Compensation is payable at a rate computed from the claimant’s average weekly wage under the contract of hire in force at the time of the accident. ARK. CODE ANN. § 11-9-518(a)(1). The Commission is empowered in exceptional circumstances to determine the average weekly wage by a method that is just and

fair to the parties. ARK. CODE ANN. § 11-9-518(c).

Determination of this claimant's average weekly wage is complicated by the fact that neither party introduced payment records showing the claimant's weekly pay or hours worked. The only evidence relevant to this issue introduced by the parties was testimony as to the claimant's hourly rate of pay and copies of the W-2 tax forms furnished to the claimant for 1998 and 1999.

In any event, it is clear that the respondent has improperly calculated the average weekly wage. First, the respondent's attorney represented that its adjuster arrived at an average weekly wage of \$493.33 by averaging the hourly rate of pay earned by the claimant with the hourly rate received before his pay raise of March, 1999. This averaging was improper, for the statute mandates that the wage be calculated on the "contract of hire in force at the time of the accident." ARK. CODE ANN. § 11-9-518(a)(1). Therefore, the claimant's hourly rate before his raise is irrelevant and should not be considered. Second, it is readily apparent that the adjuster failed to account for overtime earned by the claimant; again, the statute is clear that overtime must be included in the calculation. ARK. CODE ANN. § 11-9-518(b).

Because the parties have failed to introduce adequate evidence to properly calculate the average weekly wage using the statutory formula, I find that

exceptional circumstances exist. I further find that the most fair and just method of determining the average weekly wage of this claimant is to divide his total earnings from the respondent in 1999, the year of his accident, by the number of weeks worked in 1999. The 1999 W-2 furnished by the respondent to the claimant states that the claimant was paid \$32,723.22 in 1999 by the respondent. The claimant's accident was October 11, 1999; I calculate that the claimant worked for forty (40) full weeks prior to his accident. Dividing these figures, I find that the claimant has proven by a preponderance of the evidence that he earned an average weekly wage of \$818.08 at the time of his accident. Two-thirds of this amount is \$545; I take judicial notice of the fact that for injuries sustained in 1999, the maximum compensation rates were \$375 for total disability benefits and \$281 for permanent partial disability benefits. I therefore conclude that the claimant is entitled to the maximum compensation rates.

I realize that this computation is based on less than 52 weeks of pay. Nonetheless, my calculations show that even if the claimant's earning for the prior year were taken into account, or even if his 1999 earnings were divided by 52 weeks instead of 40 weeks, the claimant's average weekly wage would still be high enough to entitle him to the maximum compensation rates.

The parties agreed at the end of the hearing that underpayment of temporary

total disability benefits was an issue. The respondent's attorney stated that the claimant has been paid benefits at the rate of \$329 per week. I have found that the claimant was entitled to the maximum compensation rate, or \$375 per week; I therefore conclude that the claimant has proven by a preponderance of the evidence that he is entitled to payment of additional temporary total disability benefits to cover the respondent's underpayment of those benefits from October 11, 1999, through September 26, 2000.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that the back surgery and related treatment by Dr. Arthur was reasonably necessary in connection with his compensable injury; that he is entitled to temporary total disability benefits from the date those benefits were terminated, September 26, 2000, until the end of his healing period, March 26, 2001; that he has sustained permanent anatomical impairment of 5%; that he is permanent and totally disabled as of March 26, 2001; that he is entitled to the maximum compensation rates; and that his temporary total disability was underpaid by the respondent from October 11, 1999, through September 26, 2000. The respondent is hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth

herein.

The claimant's attorney, Mr. Orvin Foster, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge