

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E118941

CALREECE WILLIAMS, EMPLOYEE	CLAIMANT
INTERNATIONAL PAPER COMPANY, SELF INSURED EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., TPA	RESPONDENT

**OPINION FILED AUGUST 16, 2004**

Hearing conducted before Administrative Law Judge C. MICHAEL WHITE in  
Texarkana, Miller County, Arkansas.

The claimant was represented by GREGORY R. GILES, Attorney at Law, Texarkana,  
Arkansas.

The respondents were represented by MICHAEL J. DENNIS, Attorney at Law, Pine  
Bluff, Arkansas.

**AMENDED OPINION AND ORDER**

**FILED**

**SEPTEMBER 14, 2004**

A hearing was held in this matter on May 18, 2004. A prehearing  
conference was conducted on February 18, 2004, and a prehearing order was filed on  
February 26, 2004. A copy of the prehearing order has been marked as Commission  
Exhibit No. 1 and made a part of the record without objection.

During the prehearing conference, the parties agreed to the following  
stipulations:

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1. The employer/employee/carrier relationship existed at all relevant times.
2. The claimant sustained a compensable injury in 1990 as the result of a fall.
3. The claimant was earning sufficient wages at the time of his injury to entitle him to a total disability rate of \$231.27, and a partial disability compensation rate of \$172.53.
4. The claimant was assigned a permanent physical impairment rating of five percent (5%) to the body as a whole, which had been paid.

During the prehearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following:

1. Whether the claimant is entitled to compensation for permanent and total disability.
2. Whether the claimant sustained a permanent physical impairment in excess of the five percent (5%) permanent physical impairment accepted and paid for by the respondents as a result of the admittedly compensable injury to his neck and spine.
3. Whether the claimant sustained any impairment to his earning capacity in excess of the permanent physical impairment accepted by the respondents.

From a review of the record as a whole, to include the testimony of the claimant, as well as the medical records and other documentary evidence, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704 (Cumm. Supp. 1997):

**FINDINGS AND CONCLUSIONS**

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
3. The claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable injuries.
4. A preponderance of the evidence establishes that the claimant sustained a twenty-five (25%) permanent physical impairment to his spine and neck as a result of his compensable injuries.
5. Claimant proved by a preponderance of the evidence that he is entitled to compensation for a twenty percent (20%) permanent physical impairment in excess of the five percent (5%) permanent physical impairment accepted and paid by the respondents.
6. The claimant sustained a 30% whole body impairment to his earning capacity, in excess of the permanent physical impairment established by the medical records.
7. The respondents controverted the claimant's entitlement to any permanent disability compensation in excess of the 5% permanent physical impairment which they accepted and paid.

**DISCUSSION**

The claimant began working for the respondent employer in January of 1973. He began as a general laborer, and over the years he advanced to several jobs, finally becoming the woodyard foreman. On July 9, 1991, he sustained compensable injuries to his neck and low back when he slipped in oil and fell. He was initially seen Dr. Charles Fohn, a general practitioner, who ultimately referred him to Dr. Jay Lipke, an

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orthopedic surgeon. Dr. Lipke treated the claimant for his back complaints, but he referred the claimant to Dr. Steven Cathey, a neurosurgeon for his cervical complaints. Dr. Cathey caused an MRI to be performed, which revealed cervical disc disease, as well as problems in the lumbar spine.

At the request of the respondent carrier, the claimant then came under the care of Dr. Wilbur Giles, a neurosurgeon. Dr. Giles performed a myelogram, which revealed a herniated nucleus pulposus at C5-6. Consequently, in 1991, Dr. Giles performed an anterior cervical fusion at that level. When the claimant recovered from the surgery, he returned to work at his previous job of woodyard foreman. However, he continued to experience problems with his low back, including pain in his right lower extremity, and, in 1991, Dr. Giles performed a bilateral discectomy and neural foraminotomy at L4-5. Dr. Giles released the claimant to return to work, with a fifty (50) pound lifting restriction. The claimant did return to work for the respondent employer after recovering from the surgery in 1993, and the claimant again returned to the same job. He remained in that job until 2001, when the plant was shut down. After the shutdown, the claimant attempted to work hauling logs; however, he was unable to work more than just a few days due to the pain he experienced. The claimant continued seeing Dr. Giles periodically. X-rays taken by Dr. Giles indicate that a defect at C5-6 continued to exist, and he recommended surgery. A MRI performed on July 17, 2001, revealed anterior and posterior defects at C3-4 and C6-7.

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Defects were also noted at L4-5. Dr. Giles recommended surgery on both the claimant's cervical and lumbar spine. However, the respondents then sent him to Dr. Wayne Bruffett. In addition, the claimant has been treated by Dr. William Ackerman, a pain specialist.

Dr. Giles opined that the claimant sustained a 5% permanent impairment to the body as a whole as a result of his low back injury, and the respondents accepted and paid this rating. On April 30, 2004, Dr. Warren Long, Jr., a neurosurgeon, opined that the claimant sustained a twenty-five (25%) permanent physical impairment as a result of the injuries to his cervical and lumbar spine. In this regard, Dr. Long explains in his narrative statement that he used the Fourth Edition of the A.M.A. Guides to the Evaluation of Permanent Impairment, to assign this rating and he describes in his statement how the guides were applied. In addition, Dr. Long notes that he did not consider certain aspects of the guides because those factors are not allowed to be considered under the Arkansas Workers' Compensation Law.

Injured workers bear the burden of proving that they are entitled to an award for a permanent physical impairment. Therefore, when considering claims for permanent physical impairments, the Commission must impartially weigh all of the evidence in the record to determine whether the preponderance of the evidence establishes that the worker sustained a permanent physical impairment as a result of a compensable injury. Consequently, an injured worker must prove that the work-

related injury resulted in, or worsened, a permanent anatomical, physiological, or psychological condition which limits the ability of the worker to effectively use part of the body or the body as a whole. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if we determine that such an impairment did occur, we have a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, \_\_\_ S.W.2d \_\_\_ (1994). In making determinations regarding the existence and extent of anatomical loss of use, The Commission is not limited solely to medical evidence. Id. In the present claim I find that a preponderance of the evidence establishes that the claimant sustained a twenty-five (25%) permanent physical impairment as a result of the injuries to his cervical and lumbar spine. As discussed above, Dr. Long opined that the claimant sustained a twenty-five percent (25%) permanent physical impairment as a result of these injuries and he described in detail the method he used in applying the Fourth Edition of the AMA Guides in assigning this rating. I find that Dr. Long's rating was assigned in compliance with the Arkansas Workers' Compensation law and I find that the claimant is entitled to compensation for a twenty-five percent (25%) permanent physical impairment to his lumbar and cervical spine. Accordingly, I find that the claimant proved by a preponderance of the evidence that he is entitled to compensation for a twenty percent (20%) permanent physical impairment in excess of the five percent (5%) permanent physical

impairment accepted and paid for by the respondents.

As discussed above, the claimant contends that he is permanently and totally disabled as a result of his admittedly compensable injury. In this regard, I initially note that the claimant's injury occurred before the effective date of Act 796 of 1993, so this claim is controlled by the law in effect at the time of his injury. When determining the degree of permanent disability sustained by an injured worker, the Commission must consider the degree to which the worker's future wage earning capacity is impaired. In addition to medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, the Commission must also consider other factors, such as the worker's age, education, work experience, and any other matters which may affect the worker's future earning capacity, including the degree of pain experienced by the worker. Ark. Code Ann. § 11-9-522 (1987); Tiller v. Sears, 27 Ark. App. 159, 767 S.W.2d 544 (1989). When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

Likewise, an employee who is injured to the extent that he can perform services that are so limited in quality, dependability, or quantity that a reasonably stable market

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for them does not exist may be classified as totally disabled under the odd-lot doctrine. Lewis v. Camelot Hotel, 35 Ark. App. 212, 816 S.W.2d 632 (1991). The odd-lot doctrine recognizes that the obvious severity of some injuries may combine with other factors to preclude the employee from obtaining employment in any reasonably stable market, although the employee is not altogether incapacitated from work. Id. In this regard, the factors which may combine with the obvious severity of the employee's injury to place him in the odd-lot category are the employee's mental capacity, education, training and age. Id. If the claimant makes a prima facie showing that he falls in the odd-lot category, the respondents have the burden of going forward with evidence showing that "some kind of suitable work is regularly and continuously available to the claimant." Id.

In considering the factors which may affect an employee's future earning capacity, we may consider the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity. City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982). Likewise, although a claimant's failure to participate in rehabilitation does not bar his claim, the failure may impede a full assessment of his wage earning loss by the Commission. Nicholas v. Hempstead County Memorial Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

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In the present claim, the claimant was 57 years old at the time of the hearing. He graduated from high school, and he attended college for three years, where he completed approximately 97 hours but did not earn a degree. He then served in the Army for two years, and he received an honorable discharge. Soon after his discharge from the Army, he went to work for the respondent employer, and he continued to work for the respondent employer for over 28 years. As discussed above, while working for the respondent employer, the claimant eventually worked in the job of foreman, where he had supervisory responsibilities.

The medical records indicate that the claimant's injuries were relatively severe. However, the medical records indicate he received good results from his surgeries, and he was able to return to work and continue working for almost ten years after the injury. In fact, he was able to continue working with only minimal limitations until the plant was closed in 2001. After the plant closed, he attempted to work in the logging woods, hauling logs. According to his testimony, he attempted this work for two to three days on two different occasions. I note that the case coordinators notes as well as Dr. Ackerman's notes indicate that they were under the impression that the claimant attempted to work hauling wood for a longer period of time. I also note that the claimant filed for unemployment benefits and that he attempted to obtain employment at a number of businesses.

The claimant testified that his condition has continued to worsen and that he experiences considerable pain and other problems. With regard to the other problems, he testified that he experiences numbness in his extremities and that he experiences weakness in his lower extremity which has caused him to fall on a number of occasions. He testified that these problems have limited his ability to engage in many of the activities that he previously enjoyed, such as hunting and fishing. He also testified that he is unable to assist in activities around his home, such as working in the yard and assisting with house work, in the same way that he could before the injuries. The medical records do contain objective findings of conditions that are consistent with the claimant's complaints.

After considering all relevant considerations, I find that the claimant sustained a thirty percent (30%) impairment to his earning capacity in excess of the physical impairment established by the medical evidence. As discussed above, the medical records do indicate that the claimant continues to suffer from problems which can be expected to limit his activities and his ability to earn wages. However, the medical records do not indicate that these conditions are sufficiently severe to completely incapacitate the claimant from earning wages. Accordingly, I find that the claimant failed to prove by a preponderance of the evidence that he is permanently and totally disabled as a result of his compensable injuries. Moreover, I also note that the

claimant's work experience includes substantial supervisory experience, which can be transferred into a number of employment situations that are within the claimant's physical restrictions. Consequently, I find that the claimant sustained a 40% whole body impairment to his earning capacity, in excess of the permanent physical impairment established by the medical evidence.

**ORDER**

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein, along with their proportionate share of attorney's fees. 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 (Cumm. Supp. 1997).

IT IS SO ORDERED.

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HON. C. MICHAEL WHITE  
Administrative Law Judge