

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F310555

JERRY L. HERMAN, EMPLOYEE	CLAIMANT
CITY OF SEARCY, EMPLOYER	RESPONDENT #1
ARKANSAS MUNICIPAL LEAGUE, CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #3

OPINION FILED FEBRUARY 9, 2005

A hearing in this case was conducted on November 15, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by Neal L. Hart, Attorney at Law, Little Rock, Arkansas.

Respondent #1 was represented by J. Chris Bradley, Attorney at Law, North Little Rock, Arkansas.

Respondent #2 was represented by David L. Pake, Attorney at Law, Little Rock, Arkansas.

Respondent #3 was represented by Judy W. Rudd, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 7, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to ten stipulations. Four of these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to the remaining stipulations at the hearing. The following stipulations are hereby accepted.

1. Claimant sustained a compensable injury on May 13, 2003.
2. The employee-employer-carrier relationship existed on May 13, 2003, and at all other relevant times.
3. Claimant's rate for temporary total disability benefits is \$433.00 per week; his rate for permanent partial disability benefits is \$325.00.
4. Claimant reached maximum medical improvement and the end of his healing period on December 17, 2003.
5. Appropriate temporary total disability benefits have been paid to Claimant.
6. Permanent partial disability benefits based upon an 8% permanent impairment rating to the body as a whole have been paid in full to Claimant.
7. Respondent #1 controverts permanent total disability benefits, and permanent partial disability benefits in excess of the 8% permanent impairment rating.
8. Respondent #2 controverts liability for wage-loss disability benefits.
9. Respondent #1 has not offered a program of vocational rehabilitation to Claimant.
10. Claimant's average weekly wage is \$650.21.

At the November 15, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to an anatomical impairment rating of 20% to the body as a whole, or 8% to the body as a whole.
2. Whether Claimant is permanently and totally disabled.
3. If Claimant does not submit a program of vocational rehabilitation, whether he's

constructively waived wage-loss benefits under Ark. Code Ann. § 11-9-505.

4. In the alternative, whether Claimant is entitled to wage-loss disability benefits.

5. Whether Claimant is entitled to an attorney's fee based upon controversion, and if so, from which Respondent(s).

6. Whether the Second Injury Fund is liable to Claimant for benefits.

7. Whether the Death and Permanent Total Disability Trust Fund is liable to Claimant for benefits.

8. Whether Respondent #1 must first pay any permanent partial anatomical ratings to Claimant before it pays permanent total disability benefits.

9. Whether Respondent #1 is entitled to a credit for any permanent partial anatomical ratings paid to Claimant against its \$75,000.00 maximum liability.

_____ Claimant contends that he is entitled to the permanent impairment rating of 20% assigned by Dr. Terry Green. He claims that he is permanently and totally disabled, or in the alternative, that he is entitled to wage-loss disability benefits. Citing the opinions of two doctors that he is totally disabled, Claimant argues that he is not required to submit a program of vocational rehabilitation, nor did he abandon his employment after his release to return to full duty. Claimant seeks an attorney's fee based upon controversion.

Respondent #1 contests Dr. Green's rating, because it is based upon the Fifth Edition of the Guides. Respondent #1 presented evidence that Claimant is not permanently and totally disabled; further, Respondent #1 contends that Claimant abandoned his employment after his release to return to full duty on December 17, 2003, and therefore is not entitled to wage-loss disability benefits. Respondent #2, citing Ark. Code Ann. § 11-9-505, contends that Claimant waived wage-loss disability benefits by

failing to submit a program of vocational rehabilitation before the determination of the extent of his disability. Respondent #2 further contends that there is no combination of disabilities or impairments such as were contemplated by the Second Injury Fund law. Respondent #3 defers to the outcome of litigation on issues 1 through 7; it contends that issue number 8 must be answered in the affirmative and that issue number 9 must be answered in the negative.

DISCUSSION

In March 1995 Claimant began to work for the respondent employer. Shortly thereafter, he was assigned to its transfer station; he described his duties as follows:

We unload trucks or see that the trucks are unloaded in the proper places. When the compactor bins are full, we pull them out with a truck and close the heavy metal doors and chain them up and move them out - just change out the compactor bins.

...

There was a lot more heavy stuff to lift, like the doors on the bins, very heavy steel doors. Plus, I did the repair work. There was a lot of heavy steel to be lifting, and I helped people unload their - we took furniture, refrigerators, all appliances.

Claimant explained how he sustained his compensable injury on May 13, 2003.

I was changing out a compactor bin. ... [The compactor doors] are steel doors that are approximately eight foot wide, and they fold in half. So we had to fold them up and then lift it up and hold it with one hand and hook a chain to it to hold it up. So I was doing that. When I got it up, I reached to get the chain and the door slipped a little bit; and when it did, I held it.

I didn't let it fall all the way, and I shoved it back up. When I did, I felt a pop in my hip and my lower back over here. When I did that, I started walking off. I couldn't get back up in the truck. So I walked up to the building and told my partner and asked him to put the bin in for me.

I was hurting and everything. I waited a while, trying to see if I could walk it off, but it was getting worse. So I called the office and reported it.

Claimant experienced pain in his back, left hip, and left leg. At the respondent employer's direction, he sought medical treatment.

Despite conservative treatment, Claimant's pain persisted. Claimant was initially treated by Dr. Paul Ramirez; he was then referred to Dr. Terry Green. Claimant underwent an MRI of his lumbar spine on July 7, 2003; the study resulted in the following impression: "Annular disk at L3-4, L4-5 with right sided affects on the exiting nerve rootlets at those levels. The right L3 nerve rootlet appears to be more affected than the right L4-5." Dr. Green interpreted this study in a letter dated July 28, 2003.

His MRI was interpreted by the radiologist as an annular disc at 4-5 and 3-4 to the right. I really don't think those discs are symptomatic or significant at this stage. He has radicular pain down the back of the left leg and I think it is likely spondylitic changes and foraminal stenosis at 5-1.

Dr. Green did not recommend surgery; he scheduled Claimant for an epidural steroid injection. This procedure, performed July 31, 2003, did not reduce Claimant's pain.

On September 22, 2003, Dr. Green noted "an established diagnosis of lateral recess stenosis at L5-S1 on the left." Dr. Ramirez concurred with Dr. Green's opinion that an operation was needed. On September 26, 2003, Claimant underwent a "[l]aminotomy and foraminotomy, left L5-S1." Despite this procedure, Claimant reported to Dr. Green on October 3, 2003 complaining of pain that "aches down the side of his left leg, a stabbing type pain." Claimant underwent physical therapy and continued with his medications.

In late November 2003, an insurance investigation company videotaped Claimant's activity around his residence. A copy of this video, transferred to disc, was admitted into the record as Respondent #1's Exhibit #2. A segment of this video was played at the hearing and again reviewed in preparation for this opinion. Claimant was questioned about

his activity on November 21, 2003 as depicted by the video, while it played at the hearing.

Q. Okay. You're lifting - what was that big old piece of something?

A. That is a fiberglass seat.

Q. You're not walking with your cane; are you?

A. No. I'm just limping.

Q. So you lifted that out. And you're going to go back to your truck, aren't you, and work some more?

A. Yes, sir.

Q. You've [sic] bending over there a little bit; aren't you?

A. Just a little bit there. I'm not bending that much.

...

Q. You're kinda doing some work in the back of the bed of the truck; right?

A. Okay. I know what that is. I had a trailer on there.

Q. Now you've got a piece of plywood or something?

A. I don't know what that was.

Q. Well, it's a big bulky object; isn't it?

A. Yes.

As indicated, the video reveals Claimant removing at least two large, bulky objects from the bed of his truck. At some points in the video he is using his cane; at others, he is not. The video depicts Claimant walking with a limp, bending, lifting, and carrying.

Claimant presented to Dr. Reginald Rutherford on November 25, 2003, to undergo electrodiagnostic testing. Dr. Rutherford concluded:

The nerve conduction study is normal other than inability to obtain an H reflex either lower extremity which correlates with clinical examination pertaining to absent reflexes. Nerve conduction study yields normal motor

and sensory responses. There is no evidence to suggest diabetic neuropathy. On electromyographic examination there is no evidence to suggest radiculopathy or plexopathy.

Dr. Rutherford suggested that Claimant undergo a functional capacity evaluation, which he did on December 11, 2003. The evaluator concluded that Claimant “underwent functional evaluation this date with unreliable results for effort. [Claimant] put forth very inconsistent effort and demonstrates many inconsistencies with inappropriate illness responses.” He opined that Claimant “did demonstrate the ability to perform Lifting activities at the Light level with a maximal lift of 21 lbs as well as carry of 11 lbs.”

In a clinic note dated December 17, 2003, Dr. Rutherford made reference to the “invalid FCE” and advised Claimant that he believed Claimant could return to “regular work duties without restriction.” Claimant did not agree, “advising that he was unable to walk.”

From my perspective, there is no objective basis to support this allegation. From my perspective, [Claimant] may return to full work duties without restriction. Secondarily there is no objective abnormality identified which would warrant consideration of a permanent partial impairment rating.

However, when Claimant presented to Dr. Green that same date, Dr. Green recommended that Claimant apply for Social Security disability benefits.

Dr. Brent Sprinkle examined Claimant on February 3, 2004. Dr. Sprinkle did not believe that Dr. Rutherford’s nerve conduction study was conclusive, in that it did “not definitely exclude the diagnosis of diabetic peripheral neuropathy.” Dr. Sprinkle offered some treatment, including a TENS unit; on March 2, 2004, Dr. Sprinkle recommended that Claimant continue the TENS unit, but otherwise released Claimant from his care.

Dr. William Blankenship reviewed Claimant’s medical records on March 4, 2004. He noted Claimant’s “long history of diabetes mellitus.” After summarizing Claimant’s

various medical records, including his July 7, 2003 MRI study, Dr. Blankenship opined:

There are questions that need to be answered in that it appears from the objective findings of the MRI, everything that was found tended to be on the right side and this man's symptoms were on the left side. Even the EMG and nerve conduction study that was done postoperatively did not reveal any essential neurological disease, either from a neuropathy standpoint which could possibly be caused by his diabetes, or nerve problems that could be due to stenosis or any type of nerve encroachment.

Also with regard to an opinion regarding a rating, the complaints of pain with regard to the spine as well as limitation of motion regarding the spine are considered not objective findings and therefore can [not?] be considered in a rating impairment.

In the view of this examiner, in light of the objective findings, it would appear there is no objective basis of any impairment as a result of his work-related injury. However, he has had a surgical procedure done on his back, which was a left L5-S1 foraminotomy. According to the American Medical Association Guides to the Evaluation of Permanent Impairment, 4th Edition, located on page 3/113, table 75, under IV, titled "Spinal Stenosis, Segmented Instability, Spondylolisthesis, Fracture or Dislocation, Operated On", under "A", Single level decompression without spinal fusion and without residual signs and symptoms would be 8% to the body as a whole.

Dr. Ramirez continued to treat Claimant. He doubted that Claimant's condition was related to his diabetes, "because his pain is basically... located in his legs and low back.

If this were to be diabetes, is [sic] should be generalized neuropathy." On May 4, 2004,

Dr. Ramirez offered the following assessment:

1. Status post lumbar fusion and decompression.
2. Radicular pain left lower extremity.
3. Diabetes mellitus type II noninsulin dependent complicated with neuropathy.
4. Essential hypertension.
5. Obesity.

Dr. Ramirez opined that Claimant "is currently totally disabled to perform any kind of job."

He repeated this opinion in a letter dated May 5, 2004, stating: "[I]t is my personal opinion that I do agree with Dr. Green in that this patient is unable to carry on a gainful job."

Claimant's attorney wrote to Dr. Green on January 4, 2004, seeking his opinion as to the extent of Claimant's permanent impairment, if any. Dr. Green responded on February 11, 2004. Where Claimant's attorney made reference to "AMA Guides, 4th Edition," Dr. Green struck out "4th" and wrote in "5th." He rated Claimant's permanent impairment as 20% to the body as a whole.

A. Additional Permanent Partial Impairment Benefits

Benefits based upon an 8% permanent impairment rating have been paid in full to Claimant. Claimant seeks additional permanent partial impairment benefits, arguing his entitlement to a permanent impairment rating of 20% to the body as a whole.

There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, _____ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). 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 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's Guides to the Evaluation to Permanent Impairment (4th ed. 1993) (hereinafter "Guides"). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34.

A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-

704(c)(2). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

Dr. Green’s rating of 20% permanent impairment to the body as a whole offered on February 11, 2004, is of little assistance. Obviously, his reliance upon the Fifth Edition of the Guides is contrary to law. Dr. Green did not identify any supporting objective findings or address the causation requirement. However, this does not resolve the issue; the Commission is authorized to assess its own impairment rating rather than rely solely on ratings assigned by physicians. See Polk County v. Jones, 74 Ark. App. 159, 164-65, 47 S.W.3d 904, ___ (2001).

I find that Claimant has not sustained his burden of proving by a preponderance of the evidence that he is entitled to additional permanent partial impairment benefits. Specifically, without addressing the other two factors, Claimant has not demonstrated that the compensable injury was the major cause of any additional impairment at issue. The MRI of Claimant’s lumbar spine taken July 7, 2003 revealed “[a]nnular disk at L3-4, L4-5.” However, as Dr. Blankenship noted on March 4, 2004, “it appears from the objective findings of the MRI, everything that was found tended to be on the right side and this man’s symptoms were on the left side.” Since Claimant’s immediate and following symptoms were in his back, left hip, and left leg, it would require speculation to find that these discs with “right sided affects” did not preexist his May 13, 2003 compensable injury.

It should be noted that Dr. Rutherford’s November 25, 2003 EMG report observed an “inability to obtain an H reflex either lower extremity...” According to Table 71, differentiator 4, found on page 3/109 of the Guides, this could be a significant objective

finding. However, Claimant offered no evidence, in the medical record or otherwise, to establish that his compensable injury was the major cause of this finding. Indeed, to the contrary, Dr. Rutherford discounted this finding by later noting “no objective abnormality identified which would warrant consideration of a permanent partial impairment rating.” Likewise, Dr. Blankenship noted this finding in his March 4, 2004 letter, but did not use it as a basis for an impairment rating.

B. Permanent Total Disability Benefits

Claimant seeks a determination that he is permanently and totally disabled. “Permanent total disability” means inability, because of compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving his inability to earn any meaningful wage in the same or other employment; he must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2).

Claimant’s injury is not scheduled under the Act; therefore, his entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Pursuant to this statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant permanently and totally disabled based upon wage-loss factors. Whitlatch v. Southland Land & Dev., 84 Ark. App. 399, 405, 141 S.W.3d 916, ___ (2004).

The wage-loss factor is the extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant’s age, education, and work experience. In considering factors that may affect an employee’s future earning capacity, the court considers 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.

Lee v. Alcoa Extrusion, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (January 26, 2005) (citations omitted). In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) provides that: “[p]ermanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” “Major cause” is defined as more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A).

As an initial matter, Claimant has been assigned an anatomical impairment rating to the body as a whole. The parties stipulated that Claimant has been paid benefits based upon an 8% permanent impairment rating to the body as a whole.

Nonetheless, I find that Claimant has not sustained his burden of proving by a preponderance of the evidence that he is not able, because of his compensable injury, to earn any meaningful wages in the same or any other employment. The video of Claimant's November 21, 2003 activity, entered into the record, demonstrates that Claimant is able to bend, lift, and carry large bulky objects without the use of his cane. Claimant's December 11, 2003 functional capacity evaluation, taken less than a month after the video, concludes that Claimant “did demonstrate the ability to perform Lifting activities at the Light level with a maximal lift of 21 lbs as well as carry of 11 lbs.” Claimant is clearly able to engage in some activity; his compensable injury does not prevent him from earning any meaningful wages. I acknowledge the contrary opinions of Dr. Green and Dr. Ramirez that Claimant “is unable to carry on a gainful job”; of course, Dr. Rutherford released Claimant to full work duties without restriction. Given the conflicting medical opinions, the video of Claimant's activities coupled with the functional capacity evaluation persuasively demonstrate that Claimant is not permanently totally disabled.

C. Constructive Waiver under Section 11-9-505(b)

Respondent #2, citing Ark. Code Ann. § 11-9-505(b), contends that Claimant waived wage-loss disability benefits by failing to submit a program of vocational rehabilitation before the determination of the extent of his disability. At the hearing, Respondent #2's attorney argued:

[B]ecause Section 505(b)(4) requires that the claimant submit a program of vocational rehabilitation before the determination and extent of disability, if he continues on with his extent of disability hearing not having presented a program of vocational rehabilitation, he has passively waived it or waived it as a matter of law.

Apparently, no respondent offered Claimant a program of rehabilitation or job placement; Respondent #1 stipulated that it has not offered Claimant a program of vocational rehabilitation.

Claimant testified that he visited his local Arkansas Rehabilitation Services office three times, seeking assistance in finding a job; that office did not provide him with a list of jobs. He testified that if he had been offered retraining, he would have been cooperative and met with a vocational rehabilitation specialist. Claimant reiterated that no one has offered him a program of vocational rehabilitation. On the other hand, Claimant has not filed such a program, nor did he ask the respondent employer to provide such a program prior to the hearing.

Ark. Code Ann. § 11-9-505(b)(3) and (4) state:

(3) The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

(4) A request for the program, if elected by the claimant, must be filed with the commission prior to a determination of the amount of permanent disability benefits payable to the employee.

As this statute is interpreted by the Arkansas Court of Appeals and the Full Commission, a claimant's mere failure to offer a program of vocational rehabilitation, standing alone, does not constitute a waiver of rehabilitation. See Second Injury Fund v. Stephens, 62 Ark. App. 255, 264, 970 S.W.2d 331, ___ (1998) (rejecting "an identical argument by the Fund that a claimant had a duty to pursue rehabilitation and that he failed to do so"); Second Injury Fund v. Furman, 60 Ark. App. 237, 245, 961 S.W.2d 787, ___ (1998) (section 11-9-505(b)(4) "does not stand for the proposition that every claimant must formally file for rehabilitation with the Commission or waive entitlement to disability benefits"); Craig v. Beaty Logging Company, Full Workers' Compensation Commission Opinion filed June 4, 2004 (F113089) (finding that the record is void of any offer of vocational rehabilitation from the respondents "and, at most, merely shows that claimant was not interested in pursuing the vocational rehabilitation on his own volition nor was he informed of rehabilitation opportunities"); Bruton v. Baltz, Full Workers' Compensation Commission Opinion filed April 24, 2000 (E707801). In Bruton, the Commission wrote:

As an initial matter, we note that respondent seems to suggest that claimant should be barred from receiving wage loss benefits under Ark. Code Ann. § 11-9-505(b)(3) and (4), because the claimant did not request a rehabilitation program. Even if the respondents were correct that the claimant did not request a rehabilitation program, the fact that a claimant does not propose a rehabilitation program has previously been held not to be grounds for barring wage loss benefits under the Arkansas Workers' Compensation Law as amended by Act 796 of 1993.

Bruton, supra

I find that Claimant's failure to submit a program of vocational rehabilitation does not

constitute constructive waiver of wage-loss benefits under Ark. Code Ann. § 11-9-505(b)(3) and (4). Claimant did seek assistance from an Arkansas Rehabilitation Services office. He testified to willingness to cooperate if Respondents offered a program of vocational rehabilitation; no such offer has been forthcoming. In light of the authorities cited above, and these facts, Claimant's failure to submit a program of vocational rehabilitation does not constitute a waiver of his wage-loss disability benefits.

D. Wage-loss Disability Benefits

Claimant seeks wage-loss disability benefits in the alternative. Respondent #1 contends that Claimant abandoned his employment after his release to return to full duty on December 17, 2003, and therefore is not entitled to wage-loss disability benefits. Claimant has been assessed an 8% permanent impairment rating to the body as a whole; therefore, the Commission may consider his claim for wage-loss disability in excess of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Elec. v. Gaston, 75 Ark. App. 232, 237, 58 S.W.3d 848, ___ (2001).

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. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage-loss.

McKinney v. Plastics Research & Development, Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881); see Ark. Code Ann. § 11-9-522(b)(1);

Emerson Elec., 75 Ark. App. at 237, 58 S.W.3d at _____. In addition, permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a); see McKinney, supra. “Major cause” is defined as more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. § 11-9-522(b)(2). The employer or its workers’ compensation insurance carrier has the burden of proving the employee’s employment, or the employee’s receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. § 11-9-522(c)(1).

I find that Respondent #1 did not sustain its burden of proving that Claimant is barred from receiving wage-loss disability benefits under Ark. Code Ann. § 11-9-522(b)(2). Dr. Rutherford opined that Claimant could return to his regular work duties without restriction, as of December 17, 2003. However, the video of Claimant’s November 21, 2003 activities, while demonstrating that he is not permanently and totally disabled, also demonstrates his consistent limping and affected movement. Claimant’s December 11, 2003 functional capacity evaluation restricted Claimant’s lifting activities to the “light” level, less than the job Claimant was performing at the time of his compensable injury. Claimant

testified that, at his meeting with his supervisor and others after the December 17, 2003 release, he was informed there were no “light positions” available; since Claimant did not believe he could return to his former job, the respondent employer terminated his employment. Under the terms of the statute, Claimant did not return to work, he has not obtained other employment, and Respondent #1 did not prove a reasonably obtainable offer to be employed at wages equal to or greater than Claimant’s average weekly wage at the time of the accident. Claimant did not abandon his employment.

Turning to the question of wage-loss disability benefits, at the time of the hearing Claimant was 48 years of age, had a tenth-grade education, and had failed the GED examination twice. His employment history involves fields requiring manual labor; he confirmed that he has never had a desk job. Claimant has undergone surgery at L5-S1, which failed to alleviate his complaints of pain and resulted in an 8% permanent impairment rating to his body as a whole. Two doctors agree that Claimant is unable to carry on gainful employment. On the other hand, the video of Claimant’s activity on November 21, 2003, and Claimant’s functional capacity evaluation, both indicate that Claimant has some ability to engage in work activity. Claimant’s motivation to return to work is questionable; at the hearing he confirmed his belief that he will not be able to work again. At his deposition, he admitted that he has not completed any employment applications or otherwise made any effort to seek employment. Claimant apparently does not believe that he is able to undergo vocational rehabilitation.

After considering all relevant wage-loss factors, I find that the Claimant has established a decrease in his wage earning capacity equal to 15% to the body as a whole. He is entitled to benefits for this decrease in his wage earning capacity. Further, I find that

Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. Claimant could perform his job prior to his compensable injury; since then, two doctors agree with Claimant's belief that he cannot perform any employment. Claimant's compensable injury is the sole, and thus the major, cause for his decrease in earning capacity.

E. Second Injury Fund Liability

In 1992 Claimant sustained a compensable injury to his neck while working for another employer. Claimant underwent surgery to treat his condition, spent some time off work, and settled his subsequent claim. Claimant believed it took about a year before he could return to work. He testified during his August 9, 2004 deposition that he did not miss any time from work between 1995 and 2003 due to his neck injury; he confirmed that this injury did not keep him from doing a full day's work for the respondent employer. When asked at the hearing what symptoms currently bother him, Claimant replied:

I just have - in my back, I still have a lot of pain in my hip and everything; and my leg goes numb all the way to my foot, and it stings and burns at different times. If I sit too long without my leg up, like right now, my foot goes to swelling and starts getting numb.

As can be seen, Claimant did not mention his neck as being symptomatic.

Respondent #2 argues that there is no combination of disabilities or impairments necessary to impose liability. The conditions for imposing liability upon the Second Injury Fund are as follows:

First, the employee must have suffered a compensable injury at his present place of employment. Second, prior to that injury the employee must have had a permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status.

Second Injury Fund v. Stephens, 62 Ark. App. 255, 259, 970 S.W.2d 331, ____ (1998) (citations omitted); see Ark. Code Ann. § 11-9-525.

I find that Respondent #2 is not liable for wage-loss disability benefits. The medical records relating to the May 13, 2003 compensable injury do not support a finding that Claimant's 1992 and 2003 injuries combined to produce his current disability status. Claimant testified that he did not miss a day of work from 1995 until 2003 due to his 1992 compensable neck injury. And, Claimant did not indicate that his neck injury was symptomatic after his May 13, 2003 compensable injury. Under the third part of the test recited above, there simply is no evidence that Claimant's 1992 disability or impairment combined with his 2003 compensable injury to produce his current disability status.

F. Issues Seven, Eight, and Nine

This opinion finds that Claimant did not sustain his burden of proving that he is permanently and totally disabled. Therefore, it is not necessary to discuss issues 7, 8, and 9, relating to the liability of the Death and Permanent Total Disability Trust Fund. Compare Ark. Code Ann. § 11-9-502(b) (providing for payments by the Fund if benefits for death or permanent total disability have been paid to the claimant).

G. Attorney's Fee

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This opinion awards Claimant wage-loss disability benefits based upon the relevant factors. The parties stipulated that Respondent #1 controverted permanent partial disability benefits in excess of the 8% permanent impairment rating previously paid to Claimant. As noted above,

Respondent #2 and Respondent #3 are not liable for the payment of benefits to Claimant. Thus, Claimant is entitled to an award of an attorney's fee pursuant to the statute to be paid by Respondent #1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. Claimant sustained a compensable injury on May 13, 2003.
3. The employee-employer-carrier relationship existed on May 13, 2003, and at all other relevant times.
4. Claimant's rate for temporary total disability benefits is \$433.00 per week; his rate for permanent partial disability benefits is \$325.00.
5. Claimant reached maximum medical improvement and the end of his healing period on December 17, 2003.
6. Appropriate temporary total disability benefits have been paid to Claimant.
7. Permanent partial disability benefits based upon an 8% permanent impairment rating to the body as a whole have been paid in full to Claimant.
8. Respondent #1 controverts permanent total disability benefits, and permanent partial disability benefits in excess of the 8% permanent impairment rating.
9. Respondent #2 controverts liability for wage-loss disability benefits.
10. Respondent #1 has not offered a program of vocational rehabilitation to Claimant.
11. Claimant's average weekly wage is \$650.21.
12. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to additional permanent partial impairment benefits. Dr. Green's

20% permanent impairment rating to the body as a whole is flawed, due to its reliance upon the Fifth Edition of the Guides. Claimant otherwise failed to demonstrate that the compensable injury was the major cause of his “[a]nnular disk at L3-4, L4-5” or his absent H reflex. The record does not reflect whether these two impairments preexisted Claimant’s compensable injury or not.

13. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is permanently and totally disabled. The video of Claimant’s November 21, 2003 activities, as well as his December 11, 2003 functional capacity evaluation, both demonstrate that Claimant is able to earn meaningful wages in some employment.

14. Claimant did not waive wage-loss disability benefits by failing to submit a program of vocational rehabilitation before the determination of the extent of his disability. The applicable statute is not interpreted to equate the mere failure to offer a program of vocational rehabilitation with a waiver of rehabilitation.

15. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to 15% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injury is the major cause of his decrease in earning capacity. I also find that Respondent #1 did not prove that Claimant abandoned his employment after his release to return to full duty on December 17, 2003.

16. Respondent #2 is not liable for wage-loss disability benefits payable to Claimant. There is no evidence in the record that Claimant’s 1992 disability or impairment combined with his 2003 compensable injury to produce his current disability status.

17. Because this opinion finds that Claimant did not sustain his burden of proving

that he is permanently and totally disabled, it is not necessary to determine issues 7, 8, and 9, relating to the liability of the Death and Permanent Total Disability Trust Fund.

18. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715, to be paid by Respondent #1.

AWARD

Respondent #1 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 #1 in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml