

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F306434**

<b>DARRELL KING, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BRYCE CORPORATION, EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>ROYAL INSURANCE COMPANY OF AMERICA, CARRIER</b>	<b>RESPONDENT #1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT #2</b>

**OPINION FILED AUGUST 11, 2005**

A hearing in this case was conducted on May 16, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent #1 was represented by Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

Respondent #2 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 March 1, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to eight stipulations. Six of these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to two additional stipulations at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on October 14, 2002, and at all other relevant times.

2. Claimant sustained a compensable low back injury on October 14, 2002.
3. Claimant reached the end of his healing period, and attained maximum medical improvement, on November 1, 2003.
4. Respondent #1 has paid the value of Claimant's assigned 5% permanent impairment rating.
5. Claimant underwent surgery at C6-7 on February 23, 1990.
6. The issue of Claimant's child support should be addressed in any future award or joint petition settlement, if necessary.
7. Claimant's compensation rate for temporary total disability is \$425.00 per week; his compensation rate for permanent partial disability is \$319.00 per week.
8. Respondents controvert Claimant's request for wage-loss disability benefits in excess of his 5% permanent impairment rating.

At the May 16, 2005 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 wage-loss disability benefits in excess of his 5% permanent impairment rating.
2. If so, whether Respondent #2 is liable for payment of benefits under Ark. Code Ann. § 11-9-525.
3. Whether Claimant is entitled to an attorney's fee.

In the course of the hearing, Claimant testified that he did not sustain permanent impairment or disability as a result of his February 23, 1990 surgery at C6-7. At the conclusion of his cross-examination, Respondent #2 moved to be dismissed. Without

objection from the remaining parties, Respondent #2 was then dismissed from the proceeding. Therefore, this Opinion will not address issue #2.

In a previous Opinion filed September 13, 2004, Claimant was awarded benefits based upon an impairment rating of 5% to the body as a whole. In this proceeding, Claimant seeks wage-loss disability benefits in excess of that rating. Respondent #1 challenges this request.

## **DISCUSSION**

### **A. WAGE-LOSS DISABILITY BENEFITS**

At the time of the May 16, 2005 hearing, Claimant was 46 years of age. He completed high school and later, while working for the Respondent employer, attended classes at Arkansas State University-Searcy to work towards an industrial maintenance technician's license. He did not complete that program, and does not have any technical certificates or licenses. He claims skills or experience in using hand tools or machine shop tools, and in tasks such as supervising, inventory control, scheduling, and instructing. He apparently has some qualification in the field of sheet metal fabrication.

\_\_\_\_\_ Claimant's job with the Respondent employer involved maintaining the day to day functions of a printing press. His duties involved bending, lifting, stooping, pushing, and pulling. He described how he sustained his October 14, 2002 compensable injury:

Of course, my job is working on the back of a machine. They have docker blade assemblies that actually transfers the ink to the rubber plates which goes to the drum. These plates wear out and we have to change them periodically. The docker blade system that I was working on, the full assembly probably weighs 60 or maybe even 70 pounds; I never got to weigh one.

But they've got ladders going up on the machine. And I was taking the one out of the top unit, which is approximately ten feet off the ground. And I took

it down and I changed the blade out. My operator went up and kind of cleaned the pan and got things ready for it to go back together.

Once I changed the blades and made the new assembly I started up the ladder. And just before I got up the ladder, the ladder broke and broke on the right side throwing me to my right side. And I had to try to throw the docker blade away, you know, to keep it from falling on me; they are sharp. So when I landed I just kind of landed awkward on my right leg and sprained my ankle and went to the floor.

Claimant sustained injuries to his right ankle, right side, and low back; the parties stipulated that Claimant sustained a compensable low back injury on October 14, 2002.

Commission Exhibit #2 is an Opinion filed September 13, 2004, awarding Claimant a 5% permanent impairment rating. On October 13, 2003, Dr. Anthony Russell interpreted an MRI of Claimant's lumbar spine taken on that same date, in the course of a letter explaining Claimant's condition.

[Claimant] continues to complain of pain in the right leg with radiation into the calf area and foot. The MRI scan that accompanied the patient shows two level lumbar disk disease, most prominent at L4/5 and L5/S1. The L4/5 [sic] disk has a left sided component that does appear to be causing some minor irritation of the S1 nerve root on the left. The L4/5 disk on the other hand, is a major right sided component. It does appear to be causing direct compression of the nerve root at it's base.

I believe that the L4/5 disk is responsible for [Claimant's] ongoing low back and lower extremity pain. It is apparent that with any increase in size of the disk, which would be expected with upright activity or any strenuous activity further nerve root compression would occur, leading to increased pain in the leg.... I believe that this is an acute finding that dates back to the injury ascribed to [Claimant's] work related incident. I do not believe that he is currently symptomatic from the L5/S1 disk. However the disk is such that with minimal provocation it could very easily rupture and lead to further problems down the line. These opinions are stated with a reasonable degree of medical certainty. This is based on the fact that prior to the incident [Claimant] had no back pain and especially no radicular pain. I believe that more likely than not, he will ultimately require surgical intervention for the L4/5 disk, if not for the L5/S1 disk as well.

In his March 31, 2004 deposition, Dr. Russell confirmed his opinions offered in the letter.

Concerning the L4-5 disc, Dr. Russell stated: "I just think that the size of the disc and the proximity to the nerve and all, I believe that at some point, he's going to require surgery for the symptoms that he has." The parties stipulated that Respondent #1 has paid the value of Claimant's 5% permanent impairment rating.

As of the hearing, Claimant continued to experience pain in his low back and right leg. He described his low back pain as an "aching pain" that is "there most of the time" but worse at some times than others. If he stands too long, Claimant experiences "numbness in my right leg," that is "just a constant day-to-day, hour-by-hour type thing." Claimant indicated that he did not have pain in any other parts of his body. Claimant testified to difficulty sleeping; it is difficult for him to relax and get comfortable to sleep, and sometimes the discomfort of his leg wakes him. From the record, it appears that Claimant has not yet undergone surgery; he does not appear to currently be undergoing physical therapy or any other special treatment. He would like to see another doctor since Dr. Russell has retired.

Claimant's testimony indicates that his activities are restricted as a result of his compensable injury. He testified that his activities were "unlimited as to what I could do before I got hurt," including horse riding, skiing, and hunting or fishing with some frequency. He testified that now he would be "afraid" to attempt his old job with the Respondent employer, that he does not ski or ride horses, and that he hunts with much less frequency.

A functional capacity evaluation was administered to Claimant on December 28, 2004; the resulting report is dated December 29, 2004. The report notes that Claimant gave a reliable and consistent effort, so that he "passed all criteria for validity and demonstrates no signs of symptom magnification or other inappropriate illness response." The report concluded that Claimant "demonstrated the ability to perform work at the

MEDIUM Physical Demand Classification as determined through the Department of Labor for an 8-hour day with” certain limitations. The report noted that Claimant did not meet the requirements for his former job with the Respondent employer, but that he did meet all of the requirements for a sales representative.

A vocational assessment, apparently dated January 17, 2005, is found in the record. Claimant reported that “he is not on any medication and does not take over the counter medication except on a PRN basis.... The pain in his back depends on what he is required to do. If he stands too long or has to lift anything on a regular basis he then has back pain.” The assessment noted physical limitations in standing, walking, bending, kneeling, lifting, and climbing. The examiner recorded Claimant’s interest in returning to his former wage earning ability and his interest in retraining.

The vocational assessment corroborates Claimant’s testimony concerning his work history. He worked for Carrier from 1980 to 1996 in a sheet metal fabrication shop. He began working for the Respondent employer in June of 1997; this employment was terminated in May of 2003. He was unemployed for about nine months, until he found a job as a sales representative with Venable Windows and Siding Company in February of 2004; he later promoted into some management positions. In April of 2005 Claimant left Venable. In May of 2005 he found a job with Home Depot as a millwork specialist.

Although his tax returns were not entered into evidence, Claimant testified to the following adjusted gross income in the following years:

2001	\$37,607.94
2002	\$39,184.00
2003	\$27,740.00
2004	\$29,446.00

Claimant testified that his 2003 income included \$17,725.00 in actual wages and slightly over \$10,000.00 in unemployment benefits. As to his salary at his new Home Depot job, he “was told it’d be somewhere around 24,000.”

Whenever he has been unemployed, Claimant has been diligent in attempting to find work. Following the termination of his job with the Respondent employer, he sought a position for which he was qualified by looking in the newspaper, searching the internet, and consulting with the Employment Security Division. With regard to the ESD, Claimant stated that “[a]ll I did was register for anything that my qualifications could get me to.” During his nine months of unemployment, Claimant “did a lot of interviews, but as soon as they found out I had a workmen’s comp claim, they would not hire me.” He found his job with Venable through the newspaper. He found his job at Home Depot without the assistance of the ESD; he explained: “I just seen the building was being built and I started inquiring and went online and found an application online and filed online.”

Finally, as to child support, Claimant testified that his children are no longer minors and that he has “got everything paid off and paid up right now.” At the close of the hearing, Claimant’s counsel confirmed that there is no back child support to be addressed.

The Claimant seeks wage-loss disability benefits. Again, a 5% permanent impairment rating has been awarded and paid. Therefore, the Commission may consider his claim for wage-loss disability in excess of his 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. Logan County v. McDonald, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (April 6, 2005).

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 & Dev., Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881)(citations omitted); see Ark. Code Ann. § 11-9-522(b)(1); Logan County, \_\_\_ Ark. App. at \_\_\_, \_\_\_ 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).

Claimant has the burden of proving his entitlement to wage-loss disability benefits. 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).

At the time of the hearing, Claimant was 46 years of age with a high school degree and some post-secondary technical education. His work history consists primarily of manual labor or positions in sales, although his manual labor has been of a technical nature and he has held some management-level positions. His low back condition continues to trouble Claimant; this condition has not been operated on, but Dr. Russell believes "that more likely than not, he will ultimately require surgical intervention for the

L4/5 disk, if not for the L5/S1 disk as well.” Claimant credibly testified to the pain and restricted activity caused by his condition; his valid FCE corroborates his inability to return to the type of employment he held with the Respondent employer.

The decrease in Claimant’s post-injury income should be noted. He made \$39,184.00 in the calendar year of his injury; his highest annual income afterwards is \$29,446.00; at the time of the hearing, he had accepted a job paying around \$24,000.00 per year. His post-injury income has been substantially less than his income prior to his compensable injury.

Claimant’s motivation, interest in pursuing employment, and attitude in looking for work are all favorable. He apparently cooperated fully in his functional capacity evaluation and vocational assessment. The record reflects that Claimant has been diligent in attempting to find work during any period of unemployment, and that he has been willing to accept work even though his income would be significantly less than prior to his injury.

After considering all relevant wage-loss factors, I find that the Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to wage-loss disability benefits in the amount of 15%. I find that there are no impediments in this record to assessing wage-loss; Claimant’s motivation and attitude towards finding work are exemplary.

I further find that Claimant’s October 14, 2002 compensable injury is the major cause of his disability. Claimant could perform his job prior to his injury, but as the FCE confirms, he is physically unable to perform that job after the injury. No other cause is identified in, or revealed by, the record. Thus, I find that Claimant’s October 14, 2002 compensable injury is the sole cause, and thus the major cause, of his disability.

**B. 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; the parties stipulated that Respondents controvert Claimant's entitlement to wage-loss disability benefits in excess of his 5% permanent impairment rating. Thus, Claimant is entitled to an award of attorney's fees 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. The employee-employer-carrier relationship existed on October 14, 2002, and at all other relevant times.
3. Claimant sustained a compensable low back injury on October 14, 2002.
4. Claimant reached the end of his healing period, and attained maximum medical improvement, on November 1, 2003.
5. Respondent #1 has paid the value of Claimant's assigned 5% permanent impairment rating.
6. Claimant underwent surgery at C6-7 on February 23, 1990.
7. The issue of Claimant's child support should be addressed in any future award or joint petition settlement, if necessary.
8. Claimant's compensation rate for temporary total disability is \$425.00 per week; his compensation rate for permanent partial disability is \$319.00 per week.
9. Respondents controvert Claimant's request for wage-loss disability benefits in excess of his 5% permanent impairment rating.

10. Based upon Claimant's testimony at the hearing, I find that Respondent #2 should be, and hereby is, dismissed from liability in this claim.

11. Upon consideration of all relevant wage-loss factors, I find that Claimant did establish a decrease in wage earning capacity equal to 15% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant's October 14, 2002 compensable injury is the only, and therefore major, cause of his decrease in earning capacity.

12. 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 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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