

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005922

BARRY NEEDHAM	CLAIMANT
JOHNSON CONTROLS, INC.	NO. 1 RESPONDENT
SPECIALTY RISK SERVICES, INC. INSURANCE CARRIER	NO. 1 RESPONDENT
SECOND INJURY FUND	NO. 2 RESPONDENT

AMENDED OPINION FILED JULY 6, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents No. 1 represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

Respondent No. 2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 5, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 6, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on June, 18, 1998.

4. Medical expenses have been paid to June 20, 1998, for the claimant's low back injury.

5. The claimant is entitled to a weekly compensation rate of \$359.00 for temporary total disability and \$269.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's cervical back problems of June 16, 1998.

2. Medical for the claimant's cervical back and low back after June 20, 1998.

3. Temporary total disability from June 18, 1998, to a date to be determined.

4. Permanent partial impairment rating of 20 percent to the whole body.

5. Is the claimant permanently and totally disabled or entitled to wage loss over his impairment?

6. Second Injury Fund liability.

7. Respondents No. 1's entitlement to a credit for payment of permanent partial impairment against its \$75,000.00 maximum liability pursuant to Ark. Code Ann. §11-9-502(b)(1).

8. Attorney's fees.

In regard to the foregoing issues the claimant contends that he suffered from a myriad of problems, including but not limited

to: cervical problems, low back problems, bi-polar disorder, depression, and fibromyalgia, tremor and thoracic outlet syndrome prior to June 18, 1998. On June 18, 1998, the claimant was involved in a motor vehicle accident and subsequently sought treatment from numerous different physicians. The claimant was under the impression that workers' Comp was paying for the same. His prior attorney, however, recently discovered that after June 20, 1998, all bills that were paid were being paid by Blue Cross/Blue Shield of Illinois, his health care provider. The claimant attempted to work for a short period of time but ultimately could not hold up to the same and was removed from work by Dr. Raben. The claimant claims that he is temporarily totally disabled from the date of the accident through current with credit to the respondents for benefits that may have been paid during that time frame. The claimant also received some long-term disability payments through Met Life under a private insurance policy. The claimant was ultimately awarded Social Security disability and had to repay the Met Life benefits from the Social Security disability payments. The claimant would assert that the respondents are not entitled to an offset and should be required to reimburse the health care provider as well as any other provider including Social Security. The claimant also paid substantial monies out of his own pocket for health care for which he should be reimbursed. The respondents should also be responsible for the continuing health care required in relationship to this injury. Dr. Raben has issued a permanent partial impairment rating of 20 percent to the body as

a whole and in the event that this Court finds that the healing period has ended, the claimant would assert that he is entitled to this rating and wage loss up to and including total permanent disability. The claimant further contends that due to this myriad of health problems, combining with the work-related injury, that there is Second Injury Fund liability and that this Court should find him totally permanently disabled.

In regard to the foregoing issues Respondents No. 1 contend that they have paid all benefits to which the claimant was entitled.

In regard to the foregoing issues Respondent No. 2 will submit its contentions when discovery is complete.

The Death and Permanent Disability Trust Fund was joined in this matter but by letter dated March 30, 2005, deferred to the outcome of litigation on the issues stating that they would not be in attendance. The Death and Permanent Disability Trust Fund does contend that issue number eight is a legal issue which the Commission should address but does not require their attendance at this scheduled full hearing.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1, additional medical marked Claimant's Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was 43 years old and had begun working for the respondent on November 5, 1990. The claimant testified that he was a technician for the respondent and that the respondent's business sets up computerized systems which monitor temperature control and other interior systems of commercial buildings. The claimant testified that his job entailed working on the air, lighting, fire controls and security systems after a building had been completed. The claimant stated that his work requires moving furniture and crawling up into the ceilings often working on his hands and knees or perhaps lying on his back working on the wiring. The claimant testified that he works over a large area of the state and communicated with the respondent via his computer.

The claimant testified that on June 16, 1998, he was in route to Pine Bluff to work at a nursing home. The claimant testified that in route he changed his mind and decided to go to Phillips Community College in Helena to work on the systems at that college. The claimant testified that in route one of the ladders on his vehicle came off and he pulled over and began to back up in order to retrieve the ladder. The claimant testified that while he was off to the side of the road another vehicle struck the back of his van. The claimant remembers that this was approximately 9:30 or 10:00 at night. The claimant testified that initially he did not feel any pain and jumped out of his vehicle to discover that it was his x-wife that had hit him remembering that she had been working

for the respondent doing contract work. The claimant testified that she was unconscious and he panicked and ran to a nearby farm house but could not arouse anyone. The claimant testified that he then came back to his van, located his cell phone which had been thrown forward into his vehicle and called the police and an ambulance. The claimant testified that the officers working the accident began to ask him questions and at that time he felt horrendous pain in his low back. The claimant testified that he drove himself to the Jefferson Regional Medical Center in Pine Bluff and, as he was driving, he felt like he had a bone sticking out of him that felt like a terrible burn.

The claimant testified that the hospital treated and released him and he went on to Helena. The claimant testified that the next day he went to work at the Phillip's County Community College even though he was in a lot of pain. The claimant testified that he had extreme low back pain that went around down into his left leg and into his foot. The claimant testified that he also had pain in his left shoulder and stiffness in his neck. The claimant testified that his worse pain, however, was in his lower back, feeling like a burn. The claimant testified that it is company policy to report injuries immediately and that he did contact the insurance company that night. The claimant testified that his supervisor at the time was Tim Ross. The claimant remembers that the respondents did not tell him what doctor to go to, so he went on his own but kept the respondents informed of his treatment. The claimant remembers that

he reported his treatment program to Charlotte London who worked in the Little Rock office.

The claimant testified that while in Helena he was seen by Dr. Bell a couple of times. The claimant testified that he continued to work although he was in a lot of discomfort. The claimant testified that during this period of time he had several jobs in different parts of the state and that there was no one else to do the work so he had to keep working. The claimant stated that there were other techs working on the same jobs and that he would have to help these individuals. The claimant stated that on occasion he would go back to Fort Smith to Westark to work on their system.

The claimant testified that he vaguely remembered being seen by Dr. Ross on July 18, 1997. The claimant testified that he recalls having a lifting accident while working in Pine Bluff. The claimant testified that he understood that he had pulled a muscle and that he had reported this incident to the respondent. The claimant was asked about a visit he made to Dr. Bell on April 21, 1998, with complaints of low back pain. The claimant explained that the level of pain before his accident and after his accident would be a comparison between a two to a nine. The claimant explained that after his accident he had pain through his spine into his neck, down his left arm and extending all the way down his left side into his left leg and foot as well as pain on the right side. The claimant testified that he never had pain on the left side of his body until after his accident in June 1998. The claimant remembered that when he saw Dr. Bell after his automobile

accident, the doctor prescribed physical therapy but that he misplaced two of these prescriptions and was unable to participate in a physical therapy program. The claimant testified that shortly after that he was transferred to Fayetteville to work on an airport job. The claimant stated that he did ask for some time off but because of the complexity of the Fayetteville job his supervisor, Paul Brewer, asked that he please wait until after the job was finished. The claimant testified that he continued to work although he was experiencing problems and that in September 1999 he went to the doctor because he was in so much pain.

The claimant testified that he was seen by Dr. Mark Miller who ordered an MRI. The claimant testified that his Fayetteville supervisor told him that his injury was a Little Rock issue and that they had no objection to him going to Dr. Miller. The claimant testified that after his MRI he continued to work for the respondent and he also continued treatment with the doctors. The claimant testified that Dr. Miller referred him to Dr. Raben and on February 26, 2000, he was taken off work. The claimant testified that Dr. Raben has been his primary treating physician since that February date and that he has had some surgeries performed by Dr. Raben. The claimant remembers that his first surgery was to his low back in December 2001. The claimant testified that his second surgery was to place hardware in his extreme lower back because he did not fuse properly. The claimant agreed that he underwent a third surgery to remove some of the hardware.

The claimant testified that he has not been able to work since February 26, 2000, and that he has applied for and been approved for social security disability. The claimant agreed that although he is plagued with multiple physical problems, several of which predated his 1998 accident, he still was able to work up and until he had his 1998 accident. The claimant testified that for a period of time he received long term disability benefits through a disability policy he paid for through the respondents. The claimant testified that he has also begun receiving social security disability benefits and that social security has required that he repay what they paid him while he was receiving long term disability. The claimant testified that he thought his medical bills were being handled by the respondents when in fact they were just building up until he filed them on his medical insurance because he did not want his credit ruined. The claimant testified that he is still being treated by Dr. Raben and he is being seen by Dr. Piechal for pain management.

The claimant testified that he had an Associates Degree from the Oklahoma State University in air conditioning, refrigeration and heating engineering. The claimant testified that he went back to school and got a Bachelors of Science in industrial technology with an emphasis in electronics. The claimant agreed that for the last fifteen to twenty years he has been doing the same type work which he was performing for the respondent and that all of these jobs had the same physical demands. The claimant testified that since 2004 he applied for and has received authority to operate

over the road vehicles. The claimant testified that he has two trucks with one driver. The claimant testified that he has not turned a profit due to the rising gasoline prices. The claimant testified that he can do light maintenance on his trucks such as check the fluids and the walk arounds which are required for over the road trucks. The claimant explained that when the truck is out on the road he cannot do the physical maintenance checks but that he calls each day to make sure that the driver is properly looking after the truck.

On cross examination by Respondents No. 1, the claimant testified that after his June 18, 1999, accident he continued to work for the respondent until January 2000 and that his job was not modified until approximately one month before he quit. The claimant testified that prior to his 1998 injury he enjoyed hiking but that subsequent to his injury he has only been walking in the woods. The claimant was asked if he had reported to Dr. Raben on October 9, 2000, that he had been hiking after a disc space injection. The claimant stated that he did not remember saying this to the doctor. The claimant testified that he had a business named Needham Heating and Air and Needham Refrigeration while he was attending Oklahoma State University and before he went to finish his Bachelors at Northeastern State in Tahlequah. The claimant admitted that while running his own business he had problems with the management of the office as to filing taxes and payment of bills. The claimant testified that he did teach at westark in Fort Smith for one semester but that he cannot go back

to teaching due to his mental status. The claimant explained that he has an anger disorder and blows up real easy. The claimant testified that his emotional disorder keeps him from doing certain things because he has difficulty dealing with the public. The claimant testified that he buys automobiles off the internet through a government auction. The claimant agreed that the basis for these purchases are to repair the vehicles for resale but that currently he has bought three vehicles and is currently in possession of three vehicles. The claimant was asked about his trucking company and he responded that he currently owns three tractors but one of these is primarily for parts. The claimant testified that he acquired all three of these tractors subsequent to June 18, 1998. The claimant stated that he owns six trailers. The claimant testified that for a period of time he also did trading over the internet on Ameritrade. The claimant also testified that he has purchased several automobiles over the internet with the intension of repairing them for resale and possible profit. The claimant testified, however, that to date he has not sold anything that he has purchased.

On cross examination by Respondent No. 2, the claimant testified that he takes Lorcet with Hydrocodone, Neurotin and Valium every day. The claimant testified that when he buys automobiles over the internet he has to go and pick them up. The claimant testified that he takes someone with him to help him with the driving because he would not be able to do it all himself. The claimant testified that on September 28, 2001, he was sitting in a

parked vehicle on his property when a car ran off the roadway and struck his vehicle. The claimant also eventually remembered that in October or November of 2004 he was struck in the back by a fence and that he has seen the doctor in order to determine if he had caused any damage to his back. The claimant testified that he has looked for openings for jobs in the newspaper but every time he will find one he wonders if they will hire him and allow him to take Lorcet or Neurotin on the job. The claimant testified that he was open for any kind of retraining and that he was very computer literate.

Charlotte London testified that she was a former employee of the respondent working in their Little Rock office as a branch administrator. This witness testified that she was familiar with the claimant because he would, on occasion, come through her office when he was in the area. Ms. London testified that although she could not remember this specific telephone call she does remember the claimant being injured and that he was actively seeking medical treatment. The claimant testified that prior to the claimant's June 1998 injury he worked eighty to ninety hours per week. Ms. London testified that she did the time sheets and that she thinks that he might have even worked a week in which he worked over one hundred hours. Ms. London testified that she does not recall any complaints or injuries which the claimant was suffering from prior to his June accident. This witness testified that when an injury was reported to her she took down the basic information but did not tell them what doctor to go see or what hospital to go to. Ms.

London testified that once she did the initial paperwork it went to New Orleans to their regional office. This witness agreed that in July 1998 her position with the respondent was eliminated and that she went to her current job at Trane, Arkansas. Ms. London testified that to her knowledge no one was hired to replace her and that she had no idea what happened to the compensation claims that were in her office. Ms. London again agreed that at the time she left her job with the respondent in mid July 1998 she was aware that the claimant was still having health problems and undergoing medical treatment.

On cross examination by Respondents No. 1, Ms. London testified that if a person traveled one hour to the job, worked six hours and traveled one hour back from that job they would be paid for an eight-hour work day.

Lucius Corbett testified that he worked in the University of Arkansas at Fort Smith maintenance department. This witness testified that he was familiar with the claimant because they had worked together on a renovation project on the University campus. Mr. Corbett testified that he was aware that the claimant was involved in a rear end automobile accident in June 1998. This witness testified that prior to this automobile accident the claimant out worked him and the rest of his crew, noting that the claimant would stay and work a lot of hours, crawling up on ladders and crawling around in the attic. Mr. Corbett testified that after the 1998 injury the claimant was not able to perform as he had before and primarily would just work in the computer room because

he was not able to get up on the roof carrying tools like he once had. Mr. Corbett testified that he remembers that the claimant had problems with his back and there were situations when he would have to just sit down and that they would have to help him carry ladders or work on the ladder for the claimant.

Rex Pippenger testified that he worked for Phillip's Community College in Helena, Arkansas, as their director of the physical plan. This witness stated that he knew and had worked with the claimant when he put in an energy management system on their campus. Mr. Pippenger testified that this project started in 1997. This witness testified that the claimant installed the wiring and controllers and hooked it up to their air conditioning, lighting and other physical systems. This witness testified that the claimant also helped train him on the operating of the computer part of the system. Mr. Pippenger testified that the claimant, in order to put in the system, had to be able to go into the attic, get on top of the buildings and go all through the buildings pulling wiring from one end of the building to the other, climb ladders and a whole lot of other stuff. Mr. Pippenger testified that when the claimant first came to work at the college he followed him and watched him very closely but after a while he observed the claimant's knowledge in what he was doing and he knew that he could depend on him so he gave him a set of keys and told him to go and do his job. This witness stated that over time they have had to abandon the system the respondent put in and it took five men to do the job that the claimant had done. Mr. Pippenger

testified that the claimant's activities changed after he got hurt. This witness testified that one morning he came to work and the claimant was sitting in front of his office in his van. Mr. Pippenger testified that he noticed that the back of the van was all crunched up and when he spoke to the claimant the claimant told him he had had an accident and was in real bad pain. This witness testified that he urged the claimant to seek medical attention. Mr. Pippenger testified that after this date the claimant had to hire extra help in order to get the job done. Mr. Pippenger testified that he had one of his employees helped the claimant by carrying his ladder and tools for him so that he could get the project finished.

Dallas Miller testified that he is employed at the Phillip's Community College in Helena as a computer support specialist. This witness testified that he met the claimant when the claimant was working at the college. Mr. Miller testified that he was trying to learn the system from the claimant and that he would follow him around and watch him work. Mr. Miller testified that when he first met the claimant he was a go getter and that he had a hard time keeping up with the claimant. Mr. Miller testified that there was a point and time when the claimant changed as to his demeanor as well as facial expression and that you could tell he was in pain. Mr. Miller testified that he asked the claimant about it and the claimant told him about his being rear ended. Mr. Miller testified that the claimant was having such a hard time getting around that he would carry the claimant's ladder and lap top. This witness

testified that he has keep in touch with the claimant on a friendship basis but that when he saw him for the firs time the day before this hearing he almost did not recognize the claimant because he had changed so much. Mr. Miller was asked in what way the claimant had changed and he responded, "Its kind of hard to describe. You can tell, just his demeanor. He's just not as vibrant as he was."

Phillip Harrington testified that he works at the Northwest Arkansas Regional Airport. Mr. Harrington testified that he had met the claimant in college many years ago but became acquainted with him again in 1998 when he was working at the airport. Mr. Harrington testified that he got to follow the claimant around as he put in the different control systems and that the claimant taught him a tremendous amount. Mr. Harrington testified that this job lasted from 1998 to early 2000. Mr. Harrington testified that he would describe the claimant's condition as being painful, stating that the claimant was hurting in his back and in his neck. This witness stated that he would help the claimant by carrying his ladders and equipment. Mr. Harrington testified that he recalls the claimant mentioning physical therapy, again noting that it was extremely obvious that the claimant appeared to be in pain during the time he worked with him. This witness testified that the claimant continued working everyday and to his knowledge worked many many hours over forty hours per week.

On cross examination, Mr. Harrington testified that the claimant was very patient with him and that he was a very good

teacher because he was extremely competent. This witness was asked if the claimant would make a good teacher and Mr. Harrington responded, "No." Mr. Harrington explained that the claimant is so smart that people who are not as smart as he is have a hard time keeping up with him or understanding what he is saying.

The medical records set forth that the claimant was seen at the Jefferson Regional Medical Center on June 18, 1998, following an automobile accident. X-rays taken of the claimant's lumbar spine were normal. The claimant was released from the hospital with a recommended lifting restriction up to ten pounds for two to three days then to gradually resume normal activities. Bed rest was strongly encouraged and aspirin, Ibuprofen or Tylenol were recommended for the pain and discomfort. ON July 20, 1998, the claimant was again seen with complaints of back pain with pain moving down his right leg and groin area. The claimant was diagnosed with having lumbar muscle strain and Flexoril and Lorcet were prescribed as well as physical therapy. Dr. Bell filled out a physician's report on August 11, 1998, setting forth that the claimant stated that he pulled a muscle in the summer of 1997 and that on April 21, 1998, the claimant had been back in with report of low back pain radiating into his right hip and leg but this did not slow down his work schedule. The doctor sets forth that the claimant has increased pain when he is walking and standing. Dr. Bell assessed the claimant with having acute lumbar muscle strain, noting that his x-rays were negative for fractures. The medical records set forth that the claimant had medical treatment beginning

on October 5, 1999, in the form of physical therapy for a diagnosis of degenerative disc disease with a herniated disc at L5 and bulging disc at L3-L4 and then L4-L5. Throughout the month of December the claimant was involved in a rather aggressive physical therapy program which ended on or about January 4, 2000. Stephen Whitelaw, the claimant's physical therapist, writes on January 4, 2000, that the claimant has improved as a result of his physical therapy and DRS treatments but that his noncompliance with recommendations is slowing or preventing a more complete resolution of his problems. Mr. Whitelaw, in his letter, sets out that it is the claimant's work requirements that are preventing his following the recommendations and mentions a possible referral to Dr. Raben for steroid injections.

Dr. Cyril Raben writes on February 4, 2000, that he has seen the claimant. Dr. Raben writes that the claimant reports that he was injured in a motor vehicle accident while working for the respondent and underwent medical treatment at the time which did not resolve his problems. The doctor writes that the claimant has moved to the Fayetteville area, he was evaluated by Dr. Mark Miller who subsequently referred him to Dr. Whitelaw after an MRI scan indicated that he had a disc herniation and slight bulging disc at two other levels. Dr. Raben writes that the claimant describes his discomfort as an aching in his low back with pins and needles in his right side buttock with a stabling burning in his right posterior thigh to behind his knee. The doctor writes that the claimant also reports some numbness in his right calf and that he

also has some aching in his left arm just below the shoulder. Dr. Raben writes that he has reviewed the claimant's MRI from September 20, 1999, which shows an area of hypointensity posterolaterally in the disc space at L5/S1 with an otherwise pristine disc. After a physical examination, Dr. Raben assessed the claimant with having low back pain with probable L5/S1 radiculopathy as well as failed attempt at DRS treatment secondary to job noncompliance. Dr. Raben recommended that he start with some epidural steroid injections and to continue with Dr. Whitelaw with DRS treatment after his first epidural. Dr. Raben recommended that he take buffered aspirin for inflammation. Dr. Raben gave the claimant a work release with a lifting limitation of twenty to twenty-five pounds with no prolonged sitting or standing and no working in a bent over position and no repetitive bending, lifting or twisting with frequent breaks and frequent change of position. On February 18, 2000, Dr. Raben increased the claimant's restrictions as well as continued him with the DRS treatments and recommended that the claimant be evaluated for a brace and a TENS unit was prescribed. Dr. Stephen Whitelaw writes on February 23, 2000, that the claimant now is ready to take off work so that he can improve his physical condition and that they now are going to start the claimant on the DRS treatments further noting that the claimant had been given a lumbar spine brace. On February 25, 2000, Dr. Stephen Whitelaw took the claimant off work during the period of time he was to undergo the DRS treatments. Dr. Whitelaw writes on March 14, 2000, that the claimant reports that he is no longer having any low back

pain and only notices discomfort when he has to drive more than thirty minutes. Dr. Whitelaw writes that the claimant reports that his discomfort is primarily failed in the right gluteal area and will radiate down the posterior aspect of his right thigh but not past his knee. Dr. Whitelaw notes that upon physical evaluation the claimant has a negative SLR bilaterally, a negative DLR and negative standing Kemp's bilaterally. The doctor notes that the claimant's hamstrings are very tight and he has developed a piriformis syndrome of his right side. Dr. Whitelaw concludes by writing that the claimant is making excellent improvement and he anticipates him making a complete recovery. The claimant was continued with his DRS treatments as well as aquatic therapy. Dr. Whitelaw writes on March 22, 2000, that the claimant reports he is not having any low back pain but that during aquatic physical therapy he is noticing some soreness in his right buttock area radiating from the sacrum out to his right hip and along the iliac crest toward the spine. Dr. Whitelaw recommended that the claimant stop after his next DRS treatment and have him complete land physical therapy. On April 3, 2000, Dr. Whitelaw writes that the claimant states he is continuing to have a burning sensation down the posterior aspect of his right thigh and Dr. Whitelaw opined that his aggravation is secondary to his piriformis syndrome. Dr. Whitelaw recommended that the claimant's physical therapy be modified and he continued the claimant off work until April 10, 2000. Dr. Whitelaw continued to keep the claimant off work up through April 17, 2000, as indicated by his off work slips on page

48 of Claimant's Exhibit No. 1. Dr. Cyril Raben writes on April 13, 2000, that the claimant has undergone an MRI scan which shows that there is T-2 weighted image disc space dissections with an area of hypo intensity posterior laterally in this disc space and upon examination that day, the claimant has SI joint pain and tenderness. Dr. Raben notes that the claimant has been doing home therapy but that he is currently having aching with burning numbness and tingling in his low back, right hip and left knee. Dr. Raben recommended a support for him and instructed him in a specific exercise program. Dr. Raben released the claimant from work for an additional two weeks. On April 28, 2000, Dr. Raben writes that the claimant has a constant aching, burning and numbness in both shoulders, in his head, elbows, low back and down both legs. Dr. Raben writes that the claimant is doing home therapy light duty but that he has aching almost all over his body. Dr. Raben referred the claimant to Dr. Miller for an assessment as to the possibility of him having Lyme's disease. Dr. Raben further writes that the claimant mentioned that he was making some pretty good improvement as far as his spine strain syndrome was concerned. There are two off work slips signed by Dr. Raben taking the claimant off work until June 26, 2000. In May and June of 2000 the claimant was examined for hypertension and chest pain as well as psychological problems. Dr. Raben writes on June 30, 2000, that the claimant is complaining of pain all over his body and writes that Dr. Saitta feels that the claimant has hyper mobile flat feet and fibromyalgia. Dr. Raben recommends again that the claimant be

seen by Dr. Moon for evaluation. Dr. Raben writes to the claimant's attorney on July 21, 2000, that the claimant has a myriad of medical problems and that he is completely and totally disabled from his previous line of work. Dr. Raben writes that the claimant has reached maximum medical intervention. On July 28, 2000, Dr. Raben writes that the claimant is really having a flair up with his fibromyalgia and that he feels that even though the claimant has a disc derangement, it is the doctor's opinion that the claimant's fibromyalgia/fibrositis is probably the worse part of his problems. Dr. Stephen Moon saw the claimant on August 4, 2000, for his reports of having tremors. After evaluation, Dr. Moon writes to Dr. Raben setting forth that it is his opinion that the claimant has a mild essential tremor but that he did not find any cortical spinal track signs with no evidence to suggest a demyelinating illness. Dr. Moon recommended medication. The medical records set forth that the claimant continued to be seen by Dr. Raben for his ongoing complaints of back pain as well as Dr. Moon for his tremor problems and Dr. Max Baker for his psychological concerns. The claimant underwent a diskogram on November 17, 2000. Dr. Raben writes that he has reviewed the claimant's diskogram which showed reproduction at the L5/S1 interspace and a good, well contained disc at L4/5. Dr. Raben writes that the claimant has a one level disc that is completely degenerated and he wants to sit him up for an anterior interbody fusion at L5/S1 with bone graft. Dr. Raben did back surgery on the claimant on December 21, 2000. The medical records set forth that

the claimant was followed up by Dr. Raben after his surgery. In a letter to the respondent, Dr. Raben writes that he anticipates that the claimant would be off work for approximately one year and then he would have to be looking for options of light duty and/or intermittent duty.

Dr. Mark Miller writes on May 4, 2001, that he has seen the claimant with complaints of left shoulder, left arm and hand pain with an onset being three years ago. After examination, Dr. Miller assessed the claimant with having thoracic outlet syndrome on the left. Dr. Raben signed an off work slip for the claimant dated June 30, 2001, which indicates that the claimant should remain off work until further notice. Dr. Raben writes on July 27, 2001, that the claimant is having problems with his shoulder with a constant aching and stabbing pain that comes and goes with burning, numbness and tingling. Dr. Raben notes that the claimant does not have any diminution of radial pulse with valsalva and opposite side head turning. The claimant did have complaints of problems with his feet and was referred to a podiatrist. Dr. Mark Miller writes on September 21, 2001, that he has seen the claimant for his reports of exacerbation of lower and mid back pain, cervical pain, pain in his right hip that radiates down right leg, pain in his hands and fingers. After examination, the claimant was assessed with bilateral hand pain possibly due to otitis cervical disease, bilateral foot pain and left shoulder pain suspected of being an AC strain or bursitis. An MRI of the claimant's cervical spine was ordered and medications were prescribed. Dr. Raben writes on

October 26, 2001, that the claimant's MRI of his cervical spine shows perhaps left sided neuro exit foraminal stenosis at C5/6 and a broad based bulge at C6/7. Dr. Raben notes that the test also showed a slight scoliotic deformity in the upper thoracic spine. Dr. Raben writes that the claimant is complaining of left arm pain setting forth that the claimant had been in an automobile accident before this MRI scan. The doctor writes that the claimant's fibromyalgia has flared up as well as an increase in his left arm pain. Dr. Raben recommended that the claimant be placed in Health South following his accident. Dr. Miller writes on November 9, 2001, that the claimant's cervical MRI showed herniated disc at C-7 for which Dr. Raben had prescribed physical therapy. Dr. Miller writes that the claimant had to increase his Hydrocodone to three times a day due to a motor vehicle accident on September 28, 2001. It is noted that before this motor vehicle accident the claimant was taking Hydrocodone at bed time only and that his pain level has increased since this accident. On December 10, 2001, Dr. Raben writes that the claimant reports a constant aching as well as a stabbing that comes and goes with burning in his neck, shoulders and left greater than right arm and right greater than left leg. Dr. Raben recommended that the claimant work with Jessica Demontt for his fibromyalgia complex problems. The medical records set forth that the claimant continue to receive treatment for his fibromyalgia, degenerative disc disease in his neck area and emotional problems. On March 4, 2002, Dr. Raben recommended that the claimant undergo a CT of his neck as well as an EMG nerve

conduction study of the upper extremities. The nerve conduction studies and EMG of the claimant's upper extremities were carried out on March 7, 2002, were normal. The CT of the claimant's cervical spine revealed no severe bony spinal channel stenosis or neuroforaminal stenosis. There was also no acute fracture or destructive bony process demonstrated of the cervical spine. Dr. Raben writes on March 15, 2002, that he has reviewed the claimant's CT as well as EMG studies which were both normal. That in his opinion what the claimant is dealing with is his fibromyalgia and fibrositis complex. In a letter dated March 15, 2002, to the claimant's attorney, Dr. Raben writes that the claimant is suffering from severe fibromyalgia/fibrositis as well as post operative restrictions. Dr. Raben writes on April 12, 2002, that the claimant's condition currently is status post anterior lumbar interbody fusion with fibromyalgia and fibrositis complex. Dr. Raben assessed the claimant with a permanent partial impairment rating for his fusion to be 10 percent and with the complication of fibromyalgia complex this would raise it to 15 percent.

The claimant underwent a CT of his lumbar spine on June 20, 2002. This test revealed that the claimant has undergone an anterior fusion at L5/S1 with an intervertebral graft and one single retention screw. The tester writes that he cannot tell if there has been complete incorporation of the graft material into the L5 and S1 vertebral bodies. The claimant underwent a spect scan of his lumbar spine on July 10, 2002, which again revealed activity at the L5/S1 level compatible with a history of previous fusion. The

tester writes that no other demonstration of pathological tracer activity was identified within the vertebral column or intervertebral discs. Dr. Cyril Raben writes to the claimant on July 23, 2002, that as it regarded his permanent partial impairment rating with a previously operated spine and subsequent pseudoarthrosis, a partial impairment rating for non-operated pseudoarthrosis would be 18 to 20 percent according to the Arkansas modification of the A.M.A. Guidelines. The medical records set forth that the claimant continued to be seen by Dr. Max Baker for psychological counseling throughout June, July, August and September 2002. Dr. Raben writes on October 24, 2002, that he has seen the claimant for his previously operated lumbar spine with pseudoarthrosis at L5/S1. Dr. Raben writes in the history that following the claimant's fusion at L5/S1 he had good results temporarily. The doctor writes that the claimant has had multiple slip and fall accidents which lead to a severe arthritic condition as evidenced by progressive halo about the implants. After examination, Dr. Raben assessed the claimant with having disc derangement with pseudoarthrosis. Dr. Raben recommended additional surgery to address his problems. On October 24, 2002, Dr. Raben operated on the claimant's back and implanted instrumentation at the L5 S1 level. The claimant was discharged from the hospital on October 26, 2002, with medications for pain and spasm. There is a note from Washington Regional Medical Center dated October 26, 2000, indicating that the claimant did not want physical therapy but if he did he would do it himself. The claimant began pain

management with Dr. William Piechal on January 7, 2003, for his chronic low back pain and fibromyalgia in his shoulder and neck areas. The claimant continued to see Dr. Piechal once a month for pain management up through August 3, 2004. The claimant also continued to be seen by Dr. Max Baker for his psychological problems.

On November 3, 2003, Dr. Raben writes that he has seen the claimant following the MRI of his lumbar spine which showed good position of his hardware and that his fusion looks stable. A review was made of the claimant's pain diagram, noting that he has aching, numbness, burning, stabbing and cramping in his neck, arms, back and legs. Upon discussion with the claimant, the doctor writes that the claimant reports that he has had flu like symptoms for the last three years and that he is beginning to agree with Dr. Saitta that this is not coming from his back but strictly from his fibromyalgia. Dr. Raben writes that he will release the claimant to return on an as needed basis only, noting that the claimant agrees since the fibromyalgia is what is causing his pain.

Dr. Cyril Raben writes on January 18, 2005, that he has seen the claimant with complaints of neck and bilateral arm pain. Dr. Raben notes that an eighteen wheeler had lost control and struck a gas pump and a fence and the claimant was trying to get away when the fence hit him in the back. The doctor's notes set forth that the claimant was knocked to the ground and he followed up with his pain management physician, Dr. Piechal, who then suggested the claimant come see him (Dr. Raben). After examination, Dr. Raben

assesses the claimant with probable cervical disc herniation and recommended an MRI. The claimant underwent an MRI of his cervical spine on January 18, 2005, which set forth that he has disc dissection at all cervical levels, spondylosis and mild bulging annulus, at C5-6 and mild neuroforaminal narrowing as described.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his low back problems subsequent to June 20, 1998. The claimant has testified as have several witnesses that the claimant continued to have problems, inability to work as he once had and noticeable pain subsequent to this date and although the claimant did not seek medical attention for a period of time, his testimony as well as the testimony of the various witnesses indicate that he was in need of medical treatment for his low back during this period of time. Therefore, the claimant should not be punished for trying to work through his physical discomfort nor be denied treatment for his compensable injury when he finally succumbed to his physical problems and sought medical care for his low back. Therefore, the respondents should pay for all reasonable and necessary medical care for the treatment of this claimant's low back problems subsequent to June 20, 1998. The respondents are entitled to a credit in an amount equal to, dollar for dollar, the amount of benefits this claimant received under his group health policy. See Ark. Code Ann. §11-9-411(a) and following.

I also find, based on this record, that the claimant has failed to prove that his cervical problems are a result of his June 16, 1998, motor vehicle accident. At the time of his injury the claimant made no claim for neck problems and none of the medical records for several years indicated that the claimant was having discomfort in his neck. The medical records set forth that the claimant complained of pain all over his body which was diagnosed as being fibromyalgia but as to anything specific as to the claimant's neck or cervical area, it was not until he was seen by Dr. Mark Miller on or about May 4, 2001, that there were specific complaints for left shoulder, left arm and hand pain at which time he was diagnosed with having thoracic outlet syndrome on the left. The claimant had been taken off work on February 26, 2000, and had not worked for the respondent since that date. The claimant, by his very testimony, has been very active and involved in many different ventures as well as having been involved in a motor vehicle accident on or about September 28, 2001. It is not questioned that the claimant's MRI made on October 26, 2001, did reveal a broad based bulge at C6-7 but it is seriously questioned that the etiology of this bulge was a result of his June 1998 motor vehicle accident. I do find that the claimant has been temporarily totally disabled as a result of his compensable low back problems from February 26, 2000, when Dr. Raben took him off work through the end of his healing period following his first back surgery which would have ended on April 12, 2002, when Dr. Raben assessed the claimant with a 10 percent permanent impairment rating for his

one level fusion. I find that the claimant reentered his healing period when he underwent a second back surgery on October 24, 2002, and continued in a temporarily totally disabled state until Dr. Raben released him as to his low back problems on November 3, 2003. Therefore, the respondents should pay temporary total disability to this claimant for the periods of time that he was temporarily totally disabled. The respondents are entitled to a credit for the amount of benefits which the claimant has received from any long term and short term disability policies. See Ark. Code Ann. §11-9-411.

Following the claimant's first back surgery, Dr. Raben, on April 12, 2002, assessed the claimant with a 10 percent impairment rating for his fusion. The claimant again underwent surgical intervention at this same level to implant instrumentation and according to the A.M.A. Guides, Forth Edition, a second surgery is an additional 2 percent permanent impairment. See Table 75, Page 113 of the Forth Edition of the A.M.A. Guides. Therefore, the claimant is entitled to a 12 percent whole body permanent impairment rating as a result of his compensable injury. I further find that the claimant had failed to prove by a preponderance of the evidence that he is permanently and totally disabled or that he is entitled to wage loss over and above his 12 percent whole body impairment rating. This claimant is, by his own testimony, very actively pursuing many different possible lucrative fields of business. The claimant is fortunate in that he is very intelligent and has many transferable job skills particularly in the field of

electronics, mechanics, computer usage and business. Therefore, there is no Second Injury Fund liability in this matter nor any need to address the Permanent Death and Disability Trust Funds request for a credit.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his low back on June, 18, 1998.

4. Medical expenses have been paid to June 20, 1998, for the claimant's low back injury.

5. The claimant is entitled to a weekly compensation rate of \$359.00 for temporary total disability and \$269.00 for permanent partial disability.

6. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury subsequent to June 20, 1998. See discussion above. The respondents are entitled to a credit for any group medical paid this claimant in accordance with Ark. Code Ann. §11-9-411.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his neck and cervical spine on June 18, 1998. See discussion above.

8. The claimant is entitled to temporary total disability from February 26, 2000, until April 12, 2002, then again from October 24, 2002, until November 3, 2003. See discussion above. The respondents are entitled to a credit for any long term or short term disability benefits which this claimant was paid. See Ark. Code Ann. §11-9-411.

9. The claimant is entitled to a permanent partial disability rating of 12 percent to the body as a whole based on the impairment rating assessed by Dr. Raben for his initial back surgery and an additional 2 percent for a second surgery at this same level. See discussion above.

10. The claimant has failed to prove by a preponderance of the evidence that he is permanently or totally disabled or entitled to wage loss over and above his impairment rating. See discussion above.

11. There is no Second Injury Fund liability in this matter.

12. The respondents have controverted this claimant's claim for benefits as a result of his compensable low back injury.

13. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable neck and cervical injury on June 18, 1998. Therefore, no benefits will be awarded for his cervical and neck problems.

The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury subsequent to June 20, 1998. In accordance with Ark. Code Ann. §11-9-411, the respondents are entitled to a set off or credit for the amounts this claimant may have received under a group health policy.

The claimant has proven by a preponderance of the evidence that he was temporarily totally disabled as a result of his low back compensable injury from February 26, 2000, until April 12, 2002, and then again from October 24, 2002, until November 3, 2003. Therefore, the respondents should pay temporary total disability to this claimant for these periods of time. In accordance with Ark. Code Ann. §11-9-411, the respondents are entitled to a credit for the amount of long term and short term disability which this claimant has received during these periods of total disability.

The respondents should pay permanent partial disability to this claimant in the amount of 12 percent to the whole body for his compensable low back injury.

The claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled or entitled to wage loss as a result of his compensable injuries of June 18, 1998. Therefore, there is no Second Injury Fund liability in this matter.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said

attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE