

**BEFORE THE ARKANSAS WORKERS' COMPENSATION  
COMMISSION**

**CLAIM NO. F400149**

<b>THOMAS E. SIMMONS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>PINNACLE STRUCTURES, INCORPORATED, EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>COMMERCE &amp; INDUSTRY INSURANCE CO., C/O AIG CLAIMS SERVICE, INSURANCE CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT NO. 2</b>
<b>DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT NO. 3</b>

**OPINION FILED JUNE 22, 2005**

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 24, 2005, in Little Rock, Pulaski County, Arkansas.

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

Respondents No. 1 represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, the Second Injury Fund, represented by Mr. Terry Pence, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3, the Death and Permanent Total Disability Trust Fund, waived appearance at the hearing, as its issues were not ripe for consideration.

A hearing was held on March 24, 2005, to determine the following issues:  
whether all temporary total disability has been paid; whether claimant is permanently

and totally disabled or, in the alternative, whether claimant is entitled to wage loss disability experienced over and above the 5 percent impairment rating accepted by respondents No. 1 for claimant's admittedly compensable December 19, 2003, injuries. Other issues include whether the Second Injury Fund or the Death and Permanent Total Disability Trust Fund bear any liability in this case.

The parties stipulated to the existence of the employee-employer relationship on December 19, 2003, when claimant sustained compensable injuries to his neck, left shoulder, and head. It was further stipulated that claimant was earning an average weekly wage of \$625.00. The parties additionally stipulated that claimant reached the end of his healing period, having reached maximum medical improvement on July 28, 2004, with a 5 percent impairment rating to the body as a whole, which was accepted and has been paid by respondents No. 1.

Claimant contends that he is entitled to full temporary total disability benefits for the period of May 17, 2004, through July 7, 2004, and that there is no proof by respondents No. 1 that benefits were actually paid during that period, which represents a gap in the period of time benefits were paid. Claimant further contends that as a result of his injuries, he has been rendered permanently and totally disabled or, in the alternative, that he is entitled to a determination with respect to the extent of wage-loss disability he has experienced over and above the admittedly

compensable 5 percent impairment rating. Claimant contends that benefits in excess of that rating have been controverted for purposes of attorney's fees.

Respondents No. 1 contend that claimant sustained admittedly compensable injuries on December 19, 2003, and that all benefits were paid, including the 5 percent impairment rating. Respondents No. 1, however, attempted to argue that although they originally accepted the impairment rating, the rating is not a valid rating under the Workers' Compensation Act, in that it appears that it was based on degenerative or osteoarthritis changes and not based upon objective new medical findings. Respondents No. 1 were estopped from making that argument on the date of hearing, as they had previously stipulated to the impairment rating and had not put claimant on notice that they were changing their position with regard to that issue.

With regard to temporary total disability benefits, respondents No. 1 contend that claimant was released to return to work according to the medical documentation during the period of May 17, 2004, through July 7, 2004; and, as such, temporary total disability benefits should not be awarded for that additional period of time.

Respondents No. 1 contend that respondent No. 2, the Second Injury Fund, would have liability for any wage-loss disability benefits, to the extent that they exist, because the claimant has had numerous preexisting problems, conditions, and impairments. Respondents No. 1 contend that those prior problems have combined with his current injury to make disabilities which are greater than that which would

have resulted from the December 19, 2003, injuries alone. Therefore, respondents No. 1 contend that, pursuant to Ark. Code Ann. § 11-9-525 and Commission Rule 24, the Second Injury Fund would have liability for any wage loss.

With regard to claimant's contention that he is permanently and totally disabled, respondents No. 1 contend that, in the event claimant is found to be permanently and totally disabled and respondents No. 1 are found liable, respondents No. 1 would then be entitled to a credit against its \$75,000.00 maximum for payment of claimant's permanent partial anatomical ratings for the compensable injury.

Respondent No. 2, the Second Injury Fund, attempted to argue at the hearing, like Respondents No. 1, that the impairment rating is not a valid rating under the Workers' Compensation Act, in that it appears that it was based on degenerative or osteoarthritis changes and not based upon objective new medical findings. While the Fund is not generally bound by the stipulations or actions of Respondents No. 1, respondent No. 2 was, likewise, estopped from arguing the validity of the previously-stipulated impairment rating on the date of hearing, as it had failed to put claimant on notice that it would be making such an argument at the hearing.

Respondent No. 2 further contends that respondents No. 1 have the burden of proof, not the Fund, of showing any Second Injury Fund liability by a preponderance of the evidence and that Respondents No. 1 cannot do so in this case. Respondent No. 2 contends that while the evidence may show that claimant suffered prior conditions

and preexisting problems and possible impairments, the proof will show that claimant completely recovered from those conditions and completely regained his wage-earning capacity. Respondent No. 2 contends that there is no medical evidence of any combination of disabilities or impairments.

Respondent No. 3, the Death and Permanent Total Disability Trust Fund, being implicated only in the event that the claimant is found to be permanently and totally disabled, contends that respondents No. 1 must first pay permanent partial disability in the form of anatomical ratings for the claimant's compensable injury before payment of permanent total disability benefits. Additionally, respondent No. 3 contends that respondents No. 1 would not then be entitled to a credit against its \$75,000.00 maximum for payment of claimant's permanent partial anatomical ratings for the compensable injury. As stated above, respondent No. 3 waived its appearance at the hearing in this matter, as the issues involving it were not yet ripe for consideration.

### **STATEMENT OF THE CASE**

Claimant is a fifty-six-year-old man with an eighth-grade education, who testified that he has worked primarily as a truck driver his entire life. Claimant testified that he had been working for respondent-employer for approximately six weeks when he sustained the injuries at issue in this case. Claimant testified that he was working as a flatbed truck driver for respondent-employer on December 19,

2003, when he sustained admittedly compensable injuries to his neck, head, and left shoulder.

Claimant testified that he was on his way to deliver a load to a customer, and he had stopped to check the timbers between the beams on his truck to make sure the load was securely fastened. He stated that as he was trying to put the top timber back in between a beam, he was on top of the load, and he lost his footing. He fell about eight feet, hitting the deck of the trailer, and continued off approximately another four and one-half feet to five feet down onto the ground. Claimant testified that he continued working that day, despite his accident, and worked until about January 7, 2004, at which time he began experiencing double-vision, severe migraines, and pain, feeling at times like he was going to pass out. He testified that he knew he should not drive, feeling the way he did.

He testified that his pain was sharp and severe on the left side of his neck, going down into his shoulder. He first saw Dr. Paul Stone, who was filling in for claimant's regular physician, Dr. John Price, on the day claimant first went to the doctor. Claimant then began seeing Dr. Price and had an MRI of the head and of the cervical spine. Dr. Price's notes reflect that the head was normal and had a "very tiny left-sided disc bulge at C4/5 with some spurring there as well." He further noted that there was no significant muscle spasm in his cervical spine area. Dr. Price took claimant off work for some period of time, giving him Vicodin for the pain, and

attributing his double-vision to a possible concussion as a result of the December 19, 2003, accident, and noting that it would most likely resolve itself.

Claimant saw Dr. Price again on February 13, 2004, and complained of decreased range of motion in his neck, as well as continued pain and double vision. Dr. Price referred him to a neurosurgeon. Records reflect that he saw Dr. Scott Schlesinger on April 7, 2004. Dr. Schlesinger disagreed with the radiologist's report from the MRI. Dr. Schlesinger opined that all of the findings from the MRI were degenerative in nature, and that claimant was simply suffering from a musculoskeletal soft tissue injury as a result of his work accident. Dr. Schlesinger opined that there is nothing to be done for claimant from a surgical standpoint, but that physical therapy is the only thing he would recommend.

Medical records reflect that claimant then began seeing Dr. John Wilson in May of 2004, continuing to complain of pain. Dr. Wilson's notes on May 5, 2004, state in part, as follows:

Examination revealed restriction of motion of the cervical spine. The deep tendon reflexes are present and equal in both upper extremities. Adson's sign is not present. There is mild muscle spasm of the left side of his neck. He has difficulty turning to the left.

*MRI revealed mild degenerative change at C4-5.*

[Emphasis added.] Dr. Wilson ordered a CT scan.

On May 17, 2004, Dr. Wilson notes that claimant's CT scan revealed "severe facetar arthritis at C4-5 on the left with stenosis." He further found evidence of arthritis by bone scan but no evidence of an acute fracture. Dr. Wilson released claimant from his care on that date to return to his normal activities.

On June 1, 2004, claimant returned to see Dr. Wilson, complaining of persistent neck pain, although he was still working. Dr. Wilson's notes state that he explained to claimant that he has arthritis; Dr. Wilson ordered out-patient physical therapy and a return visit in three weeks. Dr. Wilson noted, "He is to continue working."

In a letter written by Dr. Wilson on June 22, 2004, to the insurance carrier for respondent-employer, Dr. Wilson notes that claimant is scheduled for a cervical epidural injection and that with his "increased symptomatology, *I do not feel he can work.*" [Emphasis added.] No official "off work slip" is contained in the evidence for that date, but Dr. Wilson clearly opined that he did not believe claimant could work at that time.

Medical records thereafter reflect that Dr. Wilson did keep claimant off work until after claimant had a Functional Capacity Evaluation on July 21, 2004. Per the findings of the FCE, which noted that claimant was capable of doing "medium" physical demanding work with a limitation of carrying no more than thirty-one pounds

and lifting no more than forty-one pounds, Dr. Wilson released claimant on July 28, 2004, with a 5 percent permanent impairment rating to the body as a whole.

As stipulated by the parties herein, respondents No.1 accepted claimant's head, left shoulder, and neck injuries of December 19, 2003, as compensable and paid all benefits with the exception of temporary total disability benefits from May 17, 2004, through July 7, 2004. Respondents No. 1 further accepted and paid the 5 percent permanent impairment rating issued by Dr. Wilson.

Claimant testified that he has had numerous health problems and injuries throughout his adult life. He testified that he, in fact, has had nine workers' compensation injuries – four in Oklahoma, and five in Arkansas – in addition to all of his other non-work-related health problems. Claimant testified that although suffering from a congenital deformity, which he called a "congenital fusion," in his lumbar spine that was diagnosed in the late 1960s, early 1970s, he sustained a work-related low-back injury in 1981. He testified that although he required no surgery for this injury, he was given an 11 percent impairment rating.

He testified that in 1986, he sustained another work-related back injury, for which no surgery was required, and he received a 3 percent impairment rating. He testified that in 1989, he sustained a work-related right eye injury and, although he was issued no impairment rating, he still has a piece of metal in his eye. He testified that in 1990, he sustained another work-related back injury, for which no surgery was

required, and he received a 5.2 percent impairment rating. He testified that he has had no ongoing problems as a result of these injuries.

Claimant testified that sometime in 1996, he was diagnosed with chronic obstructive pulmonary disease (COPD) as a result of smoking, and that he now believes he is probably in the first stages of emphysema. He testified that his father and sister had had lung cancer, and he believes that is his fate and that he will be terminally ill within the next two years. No medical evidence was offered to support his belief. Claimant testified that his COPD causes shortness of breath, sometimes to the point where he feels he will pass out. He testified, unequivocally, that he can no longer drive a truck due to his COPD, alone; however, he also testified that he continues to smoke one-and-one-half packs of cigarettes per day, on average.

Claimant testified that he was diagnosed with Graves disease. He was also diagnosed with high blood pressure in 1996, although he testified that he did not begin taking medication for it until 2003. He testified that he is hypothyroid, which causes his weight, body temperature, and moods to fluctuate. He testified that he takes medication for this condition.

He testified that sometime in 1999, he experienced two incidences of a work-related hernia but that his workers' compensation claim for this was denied. He testified that he finally had surgery to repair the damage in February of 2004, because that was the first time he had had group health insurance since the original incident.

He testified that his stomach is highly susceptible now to a hernia, so he has lifting restrictions of no more than thirty pounds.

Claimant testified that a “long time ago,” he sustained a work-related jaw injury that required surgery, but that he has suffered no ongoing problems as a result of that injury. He testified that in 2000, he sustained a work-related fall, injuring his left shoulder. He testified that no surgery was necessary, as injections “cleared it up,” and that he was issued no impairment rating. He testified that he settled that workers’ compensation claim by way of Joint Petition, as well, and that he has no ongoing problems as a result of that injury.

Claimant testified that he had a work-related right arm and elbow injury in June of 2002, for which he had surgery. He testified that he was released with no impairment and that he settled his workers’ compensation claim by way of Joint Petition. Claimant testified that he has no ongoing problems as a result of this injury. In fact, claimant testified that the last time he had his Department of Transportation (DOT) medical certification renewed, clearing him medically to drive, was in April of 2003, and he was fine at that time from all his other injuries.

Claimant testified that sometime around 1995, he filed for Social Security disability benefits, due to a “combination of medical problems.” He noted his right eye and his breathing problems from smoking. Benefits were then denied. He testified that he intends to again file for Social Security disability benefits now.

Claimant admits that he has never attempted to return to work in any capacity since Dr. Wilson released him on July 28, 2004. In fact, claimant admitted that he never even contacted respondent-employer to let them know he had been released and could return to work within the FCE restrictions. Claimant testified that he has had no sources of income whatsoever since this accident; yet, he testified that he has not filled out even one application for employment and has not filed for unemployment benefits. He testified that he could not be cleared to drive a truck because he takes Darvocet, and he testified that he does not believe he is physically able to return to the work force. He stated, "I know I'm through."

He testified that if he could go back to work, he would, in order to pay for his wife's diabetes medication. He testified that she has to do without it because they cannot pay for it. Notwithstanding, he then testified that although he was never offered vocational rehabilitation by respondents, he is "not interested" in vocational rehabilitation as he believes it would be "fruitless," given his poor health and the fact that he believes he will be terminally-ill in two years, anyway.

Claimant appeared well-groomed and was quite articulate; he seemed much more educated than his formal education would suggest. He described himself as a "quick learner," although he testified that he has no interest in learning anything about computers that may help him obtain a job in the trucking industry, such as a

dispatcher, or traffic manager, or safety manager. He simply expressed no interest whatsoever in even attempting to return to any type of work at all.

Claimant introduced into evidence a vocational assessment prepared by vocational specialist, Bob White, at claimant's counsel's request. Mr. White opined that due to claimant's age, his eighth-grade education, work history, and health problems, claimant cannot return to work at this time, as he is "not employable and would be a liability to any employer if he could find work."

### **FINDINGS OF FACT**

1. All of the stipulations agreed to by the parties herein are accepted as fact;
2. Claimant has failed to prove entitlement to an additional period of temporary total disability from May 17, 2004, through June 21, 2004; however, claimant has proven entitlement to an additional period of temporary total disability from June 22, 2004, through July 7, 2004;
3. Respondents No. 1 have controverted any additional period of temporary total disability benefits;
4. Although claimant obviously suffers from numerous non-work-related health problems, claimant was at full wage-earning capacity on December 19, 2003, when he sustained the compensable injuries at issue in this case while working for respondent-employer;

5. The record fails to show that there was a combination of the effects of claimant's compensable work-related injury with any pre-existing disability or impairment to yield greater disability than that arising from the injuries he sustained on December 19, 2003, alone; therefore, the Second Injury Fund bears no liability in this case;
6. Claimant has failed to prove by a preponderance of the evidence that he is permanently and totally disabled;
7. Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss disability experienced over and above the 5 percent impairment rating accepted herein by respondents No. 1.

### **DISCUSSION**

In regard to claimant's assertion that he is entitled to an additional period of temporary total disability, the Arkansas Court of Appeals has held that temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court

of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

In this case, medical records indicate that claimant was released by Dr. Wilson to return to work with no restrictions on May 17, 2004, and although he saw Dr. Wilson again on June 1, 2004, Dr. Wilson noted that he was to “continue working.” However, on June 22, 2004, although Dr. Wilson did not issue an actual “off-work slip,” his letter to the insurance carrier on that date stated, “I do not feel he can work.” Claimant then remained off work, pursuant to his doctor’s orders, until he was fully released by Dr. Wilson on July 28, 2004, as was stipulated to by all parties herein.

As such, claimant is not entitled to additional temporary total disability benefits from May 17, 2004, through June 21, 2004, since Dr. Wilson had released him to return to work during that period. Claimant has, however, proven entitlement to additional temporary total disability benefits from June 22, 2004, through July 7, 2004, the date on which those benefits were admittedly resumed by respondents No. 1.

In regard to Second Injury Fund liability, the Arkansas Supreme Court set forth a tripartite test for Second Injury Fund liability in *Mid-State Construction Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). The test requires that:

1. The employee must have suffered a compensable injury at his present place of employment.

2. *Prior to that injury the employee must have had a permanent partial disability or impairment.*

3. The disability or impairment *must have combined with the recent compensable injury to produce the current disability status.*

[Emphasis added.] *See also Patterson v. Insurance Department*, 343 Ark. 255, 33 S.W.3d 151 (2000).

In this instant case, the record fails to show that claimant's previous injuries combined with his work injuries of December 19, 2003, to produce his current disability status. In fact, none of his treating physicians opined that his previous injuries were combined with his 2003 injury to produce his current disability status. Claimant himself testified that prior to his December 19, 2003, injury, he had had no ongoing problems whatsoever as a result of his previous work-related injuries. Claimant testified that he had passed his DOT medical certification in April of 2003, and was obviously at full wage-earning capacity at the time of his December 2003 injuries. Claimant testified that his COPD is actually what is keeping him from

driving a truck at present, and *not* his previous injuries or even his December 19, 2003, injuries.

Based on these findings, it is this examiner's opinion that the record simply fails to show that there was a combination of the effects of claimant's December 19, 2003, compensable work-related injuries with any pre-existing disability or impairment to yield greater disability than that arising from the injuries sustained on December 19, 2003, alone. As such, the Second Injury Fund bears no liability in this case.

In regard to wage loss disability, claimant's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522 (Repl. 2002), which states in pertinent part:

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

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 totally and permanently disabled based upon wage-loss factors. *See Whitlatch v. Southland Land & Development*, CA 03-736 (Ark. App. 1-21-2004); *Cross v. Crawford County*

*Memorial Hospital*, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). 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. *Eckhardt v. Wills Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998). 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. *Ellison v. Therma Tru*, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

Here, although the FCE determined that claimant was able to return to work at the “medium” physical demand level, and claimant’s treating physician released him, noting that he should be able to return to work within the restrictions of the FCE, claimant testified that he never looked for work following the release date his doctor gave him. Claimant testified that because he was taking Darvocet, he did not feel he could return to work. He testified that he did not file one application, nor did he file for unemployment. He admitted that he never even called respondent-employer back after June 28, 2004, to tell them he had been released and determine whether they could offer employment within restrictions of his FCE. He testified that he has not

yet filed for Social Security disability, but that he intends to. When asked if he had any desire to return to work, he stated that he would “much rather be working than fighting with social security, because that’s the way the policy is set up.”

Claimant admitted that he has numerous health problems that are unrelated to his compensable December 19, 2003, injuries *and* that are unrelated to his previous workers’ compensation injuries. Claimant then testified that he does not feel that he is able, realistically, to return to work. He stated, “My health has declined tremendously since I’ve been ill, and all the conditions that I had prior to that, it seems like they just got worse and worse and worse, and I don’t see it as an option. I don’t see it as a logical option for the industry or for me.”

Claimant testified that he has no computer skills, for instance, and that he is not interested in learning. He testified that it would be a “waste of time” to retrain him to do anything else, given his age and poor health. Vocational specialist, Bob White, obviously agrees with claimant, given his opinion in the Vocational Assessment. However, Mr. White’s opinion, given at the request of claimant’s counsel, is not convincing to this examiner.

Incredibly, even though claimant testified that if he could return to work, he would, simply in order to pay for his wife’s diabetes medication, he *still* has made no *attempt* whatsoever to earn a living since being released by Dr. Wilson. Further, although he testified that his COPD is what is keeping him from driving a truck and

that he has known it would get to that point for a long period of time, he continued (and still continues) to smoke.

When gauging the claimant's motivation to return to work in this case, his testimony that he is not interested in learning any alternative skills, believing that would be a “waste of time,” coupled with the fact that he has not filed even one application for any job whatsoever since being released from his doctor, or even alerting respondent-employer that he had *been* released, demonstrates that, although the FCE determined he was able to return to “medium” physical labor employment, claimant obviously lacks interest or true desire to even *attempt* to return to the work force.

Although claimant testified that he would rather be working than “fighting with social security,” the credibility of that response works against any purported motivation on his part to return to the work force. Additionally, the inconsistency of claimant’s asserted desire to pay for his wife’s diabetes medication but his refusal to even *attempt* to obtain employment of any kind in order to do so, equally calls his credibility into question, in this examiner’s opinion. For all of these reasons, claimant’s obvious lack of motivation impedes this examiner’s ability to assess claimant's loss of earning capacity.

For the above-stated reasons, it is this examiner’s opinion that claimant has failed to prove by a preponderance of the evidence that he is permanently and totally

disabled and has, likewise, failed to prove that he is entitled to any wage loss disability experienced over and above the 5 percent impairment rating he has been paid by respondents No.1. As such, his claim for permanent disability benefits is respectfully denied and dismissed.

**AWARD**

Respondents No. 1 are directed to pay the claimant additional temporary total disability benefits in accordance with the findings of fact above, for the period of June 22, 2004, through July 7, 2004.

Respondents No. 1 are directed to pay the claimant's attorney, Mr. Gary Davis, the maximum attorney's fee on this award for the additional period of temporary total disability benefits controverted and herein awarded, pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

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CYNTHIA ESTES ROGERS  
Administrative Law Judge