

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206791

JIMMY WALKER	CLAIMANT
FORT SMITH RIM & BOW	RESPONDENT
NATIONAL TRUST INSURANCE CO., INSURANCE CARRIER	RESPONDENT
SECOND INJURY FUND	RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT

OPINION FILED OCTOBER 17, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent Employer-Carrier represented by LEE MULDROW, Attorney, Little Rock, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

Death & Permanent Total Disability Trust Fund represented by JUDY RUDD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 19, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on January 11, 2005. However, prior to the hearing, the Second Injury Fund and the Death & Permanent Total Disability Trust Fund were added as parties, certain modifications were made in the stipulations, and certain of the issues were eliminated. A copy of the pre-hearing order with these various amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 11, 2002, the relationship of employee-employer-carrier existed between the parties.
3. The claimant earned wages sufficient to entitle him to weekly compensation rate of \$425.00 for total disability and \$319.00 for permanent partial disability benefits.
4. On June 11, 2002, the claimant sustained a compensable injury to his head, brain, and neck, and subsequently experienced a compensable cardiac complication.
5. There is no dispute at present over the payment of medical expenses.
6. There is no dispute at present over the payment of temporary total disability benefits.
7. All appropriate temporary disability benefits have been paid through March 8, 2004.
8. The claimant's healing period had ended by March 8, 2004.
9. The respondents have paid permanent partial disability benefits beginning on or about January 11, 2005, and continuing through the date of hearing.
10. The respondents have controverted all benefits for permanent disability.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The extent of permanent disability from all compensable injuries or conditions, including both

permanent partial impairment and functional disability.

2. Second Injury Fund liability.
3. The effect of Ark. Code Ann. §11-9-410 and the made whole doctrine.
4. whether the respondent's \$75,000.00 liability limit for permanent total disability includes any benefits that would or could be attributable to permanent physical impairment.

In regard to these issues, the claimant contends:

- a. The claimant contends that he has multiple impairment ratings including at least the following:
 1. A 16% impairment rating to the body as a whole from Dr. Goodman.
 2. A 5% impairment rating to the body as a whole from Dr. Moffitt.
 3. A 30% impairment rating to the body from Dr. Back.
 4. A 5% impairment rating to the body as a whole from Dr. Davis.

The claimant contends that he is disabled in an amount greatly in excess of his impairment ratings.

In regard to these issues, the respondent employer-carrier contends:

"Respondents concede that claimant has sustained some permanent impairment as a result of his compensable job injuries. Respondents submit however that some of the ratings are subject to the challenge. Further, as evidence by claimant's post injury employment, respondents contend claimant's

injuries have not rendered him permanently and totally disabled. Respondents also contend that the facts justify a finding of Second Injury Fund liability. Finally, the respondents are entitled to recover a workers' compensation lien in connection with claimant's third party settlement."

In regard to these issues, the Second Injury Fund denies liability for any benefits in this case.

In regard to these issues, the Death & Permanent Total Disability Trust Fund contends:

Pursuant to A.C.A. §11-9-525(b)(1), Second Injury Fund liability must be determined prior to consideration of the Death & Permanent Total Disability Trust Fund liability. If the Second Injury Fund is found to not have liability and the claimant is found to be permanently and totally disabled, the Trust Fund stands ready to commence weekly benefits in compliance with A.C.A. §11-9-502. Therefore, the Trust Fund has not controverted the claimant's entitlement to benefits. Respondent 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. 1 is not entitled to credit against its \$75,000.00 maximum for payment of the claimant's permanent partial anatomical ratings for the compensable injury."

DISCUSSION

I. THE EXTENT OF PERMANENT DISABILITY

Although the respondents have actually paid permanent partial disability benefits, beginning on January 11, 2005, and continuing through at least the date of the hearing, the respondents have not accepted liability for any specific percentage or degree of permanent physical impairment or permanent partial disability. The parties have also stipulated that the respondents have controverted

the claimant's entitlement to any and all benefits for permanent disability. Thus, it becomes necessary to determine the existence and extent of permanent physical impairment and permanent functional disability or loss of wage-earning capacity, including permanent total disability.

The first matter to be discussed concerns the extent of permanent physical impairment. The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. §11-9-704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the official rating guide adopted by this Commission, which is presently the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, Ark. Code Ann. §11-9-522(g). The claimant must also show that the compensable injury or injuries was the "major cause" of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. §11-9-102(4)(F)(ii)(a). The term "major cause" is defined as more than 50% of the cause, Ark. Code Ann. §11-9-102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the

Act. In order for expert medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. §11-9-102(16)(B). In determining the existence or extent of permanent physical impairment neither any medical expert nor this Commission may consider complaints of pain. In regard to the claimant's compensable cervical injury, no consideration can be given in determining the existence or extent of permanent physical impairment to loss of range of motion, Ark. Code Ann. §11-9-102(16)(A)(ii).

_____The medical evidence contains various medical opinions concerning the existence and extent of permanent physical impairment from the claimant's various compensable injuries. One of these opinions is expressed by Dr. R. Cole Goodman, a plastic surgeon and one of the claimant's primary treating physicians. Dr. Goodman performed two reconstructive surgeries on the claimant's various facial fractures, particularly those involving the orbit of his left eye. In his report of September 23, 2004, Dr. Goodman assessed a 14% permanent physical impairment to the body as a whole for permanent damage to the first and second division of the fifth cranial nerve on the left. He further assessed an additional 5% impairment to the body as a whole for loss of visual acuity from residual diplopia (double vision) which he attributed to the severe facial fractures involving the orbit of the claimant's left eye. Finally, he assessed an additional 2% impairment to the body as a whole for other reasons, arriving at a total permanent physical

impairment of 16% to the body as a whole. He stated in this report, that these impairments were all assessed in the manner recommended by the American Medical Associations Guides to the Evaluation of Permanent impairment, Fifth Edition. In a subsequent report, dated June 13, 2005, Dr. Goodman again assessed a 16% permanent physical impairment to the body as a whole, but attributed this impairment to “moderately severe uncontrolled facial neuralgic pain” involving the trigeminal or fifth cranial nerve. In this report, he stated that he has arrived at this assessment by employing the Fourth Edition of the American Medical Association’s Guides to the Evaluation of Permanent Impairment.

After consideration of all the evidence presented, I find that I cannot place any weight and credit on the impairment rating made by Dr. Goodman. Contrary to Dr. Goodman’s statements in his report of June 13, 2005, this Commission has not retained the Fourth Edition of the American Medical Association’s Guides to the Evaluation of Permanent Impairment as the official rating guide simply because Arkansas Workers’ Compensation “is so far behind,” rather most of the rating methods employed by the Fifth Edition entail the use of “subjective” factors that have been expressly barred from consideration by legislative enactment. The original assessment of impairment made by Dr. Goodman cannot be considered, as it was calculated in a manner which does not conform to the official rating guide adopted by this Commission. The second impairment rating assessed by Dr. Goodman, in his report of June 13, 2005, does conform to the Commission’s official rating guide.

However, the method used (table 9 on page 145) is based solely upon complaints of pain. The legislature has seen fit to expressly prohibit assessments of permanent physical impairment based upon complaints of pain. It must also be noted that the evidence presented shows no objective findings of any physical damage or impairment to the claimant's trigeminal or fifth cranial nerve. The reports and records of Dr. John Kareus and Dr. David Davis, both competent neurologists, noted no evidence of objective abnormalities that would indicate permanent damage to the claimant's trigeminal or fifth cranial nerve. It is also important to note that Dr. Catherine Reed, an ophthalmologist, thoroughly evaluated the claimant and could find no objective or organic basis for his subjective complaints of diplopia or blurred vision. Her evaluation indicated that the claimant's visual acuity and fields of vision were within normal limits (Joint Exhibit NO. 3, pages 138 through 140). It is even more interesting to note that, although the claimant has consistently complained of chronic and severe "headaches" none of the other various medical experts have found these complaints to be consistent with or in any way indicated the presence of "uncontrolled facial neuralgic pain" of the trigeminal or fifth cranial nerve.

The claimant has also been assessed a permanent physical impairment of 5% to the body as a whole for his post-concussive headaches by Dr. David Davis. In his report of August 13, 2004. Dr. Davis recognized that his assessment of permanent physical impairment did not specifically conform to the official rating

guides. He stated that the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition provide no "discrete rating" for post-concussive headaches.

After consideration of the evidence presented, I find that I cannot give any weight and credit to this assessment of impairment by Dr. Davis. Clearly, it was not made in a manner that would conform to the official rating guide, as required by law. It is further apparent that the rating assessed by Dr. Davis was based upon consideration of pain, which is also expressly prohibited by the Act.

The next assessment of permanent physical impairment is that made by Dr. Bettye Back-Morse, a neuropsychologist. Following her evaluation and testing of the claimant, she opined (in her report of May 14, 2004), that the claimant had experienced a permanent physical impairment of 30% to the body as a whole. In this report, Dr. Back-Morse stated that this percentage of permanent impairment was calculated in a manner that conformed to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. The basis for this impairment was abnormal findings revealed on a battery of neuropsychological testing performed by Dr. Back-Morse. She concluded that these findings were consistent with a moderate brain injury involving diffuse damage but was maximized in the left hemisphere. This was the very type of injury sustained by the claimant in the employment related assault on June 11, 2002. Dr. Back-Morse also noted that the testing she performed revealed no inconsistencies or indications that the claimant was

giving less than maximal effort or was in any way exaggerating or magnifying his deficits.

The claimant was subsequently evaluated, at the respondents' request, by Dr. Gary Souheaver, another neuropsychologist. Dr. Souheaver found that on testing, which was similar to that performed by Dr. Back-Morse, the claimant did far worse than he did on the testing performed by Dr. Back-Morse. Dr. Souheaver further indicated that the claimant failed all of the portions of the tests designed to determine if the patient was exhibiting maximum effort. It was Dr. Souheaver's opinion that this worsening in the results of the claimant's psychological testing would not be consistent with a physical injury or damage to the claimant's brain.

Although Dr. Souheaver indicated that the result of his testing would not accurately affect the claimant's true level of mental functioning, he in no way indicated that this conclusion would also extend to the test results derived by Dr. Back-Morse. Dr. Souheaver in no way opined that Dr. Back-Morse's findings or conclusions were inaccurate or that the claimant had not experienced any permanent brain damage. It is also important to note that psychological testing performed by Dr. Souheaver, (an MMPI-II) did not indicate any intentional exaggeration of psychiatric symptoms but did indicate the existence of psychological or psychiatric disorders in the form of somatization with underlying chronic depression and anxiety.

After consideration of all the evidence presented, it is my

opinion that the assessment of a 30% permanent physical impairment by Dr. Back-Morse for the compensable injury to the claimant's head or brain is stated within a reasonable degree of medical certainty and is supported by the greater weight of the other credible evidence presented. Dr. Back-Morse is a competent qualified neuropsychologist with extensive expertise in the area of medicine associated with brain injuries and their residual effects. Her assessment of a 30% permanent physical impairment is supported by objective neuropsychological testing and would be consistent with the initial physical injury to the claimant's head and brain that is objectively demonstrated by the other medical evidence presented. The evidence further shows that her assessment of permanent physical impairment was arrived at by employing the methods espoused by the official rating guide, the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. I simply find her opinion on the existence of this degree of permanent physical impairment to be convincing. Thus, the claimant has proven that he sustained a permanent physical impairment of 30% to the body as a whole, as a result of his compensable head or brain injury.

The next area to be addressed is the compensable injury to the claimant's neck or cervical spine. The only rating the claimant has received for this compensable injury was not made by any of his various treating physicians. The only permanent physical impairment rating contained in the medical evidence was made by Dr. Gary Moffitt, of the Occupational Medicine in Lowell, Arkansas. This

rating was made by Dr. Moffitt following his examination of the claimant at the respondents' request. In his report of March 5, 2004, Dr. Moffitt opined that the claimant's compensable injury to his neck or cervical spine was in the form of a chronic strain. On his physical examination he noted "quite a bit of straightening of the neck" (loss of normal cervical lordosis), which he felt to be compatible with chronic spasm. Dr. Moffitt further opined that the claimant had achieved maximum medical improvement (MMI) in regard to his neck or cervical spine injury and had a 5% permanent physical impairment for a DRE cervicothoracic Category II, as contained in the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition.

The medical record indicates that the claimant continued to experience objective symptoms involving his neck or cervical spine, primarily in the form of hypertonicity or muscle spasms. These objective defects were noted by both Dr. John Kareus and Dr. David Davis in May, June, and July of 2004. Although Dr. Kareus had indicated that an MRI of the claimant's cervical spine showed "no significant lesion," Dr. Davis interpreted this study as showing "small disc protrusions at C5-6 and C6-7," but with no neural impingement. Nerve conduction studies, performed by Dr. Davis in August of 2004, established only the presence of bilateral ulnar neuropathies, involving the claimant's upper extremities. No cause or etiology for these peripheral neuropathies has been given by any of the claimant's numerous physicians. In his report of August 13, 2004, Dr. Davis opined that the claimant will be at maximum

medical improvement (MMI) in approximately six weeks, but assigned no permanent impairment for the claimant's neck or cervical injury.

The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition provide for a method of assessing permanent physical impairment based upon a diagnosis related estimate model (DRE). This is the method that was employed by Dr. Moffitt. A patient falls under the DRE Category II for cervicothoracic impairment (minor impairment), if the patient's history and findings are compatible with a specific injury and include intermittent or continuous muscle guarding, tightness, or spasm observed by a physician, non uniform loss of range of motion, or non verifiable radicular complaints. In order to fall under the category, there can be no objective evidence of radiculopathy or loss of structural integrity. The claimant clearly satisfies the requirements for this DRE category. While some of these requirements are subjective in nature and one consideration even includes loss of range of motion (a matter which is specifically excluded from consideration under the Act), objective factors are also included in placing the claimant in this category, specifically muscle rigidity and spasm.

The Fourth Edition of the AMA Guides also provide another method for rating cervical injuries such as those sustained by the claimant, this method is found in table 75 on page 113 of the Guides. Based upon the medical evidence presented, the claimant could qualify for a rating under either Section IIB or IIC. Under IIB are classified injuries that involve intervertebral disc or

other soft tissue lesions which are unoperated on, stable, with medically documented injury, pain, and rigidity associated with none to minimal degenerative changes on structural tests, such as those involving roentgenography or magnetic resonance imaging. A 4% permanent physical impairment is assigned for this category of injury. Table 75 Section IIC applies to intervertebral discs or other soft tissue lesions which are unoperated on, stable, with medically documented injury, pain, and rigidity associated with moderate to severe degenerative changes on structural tests including unoperated on herniated nucleus pulposus with or without radiculopathy. A 6% permanent physical impairment is assigned to this category of injury. An additional 1% is to be assigned for each additional level.

After consideration of all the evidence presented, it is my finding that the opinion of the respondents' expert, Dr. Moffitt, on the extent of permanent physical impairment attributable to the claimant's compensable cervical injury is accurate and persuasive. This opinion is consistent with the other evidence presented. Dr. Moffitt has used a method espoused by the official rating guide adopted by this Commission. The evidence presented further reveals that Dr. Moffitt's assessment of permanent physical impairment is supported by "objective findings." The greater weight of the evidence further establishes that the claimant's compensable cervical injury was the "major cause" of this degree of permanent impairment. Therefore, the claimant has proven by the greater weight of the credible evidence that he sustained a 5% permanent

physical impairment to the body as a whole, as a result of his compensable cervical injury of June 11, 2002.

The medical evidence further reveals that the claimant is experiencing a mild to severe bilateral sensorineural hearing loss. However, no permanent impairment has been assigned by any physician for this loss. It is also impossible from the evidence presented to calculate the specific percentage or degree of permanent physical impairment that would correspond with this loss, following the methods espoused by the Commission's official rating guide. More importantly, the greater weight of the credible evidence presented fails to attribute this bilateral hearing loss to the trauma that the claimant sustained to the left side of his head. In his report of March 30, 2004, Dr. Michael Marsh notes that the claimant's hearing loss is greater in the right ear than in the left. Although he indicated that the claimant's hearing loss could be consistent with head trauma, he also noted that it could be consistent with noise trauma, or even a natural genetic related progressive deterioration. The fact that the claimant's hearing loss is greater in the ear opposite the area of trauma from the claimant's job related injury would make it more likely or probable that the employment related trauma was not the cause of the claimant's bilateral hearing loss.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove his entitlement to any permanent benefits for permanent physical impairment for his bilateral hearing loss. He has not only failed to present

sufficient evidence to allow a determination of the percentage or degree of impairment that would correspond with this loss, but has more importantly failed to prove that his compensable injuries were the “major cause” of this loss of impairment.

The final injury to be addressed are the claimant’s cardiac difficulties that were brought on by the assault and resulting compensable injuries to his head, brain, and neck on June 11, 2002. The medical evidence shows that these cardiac difficulties involved the occurrence of an acute subendocardial myocardial infarction and resulting respiratory failure.

The medical records contain no assessment of any permanent physical impairment as a result of the claimant’s compensable cardiac complications or consequences. In fact, the only medical evidence dealing with this subject is the report of Dr. Moffitt, dated March 8, 2004. In this report, Dr. Moffitt indicated that the claimant has reached maximum medical improvement in regard to his compensable cardiac difficulties and has experienced no “increase” in permanent physical impairment as the result of his compensable cardiac complications or consequences in June of 2002.

The medical records establishes that the claimant’s compensable complications or consequences from his employment related injuries on June 11, 2002, were in the form of a myocardial infarction, with tachycardia and respiratory failure. Clearly, this myocardial infarction would result in additional permanent damage to the muscles comprising the wall of the claimant’s heart, apparently in the area of the lateral left ventricle.

There is no doubt that the claimant was experiencing significant pre-existing heart disease and damage at the time of his compensable myocardial infarction. The evidence shows that he had a prior myocardial infarction in 1991 and a subsequent episode of unstable angina. At the time of the onset of his unstable angina, he was noted to have severe obstruction and stenosis of the circumflex coronary artery, moderate obstruction or stenosis of the mid to distal lateral descending artery and mild stenosis of the distal right coronary artery. A balloon angioplasty and stenting was performed in an attempt to open these obstructions. This attempt subsequently failed and in 2000 the claimant was noted to have a total occlusion of the circumflex artery, a 60% occlusion to the lateral descending artery, and a 30 to 40% occlusion of the proximal right coronary artery.

For these various pre-existing coronary defects, Dr. Charles Fitzgerald, a cardiologist, has opined that the claimant was experiencing a 50% permanent physical impairment for these pre-existing cardiac defects at the time of his accident on June 11, 2002. Dr. Fitzgerald further stated that this degree of permanent impairment was calculated in a manner espoused by the American Medical Association's Guides to the Evaluation of Permanent Impairment. A review of the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, confirms this fact. The 50% assessment made by Dr. Fitzgerald would be the lowest assessment recommended for a Class IV classification of coronary artery disease (table 6, page 178 of the Guides).

However, I cannot concur with Dr. Moffitt's conclusion that the second and compensable myocardial infarction, in June of 2002, did not produce any increase in permanent physical impairment attributable to the claimant's various cardiac difficulties. The American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, recommend a minimum of a 10% permanent physical impairment to the body as a whole based solely on the occurrence of a myocardial infarction or permanent damage to the muscles of the claimant's heart (table 6, page 178, Classification II). Clearly, the claimant's compensable coronary complications or consequences would have produced at least an additional 10% permanent physical impairment, if the claimant had no pre-existing permanent cardiac impairment. The mere fact that he had extensive pre-existing permanent coronary damage or impairment should not relieve the respondents from liability for the impairment attributable solely to the compensable consequence.

Although Ark. Code Ann. §11-9-525 was intended by the legislature to relieve the respondents from liability for combined disability, it is obvious from the wording of this section that it was not intended to provide the claimant with any relief from liability for permanent impairment attributable solely to the compensable injury (or in this case, the compensable consequence or complication). Therefore, I find that the claimant has proven by the greater weight of the credible evidence that he has sustained a 10% permanent physical impairment to the body as a whole as the result of his compensable cardiac consequence or complication of

June of 2002.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that he has sustained a total permanent physical impairment of 45% to the body as a whole, as a result of the permanent effects of his various compensable injuries of June 11, 2002, and their compensable consequences. This includes a 30% permanent physical impairment for his compensable cerebral or brain injury, a 5% permanent physical impairment for his compensable cervical injury, and a 10% permanent physical impairment for his compensable cardiac difficulties. The respondents Fort Smith Rim & Bow and National Trust Insurance Company are liable for permanent partial disability benefits attributable this degree or percentage of permanent physical impairment.

II. PERMANENT FUNCTIONAL DISABILITY OR LOSS OF WAGE-EARNING CAPACITY AND SECOND INJURY FUND LIABILITY

_____The issue of the extent of permanent functional disability or loss of wage-earning capacity is intertwined with the issue of applicability of Ark. Code Ann. §11-9-525 and Second Injury Fund liability. If the threshold requirements of Ark. Code Ann. §11-9-525 are met, then a determination must be made of the extent of the claimant's "combined" functional disability or loss of wage-earning capacity and liability for permanent benefits attributable thereto are controlled by the provisions of this subsection. On the other hand, if the provisions of Ark. Code Ann. §11-9-525 are inapplicable to the present claim, then the issue of the existence

and extent of permanent functional disability or loss of wage-earning capacity and liability for benefits attributable thereto are controlled by the provisions of Ark. Code Ann. §11-9-522(b) and §11-9-519.

The provisions for Ark. Code Ann. §11-9-525 provide that this subsection is applicable when the following criteria are met:

1. The claimant must be experiencing permanent disability or impairment at the time of the compensable injury giving rise to the present claim.
2. The compensable injury giving rise to the present claim must result in additional permanent disability or impairment.
3. The percentage of disability or impairment caused by the combined disabilities or impairments must be greater than that which would have resulted from the last injury considered alone and of itself.
4. The claimant must be entitled to receive compensation for the combined disabilities or impairments.

At the time of the claimant's employment related accident and resulting compensable injuries, on June 11, 2002, he was clearly experiencing a significant amount of permanent physical impairment. He had permanent damage to his heart muscle caused by the prior myocardial infarction in 1991 and had extensive stenosis or blockage of several major coronary arteries with episodes of uncontrolled angina. The respondents' expert, Dr. Fitzgerald assessed a permanent physical impairment of 50% to the body as a whole, as a result of these pre-existing coronary difficulties. This assessment of anatomical impairment is supported by the evidence presented, based upon objective findings, and was calculated in a manner that conforms to the Commission's official

rating guide.

Clearly, the claimant had not yet experienced any actual functional disability or loss of wage-earning capacity as a result of these pre-existing cardiac or coronary difficulties. However, these pre-existing difficulties would have resulted in some physical limitations of the claimant's potential employment activities (albeit not sufficient to prevent him from performing the position he had with the respondent at that time). Thus, he had only potential functional disability or loss of wage-earning capacity that was based upon his exclusion from a significant number of potential employments for which he would otherwise be qualified, should he have lost his job with the respondent.

However, in determining applicability of Ark. Code Ann. §11-9-525, I have only considered the claimant's pre-existing permanent physical impairment from his previous cardiac or coronary difficulties and not any potential pre-existing functional disability or loss of wage-earning capacity. Ark. Code Ann. §11-9-525 uses the terms "disability" and "impairment" in the alternative. Thus, the existence of either pre-existing disability or impairment is sufficient to invoke application of this subsection. Thus, as the evidence presented unquestionably shows the first requirement of Ark. Code Ann. §11-9-525 has been met.

As previously held, the compensable injuries of June 11, 2002 and their compensable consequence has resulted in additional permanent physical impairment. This permanent physical impairment is separate and distinct from that which the claimant was

previously experiencing from his pre-existing cardiac or coronary difficulties. These include the 30% permanent physical impairment for his compensable brain injury, the 5% permanent physical impairment for his compensable cervical injury, and the additional 10% permanent physical impairment for his compensable coronary consequence. Again, the evidence shows that the claimant did not, initially, experience any actual permanent functional disability or loss of wage-earning capacity, he returned to his employment at the same or greater wage. This continued until his employer went out of business some months later.

However, again Ark. Code Ann. §11-9-525 uses the term disability or impairment in the alternative. Clearly, the claimant has experienced permanent physical impairment as the result of his compensable injuries and compensable consequences which is in addition to and in excess of that that was caused by his pre-existing coronary or cardiac difficulties. This additional permanent physical impairment is sufficient to satisfy the second requirement for the application of Ark. Code Ann. §11-9-525.

Next, the greater weight of the credible evidence establishes that the claimant's combined disabilities and impairments clearly exceed the disability or impairment which would have resulted from the last injury considered alone and of itself. From a purely mathematical standpoint, the combined impairments of the claimant's pre-existing cardiac or coronary difficulties and his subsequent compensable injuries and consequences would total 95% to the body as a whole (50% plus 30% plus 5% plus 10%). This would clearly

exceed the permanent physical impairment resulting from his compensable injuries and consequences of June 11, 2002, considered alone and of themselves, of 45% to the body as a whole (30% plus 5% plus 10%).

The evidence further establishes that the claimant's pre-existing cardiac or coronary difficulties, specifically his excessive coronary artery stenosis or blockage, not only independently produced permanent physical impairment both before and after his compensable injuries of June 11, 2002, but would also independently have a significant impact upon the claimant's potential physical activities and potential employment positions. Such extensive arterial blockage would make it dangerous if not impossible for the claimant to engage in any relatively strenuous physical activities or stressful situations. This in turn would limit the claimant's availability for various employment positions for which he would otherwise be qualified. Therefore, I find that the greater weight of the credible evidence satisfies the third requirement for the application of Ark. Code Ann. §11-9-525 to the present claim.

The final consideration is whether the claimant "is entitled to receive compensation on the basis of combined disabilities or impairments." The evidence presented fails to reflect any reason why the claimant would not be entitled to receive compensation for these combined disabilities or impairments. Clearly, the claimant would be entitled to receive compensation for the impairment attributable to the compensable injuries and consequences of June

11, 2002. There is no indication that the statute of limitations has run on the claimant's entitlement to these benefits and no one so contends. There is also no evidence or contention of any other bar to his entitlement to compensation for permanent impairment.

The only arguable bar would be to the claimant's entitlement to benefits for permanent disability or loss of wage earning capacity under the provisions of Ark. Code Ann. §11-9-522(b)(2). The evidence presented shows that the claimant returned to employment for the respondent in July of 2002, as a mill room foreman over 30 to 50 employees. He continued in this position, at wages equal to or greater than those he was receiving on June 11, 2002, until the respondent went out of business in March of 2004. However, the evidence shows that this was only possible because the respondent modified his position to accommodate his restrictions and limitations, and he was not required to perform many of the activities previously required of him in this position. The claimant's ability to maintain productive employment with the respondent was due to experience gained in his 17 years of employment with the respondent.

There is no evidence presented to indicate that the termination of the claimant's employment in March of 2004, was in any way the result of his misconduct in connection with the work or the result of his leaving this employment voluntarily and without good cause connected with the work. There is also no evidence that the claimant has obtained or has had a bona fide offer of employment by any other employer, at wages equal to or greater than

those he was receiving at the time of his accident.

Applicable case law has held, in light of the provisions of Ark. Code Ann. §11-9-522(d), that a claimant's return to employment does not forever bar him or her from being entitled to benefits for permanent functional disability or loss of wage-earning capacity. These decisions have construed the provisions of Ark. Code Ann. §11-9-522(b)(2) to only prevent the claimant from being entitled to benefits for permanent functional disability or loss of wage-earning capacity during the period of continued employment at wages equal to or greater than those being received at the time of the accident and compensable injury, if the employment is terminated for reasons beyond the claimant's control and unassociated with any misconduct on the part of the claimant.

At the time of the hearing and for some time prior thereto, the claimant had not been employed at wages equal to or greater than those he was receiving at the time of his accident and resulting compensable injuries, nor did he have a bona fide offer of employment at the same or greater wage. The loss of his previous employment was in no way due to his misconduct or voluntary abandonment of the position. Thus, at the time of the hearing and at the present time, Ark. Code Ann. §11-9-522(b)(2) would not bar the claimant from entitlement to benefits for functional disability or loss of wage-earning capacity.

In summary, I find that Ark. Code Ann. §11-9-525 is applicable to the present claim. Thus, it becomes necessary to determine the respective liability of the respondent employer-carrier and the

Second Injury Fund of the State of Arkansas. In order to arrive at the respective liability of these parties, a determination must be made of the claimant's current combined "disability."

The record shows that the claimant is 53 years old. He has a high school diploma and has taken several "supervisor" courses, at Westark Community College (now UA-FS). The evidence further shows that, except for some prior work as a ranch hand, the claimant's employment has primarily involved working in the milling of wood products. The claimant had a lengthy period of employment for Ayers Furniture (approximately 10 years), where he worked his way up to a supervisory position. He also had a 5 year period of employment at Tucker Duck & Rubber, where he held a supervisory position in the mill room. Finally, he had a 17 year period of employment with this respondent, where he held a position of mill room supervisor at the time the respondent went out of business.

The evidence presented shows that the claimant has had two previous myocardial infarctions (including one at the time of the compensable injury). He has also had a previous stinting of various coronary arteries which was unsuccessful. Repeated studies have shown extensive atherosclerosis of his coronary arteries, including one which is totally occluded. All of these conditions have resulted in a susceptibility to angina upon anything more than the lightest of physical activities. No specific restrictions have been placed on the claimant's physical activities or potential employment activities, as a result of these coronary difficulties. The claimant has been instructed only to perform activity "as

tolerated.” Based upon the claimant’s testimony, his cardiac difficulties make him susceptible to fatigue and prevent him from engaging in any but the lightest or most sedentary activities.

The claimant’s skull fracture and resulting brain injury has significantly impaired his cognitive and learning abilities. These limitations would prevent the claimant from performing complicated tasks. These deficits would also interfere with his ability to adapt to new employment environments. This would make the potential of retraining or the “transfer of skills” to another type of management position extremely low.

The claimant’s chronic cervical difficulties would concurrently interfere with his ability to perform heavy manual labor. These difficulties would also prevent the claimant from performing any employment positions requiring him to repeatedly bend or move his neck or to maintain it for extended periods in a fixed position.

There is no dispute that the claimant returned to employment with this respondent in July of 2002, as the mill room supervisor and function in this capacity until the company went out of business in March of 2004. However, the claimant’s testimony indicates that the respondent’s allowed the claimant to limit his duties or activities from those previously expected of him, as the mill room supervisor, to accommodate his physical limitations and restrictions. Most likely, this was the result of his long time employment with the respondent. It is highly doubtful that a new employer would be as accommodating. The number of mill room

positions, especially in a supervisory capacity, have become extremely limited in the local area. The once numerous furniture factories and wood working operations have gone the way of the respondent.

The claimant's ability to obtain employment in the open job market, with the limitations allowed by the respondent, is highly doubtful. His current difficulties with his level of mental functioning and ability would make it highly unlikely that he could transfer any of his managerial skills to a new and different setting. I am inclined to agree with the expert opinion of the vocational specialist retained in this case, Dale Thomas. It would be unlikely that the claimant could obtain any regular full-time employment in the open job market.

After consideration of all the evidence presented, it is my opinion that the claimant has proven that he has been rendered permanently totally disabled as the result of the disabling effects of his pre-existing cardiac damage combined with the permanent damage occasioned by his various compensable injuries. Therefore, under Ark. Code Ann. §11-9-525(b)(5), the respondents, Fort Smith Rim & Bow and National Trust Insurance Company, are liable to the claimant for permanent partial disability benefits attributable to a permanent physical impairment of 45% to the body as a whole, and the Second Injury Fund of the State of Arkansas is liable to the claimant for the difference between this amount and permanent total disability.

III. APPLICABILITY OF ARK. CODE ANN. §11-9-410 IN THE MADE WHOLE DOCTRINE

_____The next matter to be addressed involves the entitlement of the respondents to a credit, under Ark. Code Ann. §11-9-410 for amounts received by the claimant in a settlement presumably against his assailant and his assailant's employer. No definitive evidence was offered concerning this third party action. At the conclusion of the hearing, the parties were requested to submit specific evidence on the exact amounts of the gross settlement, attorney's fees, and costs of collection, net settlement, pay out to the claimant, etc. In the alternative, the parties could stipulate to these amounts. However, this information was never provided. Essentially, all that has been offered on the specifics of this settlement, consists of statements of counsel.

It would appear from statements of counsel that the gross amount of the settlement between the claimant and the third party tortfeasors was \$35,000.00. Apparently, attorney's fees and costs of collection consisted of one-third of the gross recovery, or \$11,666.67. This would mean that the balance or net recovery, which could be subject to lien under Ark. Code Ann. §11-9-410, would be in the amount of \$23,333.33. Under the provisions of Ark. Code Ann. §11-9-410, the claimant would be entitled to one-third of this net settlement, outright and free of any lien by the respondents. In the present case, this would total \$7,777.78. The remaining balance of \$15,555.56 could be subject to a lien by the respondents. It would appear from statements of counsel that this

amount of the third party settlement has been retained in a trust fund pending this Commission's orders on its disposition.

The real question in this case is whether the respondents have a right to exercise or enforce this lien against all or a portion of the escrowed amounts. The respondents argue that the claimant's failure to notify the respondents of the third party proceeding and the claimant's failure to provide the respondents with the three days notice of the settlement prior to entering into the settlement would somehow estop the claimant from raising the "made whole doctrine." I find no merit to this argument.

As the Court of Appeals noted in Liberty Mutual Insurance Company v. Whitaker, 83 Ark. App. 412, 128 S.W. 3rd 473 (2003), Ark. Code Ann. §11-9-410 gives the respondents a right to notice and the opportunity to join in any third party action. It also gives the respondents the right to prior notice of any settlement. However, it provides no specific penalty should this notice not be given. As the Courts have recognized, Ark. Code Ann. §11-9-410 requires that the settlement of third party claims must be approved by a Court of competent jurisdiction or by this Commission after affording the respondents an opportunity to be heard. It specifically provides that the "distribution of that portion of the settlement which represents the compensation payable under this chapter must have the approval" of this Commission. Although the respondents have the right to be "heard" before approval of the settlement, they do not have the right to veto any settlement or the right to exclude themselves from the finality of the settlement of the third party

action.

Assuming that the respondents were not given appropriate notice of the third party proceeding or of the third party settlement (facts upon which the record is essentially silent), the respondents have still been afforded their opportunity to be heard. The current proceeding before the Commission gave them this opportunity. Although the settlement was not previously “approved” by a Court of competent jurisdiction, such approval can also be made by this Commission. In fact, the statute requires the approval of this Commission where the distribution of any portion of the settlement represents compensation payable under the Act.

Although in James the made whole doctrine was considered and applied by the Circuit Court, this Commission also has the authority and, in fact, the obligation to consider and appropriately apply this doctrine when considering the approval and distribution of third party settlements. Such a fact was clearly recognized by the Court of Appeals in Phillip Morris USA v. James, 79 Ark. App. 72, 83 S.W. 3rd 441 (2002).

I would also note that the avowed purpose, as stated by the legislature, for Ark. Code Ann. §11-9-410 “is to prevent double payment to the employee.” Clearly, this avowed purpose would not be destroyed by considering the “made whole doctrine” in determining if the respondents are entitled to enforce their subrogation rights granted them by Ark. Code Ann. §11-9-410. To estop the claimant from raising the made whole doctrine could only “unjustly enrich” the respondents by taking from the claimant this

fundamental principle of subrogation that has been expressly extended to this subsection by the Supreme Court in James. Therefore, it is my finding that the claimant is not estopped from raising the made whole doctrine in determining, at the present time, whether the respondents are entitled to any or all of the \$15,555.56 of the third party settlement being held in escrow.

The record in this case shows that the claimant's compensable injuries involved a significant displaced skull fracture along with various facial fractures. These injuries further resulted in the claimant experiencing a second myocardial infarction. As a result of the claimant's myocardial infarction and respiratory failure, the contemplated surgical reconstruction of the displaced skull fracture was never performed. However, the claimant has undergone two extensive surgeries for reconstruction of his facial fractures. Although neither party has seen fit to introduce evidence concerning the extent of the claimant's medical expenses, these would clearly be significant and obviously far more than the net recovery from his third party action.

As a result of his skull fracture and his compensable cervical injury, the claimant has experienced significant chronic pain. There is no indication that this pain will resolve in the immediate future. Although the claimant's chronic pain is not a matter specifically addressed by the Workers' Compensation Act, it is certainly a matter that can be considered in determining if the claimant has been "made whole" by the proceeds of the third party settlement.

The record reveals that the claimant has suffered significant permanent brain damage, as a result of his compensable skull fracture. This permanent damage was sufficient to entitle him to a permanent physical impairment of 30% to the body as a whole. He has also sustained permanent damage to his cervical spine, sufficient to entitle him to permanent physical impairment of 5% to the body as a whole. Finally, he has experienced significant permanent physical impairment to his heart, sufficient to entitle him to an additional 10% permanent physical impairment to the body as a whole. Although the claimant's recovery for this permanent loss of body function is limited under the Act by Ark. Code Ann. §11-9-525(a), no such limit would exist in a civil action.

Finally, the claimant's injuries of June 11, 2002, have played a significant role in ultimately producing his permanent total disability. Clearly, the role played by these injuries would have resulted in a loss of wages that would have had a present value that would far exceed the net amount of the claimant's third party settlement and the respondents' obligation for such benefits under the Act.

After consideration of the evidence presented and applying the rule announced in Franklin v. Health Source of Arkansas, 328 Ark. 163, 942 S.W. 2nd 837 (1997), I find that the claimant has not been made whole by the sum of the net amount of his third party settlement and the amounts to be paid by the respondents under the Act. Therefore, the respondents are not entitled to enforce their statutory lien against any of the proceeds of this settlement. The

entire proceeds of the net amount of this settlement should be distributed to the claimant.

IV. THE EFFECT OF PERMANENT PHYSICAL IMPAIRMENT ON THE LIMITS OF PERMANENT TOTAL DISABILITY ESTABLISHED BY ARK. CODE ANN. §11-9-502(b)(2)

_____The final issue to be addressed is the argument of the Death & Permanent Total Disability Trust Fund that the respondent employer-carrier would not be entitled to credit against its \$75,000.00 limit, conferred by Ark. Code Ann. §11-9-502(b)(2) for permanent total disability, on the monetary amount of permanent partial disability for permanent physical impairment. In previous decisions, the Full Commission has held that this argument is without merit, and I wholeheartedly concur. However, I have found that Ark. Code Ann. §11-9-525 is applicable to the present claim and that it is the Second Injury Fund of the State of Arkansas that is liable for permanent total disability benefits. The limit provided by Ark. Code Ann. §11-9-502(b)(2) does not apply to the Second Injury Fund, and the Death & Permanent Total Disability Trust Fund would have no liability in this case.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On June 11, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On June 11, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00

for total disability and \$319.00 for permanent partial disability.

4. On June 11, 2002, the claimant sustained compensable injuries to his head, brain, and neck (cervical spine). He subsequently experienced a compensable cardiac consequence or complication, which included a myocardial infarction.
5. There is no dispute, at the present time, over the payment of medical expenses and all such expenses have or are being paid.
6. There is no dispute, at the present time, over the payment of temporary total disability benefits and all such benefits accruing to date have been paid.
7. The claimant's healing period ended by March 8, 2004.
8. Although the respondents commenced the payment of permanent partial disability benefits on January 11, 2005 and continued the payment of these benefits through the date of hearing, the respondents have previously controverted all permanent disability benefits.
9. The claimant has sustained a permanent physical impairment of 45% to the body as a whole, as a result of the effects of his compensable injuries and consequences of June 11, 2002. This includes a permanent physical impairment of 30% to the body as a whole for his compensable brain injury, a permanent physical impairment of 5% to the body as a whole for his compensable cervical

injury, and a permanent physical impairment of 10% to the body as a whole for his compensable cardiac consequence (myocardial infarction).

10. At the time of the claimant's compensable injuries and consequences on June 11, 2002, he was experiencing a permanent physical impairment of 50% to the body as a whole. This pre-existing impairment was the result of his pre-existing atherosclerotic heart disease (coronary blockage), prior myocardial infarction, and prior episodes of unstable angina.
11. The provisions of Ark. Code Ann. §11-9-525 are applicable to the present claim. In that, the claimant had pre-existing impairment at the time of his compensable injuries and consequences. His compensable injuries and consequences resulted in additional permanent impairment and disability. The claimant's combined impairments and disabilities have resulted in permanent total disability, which exceeds the impairment and disability resulting from the last injury considered alone and of itself. The claimant is entitled to benefits under the Act for these combined impairments and disabilities.
12. Under Ark. Code Ann. §11-9-525, the respondents are liable to the claimant for benefits equivalent to a permanent partial disability of 45% to the body as a whole. The Second Injury Fund of the State of Arkansas is liable for any remaining benefits due the claimant for

permanent total disability.

13. Ark. Code Ann. §11-9-502(b)(2) is inapplicable to the present claim and the Death & Permanent Total Disability Trust Fund of the State of Arkansas has no liability in this case.
14. The respondent employer-carrier has controverted the claimant's entitlement to any permanent disability benefits from said respondents.
15. The Second Injury Fund of the State of Arkansas has controverted the claimant's entitlement to any benefits from said Fund.
16. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on all permanent disability benefits herein awarded. The respondents are liable for the maximum statutory attorney's fee on the permanent partial disability benefits herein found to be their obligation. The Second Injury Fund of the State of Arkansas is liable for the remaining maximum attorney's fee on the controverted permanent total disability benefits herein awarded.
17. The claimant was not made whole by the net proceeds of the third party settlement and the benefits herein found to be the respondents' liability. Therefore, the respondent employer-carrier is not entitled to enforce any statutory lien granted them by Ark. Code Ann. §11-9-410 against the net proceeds of this third party

settlement. The claimant is entitled to the entire net amount of this third party settlement.

ORDER

The respondent employer-carrier remains liable for all reasonably necessary medical services required by the claimant's compensable injuries.

The respondent employer-carrier shall pay to the claimant permanent partial disability benefits equivalent to a permanent partial disability of 45% to the body as a whole.

The respondent employer-carrier shall pay to the claimant's attorney the maximum statutory attorney's fee on these controverted permanent disability benefits.

The Second Injury Fund of the State of Arkansas shall pay to the claimant the remainder of the benefits to which he is entitled for permanent total disability.

The Second Injury Fund of the State of Arkansas shall be liable to the claimant's attorney for the maximum statutory attorney's fee on such permanent disability benefits.

The respondent employer-carrier is not entitled to enforce any lien that it may have been granted under Ark. Code Ann. §11-9-410 against the net proceeds of the third party settlement previously entered into by the claimant. The claimant is entitled to receive the entire net amount of this third party settlement.

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

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge