

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F112060 & F306137

JOHN E. WHITSON, EMPLOYEE

CLAIMANT

**ARKANSAS HIGHWAY & TRANSPORTATION
DEPARTMENT, EMPLOYER**

RESPONDENT #1

PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER

RESPONDENT #1

SECOND INJURY FUND

RESPONDENT #2

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT #3

OPINION FILED SEPTEMBER 15, 2005

A hearing in this case was conducted on June 30, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Thomas W. Mickel, Attorney at Law, Conway, Arkansas.

Respondent #1 was represented by William L. Wharton, Attorney at Law, Little Rock, Arkansas.

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

Respondent #3, represented by Judy W. Rudd, Attorney at Law, Little Rock, Arkansas, did not appear at the hearing.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on April 12, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to seven stipulations; all of these stipulations are found in the Prehearing Order, but the seventh stipulation was amended at the hearing. The following

stipulations are hereby accepted.

1. The employee-employer-carrier relationships existed on October 16, 2001; May 29, 2003; and at all other relevant times.

2. Claimant sustained a compensable low back injury on October 16, 2001; Respondent #1 accepted and paid a 7% to the body as a whole impairment rating arising from this compensable injury.

3. Claimant sustained a compensable back injury on May 29, 2003; Respondent #1 accepted and paid a 5% to the body as a whole impairment rating arising from this compensable injury.

4. Claimant's average weekly wage was \$599.32 as of Claimant's second injury; his temporary total disability rate is \$400.00; and his permanent partial disability rate is \$300.00.

5. Respondents controvert Claimant's eligibility for benefits beyond those already paid.

6. Claimant reached maximum medical improvement on March 25, 2004.

7. Claimant could not have been permanently and totally disabled prior to his last date worked, April 26, 2004.

At the June 30, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is permanently and totally disabled.
2. In the alternative, whether Claimant is entitled to wage-loss disability benefits.
3. Whether Respondent #2 is liable for the payment of benefits under Ark. Code

Ann. § 11-9-525.

4. Whether Respondent #3 is liable for the payment of permanent total disability benefits.

5. Whether Respondent #1 is entitled to a credit for impairment rating benefits paid to Claimant against its \$75,000.00 maximum liability under Ark. Code Ann. § 11-9-502(b).

6. Whether Claimant is entitled to an attorney's fee.

Claimant contends that, as a result of his two compensable injuries, he is permanently and totally disabled. In the alternative, he argues that he is entitled to wage-loss disability benefits in excess of his permanent impairment ratings. He also seeks an attorney's fee. Respondents contend that Claimant failed to sustain his burden of proof. Further, Respondent #2 argues that Claimant has not proven its liability under the statute.

DISCUSSION

At the time of the hearing Claimant was 50 years of age. He completed high school but did not have any additional education or formal training. His employment history since graduating from high school includes work at a grocery store, at a lumber yard, building pallets at a factory, as a carpenter, as a service station attendant, delivering groceries for a wholesale grocery company, as a shipping clerk for a couple of rice mills, servicing vending machines, and as a trash collector. In 1997, Claimant began working for Respondent #1.

Claimant's positions with Respondent #1 have all involved physical labor. He was first hired as a general laborer, mowing grass, patching holes, picking up trash, and flagging traffic. He then began working as a truck driver, carrying asphalt to patch holes and picking up trash. He then became a backhoe and front-end loader operator;

nonetheless, he continued to perform general laborer duties as needed. His final position was as a Maintenance Aide II, overseeing a crew doing general labor work. This was the position Claimant held at the time of his second compensable injury on May 29, 2003.

Claimant has a history of injuries. He was paid temporary disability benefits for an injury to his low back in August of 1990; he believed he sustained this injury “picking up a case of drinks and carrying them, filling up a Coke machine.” He did not sustain a permanent impairment. He was again paid benefits for an injury to his hand in March of 1999, but did not sustain permanent impairment or undergo surgery. In August of 1999 he was “picking up a tire and putting it on the bush hog, getting it out of the way” when he apparently “twisted the wrong way,” but this claim was denied.

Claimant sustained his first compensable injury on October 16, 2001. He was “pulling a PTO shaft apart ... on a tractor, a bus[h] hog.” Claimant reported to Dr. Thomas Roberts on October 24, 2001 that “[h]e was pulling some PTO shafts and had sharp pain in the middle of his lower back.” An MRI study dated October 29, 2001 produced an impression of “[l]arge central and slightly left paracentral disk protrusion at L4-L5 causing significant mass effect on the thecal sac.” Claimant underwent conservative treatment including physical therapy and medication; he remained off work and received temporary disability benefits until Dr. Roberts released him on March 4, 2002. Dr. Roberts imposed restrictions in his March 4, 2002 note: “Lifting limitations of 50 lbs. maximum and precautions against forward bending and lifting.” Dr. Roberts also assigned a 7% whole body permanent partial impairment rating; Respondent #1 accepted and paid this rating.

Between his first and second compensable injuries, Claimant was able to perform his job with Respondent #1.

Q. You went back doing the same job as before?

A. Same thing.

Q. Were you able to physically tolerate the job?

A. Yes.

Q. Did you ever have any physical problems as a result of the job; was there anything about the physical aspects of the job that was more difficult after 2002?

A. No.

Q. You were able to do your job everyday?

A. Every day.

Q. Did you miss any work between '02 and '03 for your back, until it got hurt again?

A. Not from my back.

Q. Did you see a doctor for your back between March 4th of '02 and May 29th of '03?

A. No.

Claimant sustained his second compensable injury on May 29, 2003 when he "was lifting bags of cement out of the back of a truck." Claimant estimated that these bags weighed eighty pounds. Claimant did not seek medical attention right away because he thought he "could work and try to work it out," but he eventually presented to an emergency room on June 9, 2003. Claimant was taken off work. An MRI study dated June 12, 2003 resulted in the following impression:

This patient had a prior disk herniation on the left side at L4-L5. There has been an interval change in this disk herniation with a large free fragment now seen within the axillary recess of the left L5 nerve root. This also displaces the left S1 nerve root posteriorly. There is bilateral foraminal stenosis at this level.

Dr. Edward Saer initially evaluated Claimant on June 19, 2003; after examining Claimant and reviewing his studies, Dr. Saer diagnosed a “[h]erniated nucleus pulposus L4-5 left side.” Dr. Saer concluded “that the best way to give [Claimant] some relief would be to surgically to take it out.” Claimant underwent surgery on June 23, 2003, a disc excision at L4-5 left.

Claimant continued to follow up with Dr. Saer, who “released him to return to work with some restrictions on lifting and shoveling, effective 9/18/03.” Claimant testified that he returned to work on that date, spending part of the day flagging traffic and the other part of the day cutting limbs away from signs. He testified:

Well, I got to where I couldn't even get out of bed. That was that - I worked that Thursday, which was the 18th. When I come in, I told my wife I was just wore out because of doing what I done that day. So I went and laid up on Saturday. On Sunday, I got up to take a shower; and the pain hit me so bad that I couldn't even back - I like to not got back in bed, and I stayed in bed until the ambulance come and got me.

Claimant recalled that the pain “was a lot worse” than it was after his May 29, 2003 injury. An MRI study of Claimant’s lumbar spine dated September 22, 2003 reported “[b]road-based bulge with left paracentral disc extrusion at the L4-5 level. There is mild central stenosis with mass effect on the intracanalicular left L5 nerve root. The exiting L4 nerve root is unremarkable at this time.” On September 23, 2003, Dr. Saer diagnosed a “[r]ecurrent herniated nucleus pulposus, L4-5 left.” Claimant underwent another surgery to excise the recurrent disc herniation at this level on September 24, 2003.

Claimant remained off work and continued to receive treatment from Dr. Saer. After a period of therapy, Dr. Saer arranged for Claimant to undergo a functional capacity evaluation. The summary report of this evaluation is dated February 24, 2004. It found

that Claimant gave full physical effort; it further found his “subjective reports of pain and associated disability to be both reasonable and reliable.” Claimant “did not meet the Medium physical demand level as described by the Dictionary of Occupational Titles (DOT) for Maintenance Worker-Highway.” Claimant understood the FCE meant “[t]hat mostly light duty work is what I could do.” Dr. Saer concluded that Claimant “is really pretty limited according to [the] FCE....”

After another MRI, Dr. Saer examined Claimant on March 25, 2004. He noted Claimant’s continuing complaints of pain and reviewed Claimant’s latest study. He concluded:

I do not think he is going to require any more surgical treatment for this. I reassured him about that. I encouraged him to continue with his exercising. I think he is at MMI from the standpoint of his surgery, and I would estimate an impairment of 12% to the body as a whole, using AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. He may require further medical management for his back problems, and if so, I would suggest that he see a psychiatrist who deals with this type of problem.

Dr. Saer completed two forms. On one, he indicated that Claimant could only flag traffic and intermittently pick up litter; he prohibited activities such as lifting up to fifty pounds, shoveling, driving a tractor or dump truck, or repetitive motion. On the other, Dr. Saer indicated that Claimant could not lift more than twenty pounds, and that he should not bend, squat, or climb more than one-third of his work day. He believed that Claimant could use his hands for repetitive simple grasping, pushing, pulling, or manipulation. In a letter dated April 15, 2004, he explained that Claimant’s 12% whole body impairment assigned on March 25, 2004 “should include the previous impairment given by Dr. Roberts in 2002.”

After being released by Dr. Saer, Claimant worked three weeks for Respondent #1. He described a number of physical activities he attempted before his last day of actual

work, April 22, 2004. He described what made the pain worse:

The last day I worked there, I had to watch - there was a hole inside the highway, and you had to stand out there by it and wait until - the traffic was coming in and out that driveway, and we were waiting on a truck to come and put the asphalt in it. But the day before that was when we flagged traffic. I think I flagged it three-and-a-half hours that day, and that really hurt me.

Claimant told a supervisor that he was hurting and needed to go to a doctor, and resumed his treatment. He presented to a handful of doctors, but is currently being treated by Dr. William Ackerman. His treatment has included injections, which have not provided relief, and medication.

Claimant testified to his current restrictions: "As far as picking up, very little, and bending, which is still a problem. There's a weight limit of ten pounds, which is very light." He now takes five different types of medication including Hydorcodone, Trazodone, Liquiderm patches, and Gabitril. Claimant testified that these medications treat, among other things, his muscle spasms and pain. He was asked whether he could perform his former jobs:

Q. Early on, we reviewed all the different jobs you've done in your past. Sitting here today, do you know of any of the jobs you've done in the past that you could go back to and perform today?

A. I don't think I could on the weight, as far as what I was doing back then.

Q. Do you think you could go back to driving a truck on a route?

A. No.

Q. Do you think you could go back to driving around making deliveries of heavy items to people?

A. No.

Q. Do you think you could stock in a grocery store again?

A. No.

Q. Do you think you could load a truck in a rice mill?

A. No.

Q. You don't think you could take a pinball machine or a vending machine out of a truck and move it in somewhere?

A. No.

Q. Have you thought about going back to school?

A. Never thought about it.

Q. Do you think you'd be able to sit for a full 50-minute class without having to move around?

A. That's depending on the chair, most likely.

Claimant would like to try to return to work because he needs the money; he could see himself returning to work in the next three to five years if possible. He has filed for social security benefits, but his claim is still pending.

As to his current condition, Claimant hurts in his back and down into his left leg. "It feels like my leg is just weighted down on my left side. It's just always bunched up or boxed up. If it wasn't for pills, I couldn't cope. I don't like to take pills, but I've got to." He explained how his 2003 injury was different from his prior injuries:

They call it pain, but it's unbelievable how you feel when you have a back problem. When it ruptured, it just - it'll make sweat pop out on you just like that. I mean, it's just so much pain you cannot move.

He added that it was "[a] totally different feeling and everything."

On cross-examination, Claimant was asked about Dr. Joseph Farmer's statement in his September 22, 2003 emergency room note, that Claimant "did some yard work and believes he hurt himself doing so. He began to have low back pain with radicular pain

down the left leg.” Claimant denied doing any yard work, and did not have any idea where Dr. Farmer would have acquired that information. It should be noted that Dr. Saer’s contemporaneous records do not mention yard work.

Claimant attempted to return to work after April 26, 2004, but Respondent #1 could not use him under his restrictions. He explained: “They cannot use me with the limitations I’ve got. That’s the reason I’m not at work right now.” Claimant has not attempted to find employment elsewhere since his last day of work for Respondent #1 in April of 2004. He confirmed that he is not asking for vocational rehabilitation, re-education, or retraining: “I mean, I want my job. If they’ve got the job for me, that’s what I want.”

Some of Claimant’s medical records dating after April of 2004 are relevant to the questions presented. On May 14, 2004, Dr. Brent Sprinkle examined Claimant. Noting his FCE and the return to work statement completed by Dr. Saer, Dr. Sprinkle “recommended that the return to work restrictions be based on that functional capacity evaluation from early February 2004.” On July 23, 2004, Dr. Sprinkle declared Claimant at maximum medical improvement from a physical medicine and rehabilitation perspective. Dr. Sprinkle explained: “I just do not have anything further to offer him to try to make him better.”

Dr. Ackerman first examined Claimant on September 29, 2004. He noted Claimant’s complaints of pain and inability to work. Dr. Ackerman attempted injections, as did Dr. Sprinkle; these injections did not provide Claimant with lasting relief. On October 28, 2004, Dr. Ackerman explained to Claimant that he needs an occupation where he can sit and stand periodically; “[p]rolonged sitting or standing will have an adverse effect on his back.” Dr. Ackerman further opined that Claimant “will require medications for the rest of his life as a result of his work related injury and surgery. I do not feel that further injection

therapy is warranted at this time. He will need anticonvulsant medications for neuropathic pain because of frequent muscle spasms. ... This medications [sic] will be expected to be needed long term.” On that same date, Dr. Ackerman issued Claimant work restrictions of no lifting over ten pounds, no bending or stooping, and alternating sitting and standing.

A. Permanent Total Disability Benefits

Claimant seeks a determination that he is permanently and totally disabled. “Permanent total disability” means inability, because of compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving his inability to earn any meaningful wage in the same or other employment; he must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

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

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

may affect an employee's future earning capacity, the court considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes our assessment of the claimant's loss of earning capacity.

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

_____As found above, Claimant has been assigned a total impairment rating of 12% to the body as a whole. Nonetheless, I find that Claimant failed to sustain his burden of proving by a preponderance of the evidence that he is not able, because of compensable injury, to earn any meaningful wages in the same or other employment. See Ark. Code Ann. § 11-9-519(e). Claimant's February 24, 2004 functional capacity evaluation indicates that Claimant can perform some physical activities. Both Dr. Saer and Dr. Ackerman have released Claimant to return to work, albeit with restrictions. Indeed, Claimant himself wishes to return to work, and would take his old job back if possible. I also note that Claimant has not attempted to find work with any other employer since April of 2004, which impedes an assessment of his loss of earning capacity. On this record, Claimant did not sustain his burden of proving entitlement to benefits based upon permanent total disability.

B. Wage-Loss Disability Benefits

In the alternative, Claimant seeks wage-loss disability benefits. Since he has been assessed with a total of 12% permanent impairment rating to the body as a whole, the Commission may consider his claim for wage-loss disability in excess of permanent physical impairment. See Ark. Code Ann. § 11-9-522(b)(1). The wage-loss factors and

major cause requirement are noted above.

At the time of the hearing, Claimant was 50 years of age, had a high school education, and had no other specialized training or education. Although there are some supervisory positions in his work history, that work history is primarily in service or manual labor positions. Claimant's two surgeries at L4-5 failed to alleviate his complaints of pain; Dr. Ackerman believes that Claimant will need medication for the rest of his life. While Claimant has been released to return to work, the restrictions imposed upon him by Dr. Ackerman limit the employment available to him. Dr. Saer concluded that Claimant "is really pretty limited according to [his] FCE...." Claimant does seem motivated to return to work; he testified that he needs to work, and that he would take his old job back. On the other hand, it should be noted that Claimant has not sought employment with any other employer since April of 2004. Claimant can perform some level of work.

After considering all wage-loss factors, I find that Claimant has established a decrease in his wage earning capacity equal to 45% to the body as a whole. Further, I find that Claimant did prove by a preponderance of the evidence that his compensable injuries are the major cause of his decrease in earning capacity. Claimant could perform his job duties prior to his October 16, 2001 compensable injury; although he was somewhat impaired, he still could perform his job duties prior to his May 29, 2003 compensable injury. However, after this second compensable injury, Claimant has been unable to perform his job duties, as demonstrated by his testimony and corroborated by the February 24, 2004 functional capacity evaluation. Thus, the record demonstrates that Claimant's compensable injuries are the sole, and thus the major, cause for his decrease in his earning capacity. He is entitled to benefits for this decrease in his wage earning capacity.

C. Liability of Respondent #2

After Claimant's first compensable injury on October 16, 2001, an MRI study dated October 29, 2001 revealed a disc protrusion at L4-5. Dr. Roberts treated Claimant conservatively, without surgery, and released him on March 4, 2002. In his note of that date, Dr. Roberts opined: "I think he will continue to have some problems intermittently with his back." He assigned Claimant a 7% permanent partial impairment rating.

Claimant's second compensable injury on May 29, 2003 was followed by an MRI study dated June 12, 2003, which found in part: "This patient had a prior disk herniation on the left side at L4-L5. There has been an interval change in this disk herniation with a large free fragment now seen...." In his June 19, 2003 note, Dr. Saer referred to Claimant's "long-standing herniated disk." In a letter to Dr. Roberts dated June 19, 2003, Dr. Saer elaborated on Claimant's history:

His x-rays show some narrowing and mild degenerative changes at L4-5 and L5-S1. MRI films from 2001 were reviewed and show a left-sided disk herniation at L4-5. His recent MRI done last week was reviewed and shows a very large left-sided disk herniation with an extruded fragment. This seems to be causing significant compression to the L5 nerve root and possibly S1 too.

Tom, I think he is at the point where he is going to need to have something done surgically. His symptoms are quite severe, and he does have some weakness in his leg. I just do not think that continued nonoperative management is likely to help this.

Claimant's June 23, 2003 surgery involved the same level that was at issue in 2001, L4-5.

Finally, it should be noted that Dr. Saer assigned Claimant a 12% permanent impairment rating on March 25, 2004. In a letter dated April 15, 2004, Dr. Saer clarified that this 12% rating "should include the previous impairment given by Dr. Roberts in 2002."

The Second Injury Fund's liability is addressed in Ark. Code Ann. § 11-9-525. The

test for determining the Fund's liability is well known:

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

POM, Inc. v. Taylor, 325 Ark. 334, 336, 925 S.W.2d 790, ____ (1996); see Koonce v. Cedarville Waterworks, Full Workers' Compensation Commission Opinion filed April 13, 2005 (F107049 and F211475).

Based upon the record, I find that wage-loss disability benefits awarded to the Claimant are the responsibility of the Second Injury Fund. I find that Claimant did suffer a compensable injury at his present place of employment: the parties stipulated that Claimant sustained a compensable back injury on May 29, 2003, and the evidence demonstrates that this occurred while he was in the employment of Respondent #1. I further find that, prior to this second compensable injury, Claimant had a permanent partial impairment rating of 7% to the body as a whole. The parties stipulated to this rating.

Finally, I find that Claimant's prior impairment combined with his second compensable injury to produce his current disability status. There is testimony in the record indicating that Claimant worked without needing further medical attention for his back after he was released following his first compensable injury. However, the Supreme Court has noted:

[W]here there is medical evidence that the two injuries combined to produce the current disability rating, contradictory evidence that the claimant was able to return to the same type of labor after his first injury is not determinative of the Second Injury Fund's liability. However, while the ability to work and lack of wage loss cannot be used alone to contradict the medical evidence, it may be used to corroborate it when combined with other evidence, e.g., medical testimony that the Claimant was cured after his first injury.

POM, Inc., 325 Ark. at 337, 925 S.W.2d at ___. Here, the evidence indicates that Claimant was not “cured” after his first compensable injury. Upon releasing Claimant on March 4, 2002, Dr. Roberts recorded his belief that Claimant “will continue to have some problems intermittently with his back.” It should be noted that Claimant’s 2001 and 2003 herniated disc problems occurred at the same level, L4-5. A combination between the prior impairment and second compensable injury is further supported by Dr. Saer’s June 19, 2003 characterization of Claimant’s “long-standing herniated disk.” Finally, Dr. Saer appears to have attributed the majority of Claimant’s total permanent impairment rating to conditions that preexisted the second compensable injury; of his total 12% rating, Dr. Saer attributed 7% to Claimant’s first compensable injury. Cf. Douglas Tobacco Prods. Co. v. Gerrald, 68 Ark. App. 304, 310, 8 S.W.3d 39, ___ (1999) (noting that a doctor attributed the majority of the employee’s permanent impairment rating to conditions that preexisted the compensable injury). On this record, the medical evidence demonstrates that the prior impairment and second compensable injury combined to produce Claimant’s current disability status; evidence that Claimant could work between his two compensable injuries is not determinative of Respondent #2's liability.

D. Issues 4 and 5

This Opinion finds that Claimant did not sustain his burden of proving that he is permanently and totally disabled. Therefore, it is not necessary to discuss issues 4 and 5, relating to the liability of the Death and Permanent Total Disability Trust Fund. Compare Ark. Code Ann. § 11-9-502(b) (providing for payments by the Fund if benefits for death or permanent total disability have been paid to the claimant).

E. Attorney's Fee

Attorney's fees shall only be allowed on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This Opinion awards Claimant wage-loss disability benefits based upon the relevant factors. The parties stipulated that Respondents all controvert Claimant's eligibility for benefits beyond those already paid. However, Respondent #1 is not ordered to pay any benefits, and as noted above, Respondent #3 is not liable for the payment of benefits to Claimant. Thus, Claimant is entitled to an award of an attorney's fee pursuant to the statute to be paid by Respondent #2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationships existed on October 16, 2001; May 29, 2003; and at all other relevant times.
3. Claimant sustained a compensable low back injury on October 16, 2001; Respondent #1 accepted and paid a 7% to the body as a whole impairment rating arising from this compensable injury.
4. Claimant sustained a compensable back injury on May 29, 2003; Respondent #1 accepted and paid a 5% to the body as a whole impairment rating arising from this compensable injury.
5. Claimant's average weekly wage was \$599.32 as of Claimant's second injury; his temporary total disability rate is \$400.00; and his permanent partial disability rate is \$300.00.
6. Respondents controvert Claimant's eligibility for benefits beyond those already paid.

7. Claimant reached maximum medical improvement on March 25, 2004.

8. Claimant could not have been permanently and totally disabled prior to his last date worked, April 26, 2004.

9. Claimant did not sustain his burden of proving by a preponderance of the evidence that he is entitled to permanent total disability benefits. His February 24, 2004 functional capacity evaluation indicates that Claimant can perform some physical activities; both Dr. Saer and Dr. Ackerman released Claimant to return to work, albeit with restrictions. Claimant has not attempted to find work with any other employer since April of 2004, which impedes an assessment of his loss of earning capacity.

10. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in his wage earning capacity equal to 45% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. Claimant did prove by a preponderance of the evidence that his compensable injuries are the major cause of his decrease in his earning capacity. These injuries are the sole, and thus the major, cause of this decrease.

11. Respondent #2 is liable for wage-loss disability benefits payable to Claimant. The parties stipulated that Claimant suffered his second compensable injury; this occurred in the course of his employment with Respondent #1. Prior to his second injury, Claimant had a permanent partial impairment rating of 7%, stemming from his first compensable injury. Based upon the medical records and statements of Dr. Roberts and Dr. Saer, Claimant's prior impairment combined with his second compensable injury to produce his current disability status. His first and second compensable injuries involved the same level, L4-5; after his second compensable injury, Dr. Saer referred to this as a "long-standing

herniated disk.”

12. Because this Opinion finds that Claimant did not sustain his burden of proving that he is permanently and totally disabled, it is not necessary to determine issues 4 and 5.

13. Claimant’s attorney is entitled to the maximum prescribed attorney’s fee under Ark. Code Ann. § 11-9-715, to be paid by Respondent #2.

AWARD

Respondent #2 is directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant’s attorney is entitled to the maximum statutory attorney’s fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent #2 in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml