

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F107697

JAMES ELLENBERG, EMPLOYEE	CLAIMANT
BURNETT GIBBS MOTORS, INC., EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED NOVEMBER 17, 2006

Hearing before Administrative Law Judge Barbara Webb on August 11, 2006, in Pine Bluff, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 represented by Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas.

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

Respondent No. 3 not represented by counsel at the hearing.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on August 11, 2006, before Administrative Law Judge Barbara Webb. A Prehearing Order was entered in this case on May 22, 2006. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Claimant suffered a compensable injury on May 17, 2001, to the neck and back.
3. Claimant was entitled to the maximum compensation rate for his 2001 injury of \$410.00 for TTD and \$308.00 for PPD.
4. Respondents No. 1 accepted a total of 17% anatomical impairment rating, consisting of 10% to the neck, an additional 2% to the neck, and 5% to the back.
5. Respondents No. 1 paid temporary total disability benefits through August 11, 2004.

By agreement of the parties, the issues to be litigated are:

1. When claimant's healing period ended.
2. Whether claimant is entitled to wage loss. Alternatively, whether claimant is entitled to permanent and total disability benefits.

The record consists of a one volume transcript of the August 11, 2006, hearing, consisting of the testimony of James Ellenberg and Tanya Rutherford Owen, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Claimant's Exhibit No. 2 (non-medical records); Respondents' No. 1 Exhibit No. 1 (updated medical records); and Respondents' No. 1 Exhibit No. 2 (updated medical records); Respondents' No. 1 Exhibit No. 3 (letter of Owen Vocational Services); Respondents' No.1 Exhibit No. 4 (vocational rehab report); Respondents' No. 1 Exhibit No. 5 (Deposition of Barbara McDaniel); Respondents' No. 1

Exhibit No. 6 (Deposition of Tanya Rutherford Owen); Respondent No. 3's Exhibit No. 1 (Letter of Judy Rudd). In addition, the transcript and exhibits from the May 22, 2003, hearing and all previous Orders in the case are incorporated by reference and made a part of this record as Joint Exhibit No. 1.

A hearing was held in connection with this case on May 22, 2003, before Administrative Law Judge Don N. Curdie. At that time, Respondents No. 1 and 2 stipulated that Ellenberg sustained a compensable cervical spine injury on May 17, 2001, but controverted the issue of compensability of a low back injury on May 17, 2001, and related benefits. By Opinion dated August 8, 2003, the ALJ found that Ellenberg also sustained a compensable low back injury on May 17, 2001, and "that the claimant has remained in his healing period and totally incapacitated from earning wages from February 13, 2003 to a date yet to be determined for both his compensable neck and compensable back injuries". Ellenberg was awarded temporary total disability benefits to a date yet to be determined, medical benefits, and attorneys fees.

CONTENTIONS

In the instant hearing, Ellenberg contends that his healing period ended on or about January 10, 2006, and that he is entitled to additional temporary total disability benefits from August 11, 2004 through January 10, 2006. Alternatively, Ellenberg contends that if the healing period ended on August 11, 2004, he sought additional medical treatment from Dr. Ward and entered a subsequent healing period after August 11, 2006, which ended on January 10, 2006. Ellenberg further contends that he is entitled wage loss disability and/or permanent and total disability benefits.

Burnett Gibbs Motors, Inc. and Central Arkansas Auto Dealers Self-Insured Fund ("Burnett Gibbs"), Respondents No. 1 contend that Ellenberg has been provided all appropriate benefits to which he is entitled. Burnett Gibbs contends that claimant's healing period ended in August 2004 and that he is not entitled to additional temporary total disability benefits. Burnett Gibbs contends that claimant is not entitled to wage loss or permanent total disability benefits. Alternatively, if it is found that claimant is entitled to wage loss or permanent total disability benefits, Respondents No. 1 contend that the Second Injury Fund would be liable due to disabilities resulting from a combination of all medical issues.

Respondent No. 2, Second Injury Fund (SIF), contends that it does not have liability in this claim because Ellenberg's disability is a result of his May 17, 2001 compensable injury in and of itself. Alternatively, if the SIF is found to be liable, SIF contends that Ellenberg cannot prove that he is permanently and totally disabled.

Respondent No. 3, Death & Permanent Total Disability Trust Fund (the Trust Fund), contends that SIF liability must be determined prior to consideration of the Trust Fund's liability. If the SIF is found to not have liability and Ellenberg 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. The Trust Fund has not controverted the claimant's entitlement to benefits.

FACTUAL BACKGROUND

Ellenberg is 45 years old (DOB: 5-7-61). He completed the twelfth grade and approximately 18 to 23 hours of higher education at the Phillips County Community College in Stuttgart, including Microsoft Applications and Networking. He worked as an automobile

mechanic for 20 years and holds certificates of completion of Pontiac and Buick GM training courses.

Ellenberg worked at Burnett Gibbs for approximately 12 to 13 years. At the time of his work-related injury, he was employed as a mechanical technician, making \$70,000.00 a year. He was injured on May 17, 2001, while he was pulling a car on a floor jack which stopped suddenly when the jack hit a concrete ledge in the shop. He reported immediate back pain and later began having neck pain and numbness in his left hand. He was treated by Dr. Adametz who determined that Ellenberg had herniated and bulging discs in his neck as a result of an MRI in July of 2001. Ellenberg continued in his regular employment until he was taken off work for surgery. He underwent his first surgery to the C6-7 area on July 20, 2001. After his first neck surgery in July of 2000, he returned to work at Burnett Gibbs and worked until December of 2001. He underwent a second surgery to the C3-4 area on April 16, 2002. He underwent a third surgery to the same area on May 31, 2002. The third surgery was basically to remove a piece of hardware that didn't fit properly. All of the surgeries were performed by Dr. Adametz.

He returned to Burnett Gibbs in July of 2002 about going back to work. Ellenberg testified that Burnett Gibbs were going to put him back to work, but he became disgruntled because he was going to receive a pay cut of 15 percent. He voluntarily left employment with Burnett Gibbs in July of 2002. In August of 2002, he went to work for IPSCO, a manufacturer of engines, as a generator technician, and continued there until February of 2003. At IPSCO, he explained that he worked approximately 48 hours a week.

In September of 2002, Dr. Adametz assigned the claimant a total of 12% to the body as a whole for his neck surgeries and condition. By September of 2002, the claimant's

neck had improved, but his back pain had increased. He continued to treat with Dr. Adametz and was referred to physical therapy and received steroid injections for lower back pain. He was released by Dr. Adametz on July 16, 2004 to return to light-duty work, and encouraged to get off any narcotics medications. On August 31, 2004, Dr. Adametz assigned an additional 5% impairment rating for the bulging disk in his back in accordance with the AMA Guides in combination with the total of 12% impairment previously assigned due to problems with his neck.

On January 18, 2005, Jerry Daniel performed a functional capacity evaluation (FCE) of Ellenberg. The results indicated that Ellenberg was able to work at a light physical demand for an 8 hour day with some accommodations. On March 1, 2005, Dr. Adametz reported "As far as work goes, he did undergo a functional capacity evaluation and apparently put on a good effort on it. They recommended light duty type work and so I would recommend that as well."

He began treating with Dr. Ward on May 16, 2005 for chronic pain management. Dr. Ward gave him Marcaine injections in his back, prescribed pain and depression medication, and provided a list of exercises. On January 10, 2006, Dr. Ward opined in a written report that the claimant had reached maximum medical improvement and released him from further treatment other than routine follow-up in connection with his prescription medications.

At the hearing, Ellenberg testified that he could not kneel and that he could not walk around as much as he had at the time of the FCE. He stated that his right leg stayed numb and that he had balance problems. He testified that he had never had any back or neck problems before the accident, and that the only prior medical problem was a shoulder

rotator cuff tear, from which he had a complete recovery. He described his a typical day, as follows:

in the mornings I will check my email, read the newspaper, check the web, then I may cook something in the toaster, and then I have to lay back down or prop back up on the couch again and just watch t.v. until -- well, if I didn't get to sleep the night before, I would be taking a nap probably around 11:00 to 12:00.

He explained that he walks outside in the afternoons and could walk about 150 feet. He testified that he used a cane for balance and that his condition had gotten worse over the past seven or eight months. He explained that he could take care of his personal hygiene requirements. He is able to shop for groceries, but cannot do his own housework, except the trash and the laundry. He continues taking numerous medications, including Benzo, Lexapro, Lyrica, Xanax, Soma, Lunesta, and Celebrex. He testified that he can walk about 150 feet. He has no experience doing office work, secretarial, or clerical work. He explained that his concentration was not too good. He explained that he had been denied Social Security benefits and is supported by loans from his friends and family. He explained that he had not worked since February of 2003 and received food stamps. He applied for unemployment benefits in 2004, stating that he was willing and able to go back to work, but did not receive benefits due to the fact there was no money in his account to draw. He testified that he had stopped doing woodworking in the winter of 2005, but went fishing and deer hunting, and squirrel hunting in 2005 -2006. He signed up at Arkansas Rehabilitation Services and was qualified to attend classes. He did not sign up for the classes in August of 2005 or in January of 2006. He explained that he did not sign up there because he did not believe he could sit through the class. He testified he could not do a job involving

computer work because he could not type over 15 to 20 minutes due to carpal tunnel problems.

Ellenberg testified that his low back was his major problem and his neck was such that he still couldn't perform certain job duties at Burnett Gibbs. The cane he is using is not prescribed by a medical physician. He agreed that he walked away from a job where he would still be earning over \$60,000 a year. When he went to work for IPSCO, he made \$14.50 an hour, and estimated that his yearly pay with overtime would be \$60,000.

On cross-examination, he testified that he had 22 hours of college credit, which he began in 2000, including four semesters of computer networking. He owns a computer and uses his e-mail service. He reads the newspaper on line, checks the weather, and uses the Internet.

The claimant's medical records reflect that claimant was first prescribed depression medication, Paxil, in 1998, in connection with a diagnosis that he suffers from social anxiety disorder, i.e. he does not want to get out in public and basically wanted to stay in his house. In January of 1999, he was treated by Dr. Adametz for his lower back and had surgery on his left shoulder. He received an impairment rating of five percent as a result of the shoulder injury. He also suffers from carpal tunnel syndrome, which began prior to 2001, which causes his hand to go numb and hurts when he attempts to pick up heavy objects. Although he testified that he had never had problems with his back before, he agreed that he had seen Dr. Hahn in June of 2001 and received an injection in his back and was having lower back pain at that time.

He explained that the low back problems prior to his injury in 2001 were not similar to his current condition. He testified that he had thought about looking into Internet

courses, but could not type on the Internet due to his carpal tunnel. He testified that he has not sought treatment for carpal tunnel for several years. He stated that he was not able to return to work under his current conditions. He explained that the work at IPSCO was easier physically than the mechanic shop work. He explained that the reason he did not enroll in Phillips County Community College was due to difficulty in sitting and lack of concentration.

He testified that he lived in Stuttgart in May of 2001 and moved to DeWitt in December of 2003. He acknowledged that his test results at Arkansas Rehabilitation Services were above average. He explained that he was hired at IPSCO even though he was taking medication and muscle relaxers. He has divorced since the date of the accident, which he attributes to the accident, and has also had to file bankruptcy.

Tonya Owen was also called as a witness. She testified that she was a vocational rehabilitation counselor. She has a Master's Degree in Counseling and Psychology. She is a certified rehabilitation counselor by the National Board of Certified Counselors, and works under contract with the U. S. Department of Labor, providing vocational rehabilitation services to federally employed injured workers. She performed a vocational evaluation on the claimant in a report dated April 6, 2006. She explained that she met with the claimant for a vocational interview and reviewed all available medical records and conducted labor market research and a transferrable skills analysis. She personally met with the claimant for approximately an hour and a half. She determined that the claimant was currently unemployed. Her first recommendation was that the claimant resume the Arkansas Rehabilitation Services training program. She concluded that he was able to undergo the

training. She conducted a transferrable skills analysis to determine what type of work he could do with his residual functional capacity found in the FCE, and determined what types of jobs might be available to him. She also has conducted an additional labor market survey with respect to the claimant over the week of July 24 through July 28 in DeWitt and surrounding areas. She found 13 job openings that appeared to be within the claimant's residual functional capacity. She conducted additional research for the week of July 31 through August 3 and located three openings. Considering the fact that Ellenberg needed to stand and sit periodically, she focused her job search into office-type jobs where one can typically sit and stand as needed. She explained that if she has a client that signs up for college classes and has a problem with sitting and standing, she accompanies the student to the disabled student services office and provides evidence of the person's disability and their need for accommodation. She explained that typically the student would be asked to sit in the back of the class so they don't disrupt people in the front and that they can stand along the back of the wall or sit and stand as needed. She indicated that her test results indicated that the claimant had an above-average capacity in reading comprehension, high school level in math and spelling, and would likely be successful in a traditional college format. She did not identify any problems with concentration or memory during her meeting with him. She explained that the claimant had indicated to her that he didn't feel like he could work an eight-hour day and therefore anticipated placement to be extremely difficult.

On cross-examination, she agreed that it was harder to place someone with disabilities. She acknowledged that her computer program showed some jobs that exceeded 50 miles. She testified that due to Ellenberg's concerns about full time

employment, she also was able to locate two available part-time jobs. She testified that she located available jobs in DeWitt that could be performed within the claimant's restrictions.

Barbara McDaniel testified by way of deposition. She is employed as a counselor for Arkansas County for Arkansas Rehabilitation Services and met with the claimant in March of 2005. Based on her testing results, she explained that she determined that Ellenberg is bright and has the capacity to find success in many different careers.

Ellenberg testified that he would like to return to work if his back was fixed. He explained that he could not type very long, perhaps 10 to 15 minutes. He testified that he had not had medical treatment for his carpal tunnel problem because he did not have insurance and did not have money to go to the doctor. He agreed that he had not applied for a job since February of 2003.

The medical records in the case reflect that the claimant was injured on May 17, 2001. After several years of medical treatment, including three surgeries, a functional capacity evaluation was performed on January 18, 2005. At that time, the report indicated that the claimant could safely perform work tasks within the light physical demand level. On March 1, 2005, Dr. Adametz opined that the claimant had been recommended for light-duty type work and he agreed with that recommendation. On January 10, 2006, Dr. Ward opined "based upon a reasonable degree of medical certainty and to the best of my ability, Mr. Ellenberg has reached the point of maximum medical improvement and will no longer have future improvements from treatment rendered from our office for this condition."

On February 13, 2006, the claimant underwent an independent medical evaluation conducted by Dr. Brent Sprinkle. Based on his review and evaluations, he determined that

the claimant had cervical and lumbar degenerative disk disease. He noted that the lumbar degenerative disk disease was most likely pre-existing, as a combination of the type of the work that he has done, as well as his history of smoking, but "I do not think the degenerative disk disease in the lumbar spine is related to his specific work injury." He recommended facet joint injections and a change in the medications for pain and depression, as well as a home exercise and stretching program. He opined that he did not think Botox injections would be beneficial and would be at a considerable risk for worsening his pain and destabilizing his spine, which would exacerbate his chronic degenerative disk disease. Beyond that, he opined that he did not see any indication that any further treatment related to his work injury would be beneficial. He did not conclude any permanent impairment rating to his lumbar spine regarding his work injury, noting that some of the degenerative disk changes could produce impairment but were not caused by his work injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The claimant sustained a compensable injury on May 17, 2001 to the neck and back.
3. A maximum compensation rate for a 2001 injury of \$410.00 for TTD and \$308.00 for PPD.
4. Respondents No. 1 accepted a total of 17% anatomical impairment rating.
5. Claimant reached the end of his healing period on August 31, 2004.
6. Claimant's medical treatment after August 31, 2004, with Dr. Ward was for the purpose of pain management and did not constitute a new healing period.

7. Claimant has failed to prove by preponderance of the evidence that he is entitled to permanent and total disability benefits in that he has been released to return to light duty work.
8. Claimant has failed to prove by a preponderance of the evidence that he is entitled to wage loss benefits.
9. The preponderance of the evidence demonstrates that there is no Second Injury Fund liability in this case since claimant's permanent partial impairment is directly related to his May 17, 2001 work-related injury.

DISCUSSION

End of Healing Period

The threshold issue in this case is a determination of when Ellenberg's healing period ended. Stated differently, the determination of when Ellenberg reached maximum medical improvement.

The Arkansas Workers' Compensation Act does not define maximum medical improvement. However, Ark. Code Ann. § 11-9-102(12) states that "healing period' means that period for healing of an injury resulting from an accident. The healing period ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. Clairday vs. The Lilly Company, Inc., No. CA05-696, (April 19, 2006). The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not of

itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982); Arkansas Highway & Transportation Department v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

In the instant case, there is overwhelming evidence that Ellenberg's healing period as to his compensable neck injury ended in 2002. However, the Administrative Law Judge found in his earlier Opinion in this case that the claimant was also entitled to temporary total disability benefits and medical benefits for a compensable back injury arising out of the same work-related incident. Both Doctors Adametz and Ward have issued opinions that Ellenberg has reached maximum medical improvement as to his back injuries. In September of 2002, Dr. Adametz assigned the claimant a total of 12% to the body as a whole for his neck surgeries and condition. Although the neck problems improved, the claimant continued to treat with Dr. Adametz for lower back pain. He was released by Dr. Adametz on July 16, 2004 to return to light-duty work, and encouraged to get off any narcotics medications. On August 31, 2004, Dr. Adametz assigned an additional 5% impairment rating for the bulging disk in his back in accordance with the AMA Guides in combination with the total of 12% impairment previously assigned due to problems with his neck. The results of the FCE on January 18, 2005 indicated that Ellenberg was able to work at a light physical demand for an 8 hour day with some accommodations. On March 1, 2005, Dr. Adametz concurred with the recommendation of the FCE.

Ellenberg sought a change of physician and began treating with Dr. Ward on May 16, 2005 for chronic pain management. On January 10, 2006, Dr. Ward opined in a written

report that the claimant had reached maximum medical improvement and released him from further treatment.

In the instant case, Ellenberg has been treated by a number of doctors and exhausted all possible medical treatment options with no lasting improvement. The evidence has demonstrated that epidural steroid injections gave the claimant only transient relief and over time were no longer effective. Physical therapy was not proven effective.

Based on the preponderance of the evidence in the case, I find that the claimant reached the end of his healing period for his neck in July of 2002 and the end of his healing period for his back injury on July 16, 2004, when he was released to return to work. At that time, Dr. Adametz opined that there was no further medical intervention needed. Moreover, the medical evidence in the case demonstrates that all subsequent treatment including the treatment by Dr. Ward has been directed at relieving pain symptoms and not intended to be a cure for the claimant's condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124 , 628 S.W.2d 582 (1982).

Permanent Anatomical Impairment

Ark. Code Ann. § 11-9-704(c)(B)(Repl. 2002) provides that “[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.” Further, permanent disability “benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” Ark. Code Ann. § 11-9-102(4)(F)(ii)(a)(Supp. 2002). The Commission had adopted the American Medical Association’s Guides to the Evaluation of Permanent Impairment, (4th Ed 1993) for use in assessing the extent of permanent

anatomical 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 Guides. 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).

In the instant case, the respondents have not controverted and have paid the ratings assigned to claimant by Dr. Adametz. Dr. Sprinkle opined that he did not believe the

claimant's degenerative back problems were related to his on-the-job injury and did not assign an impairment rating attributable to the back problems. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this case, I find that the opinion of Dr. Adametz, the claimant's treating physician should be afforded more weight than the opinion of Dr. Sprinkle. I find that the 5% impairment rating assigned by Dr. Adametz is supported by the medical evidence in this case. Respondents No. 1 have not controverted the ratings as assigned by Dr. Adametz and in fact have paid the ratings to claimant. In contrast, Dr. Sprinkle based his

determination that there was no additional impairment on his conclusion that the back problems were degenerative and not related to the work-related incident. That opinion is in direct conflict with the prior decision in this case that Ellenberg's back problems were connected to the work-related incident.

Permanent and Total Disability

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent anatomical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). To be entitled to any wage-loss disability benefit in excess of permanent physical impairment, a claimant must first prove, by a preponderance of the evidence, that he or she sustained permanent physical impairment as a result of a compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000). 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. Emerson Electric v. Gaston, *supra*.

In determining wage loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. § 11-9-522(b)(2)(Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. § 11-9-522(c)(1). In considering factors that may affect an employee's future earning capacity, the Commission considers the claimant's motivation to return to work, since a lack of interest or a negative attitude impedes the assessment of the claimant's loss of earning capacity. Emerson Electric v. Gaston, *supra*. The Commission

may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii)(Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14) (Repl. 2002). Further, “disability” is defined as an “incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury.” Ark. Code Ann. § 11-9-102(8) (Supp. 1999).

Considering the context in which the terms “permanent benefits” and “disability” are used in Ark. Code Ann. § 11-9-102(5)(F)(ii), the amendments of Act 796 clearly impose a requirement on a claimant seeking compensation for a permanent decrease in earning capacity to show that the compensable injury was the major cause of any decrease in earning capacity to obtain an award of permanent disability benefits.

In the instant case, the preponderance of the evidence clearly demonstrates that claimant is able to return to work. He testified that he left the employment of Burnett Gibbs because he became disgruntled after he was given a decrease in pay that he believed was

due to his on-the-job injury. At that time, he went to work for IPSCO and worked until February of 2003. Although both Dr. Adametz and Ward have released the claimant to light duty work, the claimant has not sought subsequent employment. The vocational expert testified that one of the difficulties in finding work for the claimant was his lack of willingness to work. The rehabilitation expert testified that her test results and observations revealed that the claimant was bright and capable. A rehabilitation plan consisting of a one-year training in computer maintenance was designed with Ellenberg's cooperation and approval. However, Ellenberg failed to enroll in the necessary courses or to seek further assistance in order to complete the training recommended. Based on my review of the credible evidence, I find that claimant does not appear to be motivated to return to work. Therefore, Ellenberg's request for wage loss and/or permanent total disability benefits is denied.

Second Injury Fund

The respondent employer argues that the Second Injury Fund has liability for any anatomical impairment or for any wage loss that the claimant might have sustained. In Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1998), the Arkansas Supreme Court set forth the test for determining Second Injury Fund liability:

It is clear that liability for the Fund comes into question only after three hurdles have been overcome. First, the employee must have suffered a compensable injury in his present place of employment. Second, prior to that injury the employee must have had permanent partial disability or impairment. Third, the disability or impairment must have combined with the recent compensable injury to produce the current disability status. (Original emphasis.)

The last injury “combines” when it, considered with the previous injury, causes a greater disability than the disability produced by the last injury considered alone. See Hawkins Constr. v. Maxell, 52 Ark. App. 116, 915 S.W.2d 302 (1996), *rev’d on other grounds*, 325 Ark. 133, 924 S.W.2d 789 (1996). In other words, if the more recent injury alone would have caused the claimant’s current disability status, the Second Injury Fund has no liability. In addition, “where 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 [Second Injury Fund’s] liability.” POM, Inc. v. Taylor, 325 Ark. 334, 337, 925 S.W.2d 790, 791 (1996). Further, an employee’s ability to return to the same work following a prior injury is simply not determinative of the Second Injury Fund’s liability. POM, Inc. v. Taylor, 325 Ark. 334, 925 S.W.2d 790 (1996).

Before the Second Injury Fund can be liable to pay for an injury, “the claimant’s prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause of the impairment.” See Midstate, 295 Ark. at 6, 746 S.W.2d at 542. As the court in Midstate explained, “[i]t is the substantial nature of the impairment which is emphasized...” Id.

Ellenberg testified that he had no prior medical problems with his neck or back prior to the May 17, 2001 work-related incident or other impairment. However, in response to his vocational rehabilitation plan, he has recently contended that carpal tunnel syndrome precludes his ability to work on a keyboard for a significant period of time. The medical evidence shows the claimant has been diagnosed with a psychological condition which is

controlled by prescription medication and that Ellenberg has not sought recent medical attention for carpal tunnel problems.

Claimant suggests that his carpal tunnel syndrome when combined with his neck and back problems precludes him from completing his vocational training and returning to work. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). While claimant meets the first two requirements by demonstrating that he has a permanent partial disability arising from his work-related compensable injury, there is simply no medical or other credible evidence offered to demonstrate that his current disability is any greater than the disability which has been attributed to his on-the-job injury. Based on the preponderance of the evidence in this case, I find that there is no Second Injury Fund liability.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

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IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge