

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NOS. F113710 & F113474**

<b>BOBBY EMERY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>AUTOZONE, INC., EMPLOYER</b>	<b>RESPONDENT #1</b>
<b>LIBERTY MUTUAL INS. CO., CARRIER</b>	<b>RESPONDENT #1</b>
<b>SECOND INJURY FUND</b>	<b>RESPONDENT #2</b>
<b>DEATH &amp; PERMANENT TOTAL DISABILITY TRUST FUND</b>	<b>RESPONDENT #3</b>

**OPINION FILED NOVEMBER 15, 2006**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 23, 2006, at Newport, Jackson County, Arkansas.

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents #1 represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent #2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent #3 represented by the HONORABLE JUDY W. RUDD, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claims to determine the claimant's entitlement to additional workers' compensation benefits. On June 27, 2006, a pre-hearing conference was conducted in these claims, from which a Pre-hearing Order of the same date was

filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

Respondent #2, the Second Injury Fund, contends that upon completion of discovery, it accepted and acknowledged liability for a 30% wage loss in these claims thereby eliminating one of the issues to be addressed during the course of the hearing. Respondent #2 denies that the afore has been controverted.

The testimony of Bobby Emery, the claimant, coupled with medical reports and other documents comprise the record in this claim.

### **DISCUSSION**

Bobby Timothy Lynn Emery, the claimant, with a date of birth of June 20, 1969, is a 1987 graduate of Tuckerman high school. After nine months in the National Guard claimant attended White River Vo-Tech in Newport for one year in automotive training, which he successfully completed with a degree.

Claimant was employed as an automotive mechanic at University Honda in Jonesboro for approximately a year. The claimant, who resides in Tuckerman, left the employment at University Honda because of the distance and rate of pay. He later secured employment at Madallion Foods in Newport. After starting as a packer claimant progressed into a PMO job, which was going to turn into an electrician maintenance position. Claimant remained at Madallion Foods for a period of three (3) years.

After leaving the employment of Madallion Foods, claimant was employed by Capital Wire, which was also known as General Cable. Claimant was employed by Capital Wire, a

manufacturer of stranded household wire, for five (5) years. Claimant acknowledged having problems with his back in 1994 and 1995:

I was turning a reel of wire in '94, and the reels were like six foot tall. They weighed anywhere - - it just depended on what size wire was on it. Anywhere from 1200 pounds up to 2800 pounds. Most of them were the smaller size, and I was turning the reel of wire like this (indicating). This is the way we had to turn it.

Yeah, you just jerked it to get the - - to start to finally turn, and that's where my first accident happened. (T. 14-15).

Claimant twisted and injured his back while pulling on the reel, and as a result underwent surgery under the care of Dr. Steven Cathey, a North Little neurosurgeon, on November 8, 1994.

Claimant was released to return to work on January 16, 1995, and, in fact returned to work on February 6, 1995. Claimant was assessed with a 10% anatomical impairment as a residual to the injury and surgery. Physical restrictions were imposed on the claimant relative to employment activities growing out injury and surgery which included weight lifting limitation of no more than 50 pounds.

Claimant returned to his job at Capital Wire and resumed performing his pre-injury job duties, which was contrary to the medical imposed restrictions. Claimant maintains that he was supposed to be doing some lighter sort of work. While he inquired and requested the afore of his employer, Capital Wire, he was informed that none was available. After having returned to work for a couple of months for Capital Wire, in April 1995, claimant experienced additional problems regarding his back while discharging his employment duties pushing a skid. :

I just felt, you know, my back pop. I knew I had something go wrong, and, again, it was the turning of the skid and pushing the skid forward, you know, by hand. (T. 18).

Claimant recalls that he experienced a tingling sensation in his legs following the 1995, incident, however he is uncertain if the same was true in the 1994 incident. Nevertheless, the claimant returned to Dr. Cathey for medical treatment associated with the 1995, incident. The claimant ultimately came under the care of Dr. Thomas M. Fletcher, a Little Rock neurosurgeon, who performed surgery on December 1, 1995. Claimant was released by Fletcher to return to work in February 1996.

Claimant returned to the employment of Capital Wire until July 1996, at which time the business ceased operations. The testimony of the claimant reflects that between February and July 1996, he performed coiling work, which was working with smaller reels of wire weighing approximately 30 pounds. Following the plant closure of Capital Wire claimant worked in the automotive center of Wal-Mart. Tasks performed by the claimant in his employment with Wal-Mart included changing oil, installing tire and batteries, and some brake jobs. Claimant characterized the job at Wal-Mart Automotive as light to medium. After working at the Wal-Mart job for a couple of years claimant was offered a job with respondent-employer.

Claimant commenced his employment with respondent-employer #1 on October 13, 1998. In describing his job with respondent #1, claimant testified:

I went in as a, what they call - - jus mor or less a desk clerk.  
I can't think of what its called. I keep wanting to say a PM something  
- - um - -

Parts service manager, yes. PSM, PSM, uh-huh.

You take and you look up the parts. You help diagnose their  
vehicle. I ended up with - - with - - I had tow or three people under me.  
You know, I opened the store and closed the store, things like that.(T. 22-23).

Claimant's job duties included retrieving parts off the shelves, bring them to the front, and

selling them to the customers. With respect to the weights of the parts that claimant lifted in the discharge of his job duties with respondent-employer #1, claimant's testimony reflects:

Well, I mean, we're supposed to have a engine lift or a transmission lift, either one, that will lift the pallet. If you sell an engine to a customer or a transmission, you're supposed to be able to take the pallet lift, push it up to the back of the vehicle and remove the engine or transmission with the pallet and sit it down. Well, we couldn't do that a lot of times because customers wouldn't bring them back, the pallets that is.

And so there was supposed to be no less than two people in the store at all times. That was thrown out the first time I worked there. We has a delivery a lot of times - - most the times, there would be one left in the store, which would be your parts service manager or manager, and, you know, it was just lot heavier. (T. 23-24).

The claimant disclosed to his district manager, who hired him, as well as the store manager that he had problems with his back in the past. Claimant's testimony reflects that there were occasions, once or twice per week, while employed by respondent-employer #1 that he would have to lift more than 50 pounds (engines, transmissions, batteries, cases of oil, cases of antifreeze).

Claimant worked continuously for respondents #1 until August 2001, when he injured his back within the course and scope of his employment. Regarding the status of his back from the time he begin his employment in 1998 until August 2001, claimant testified:

I'd been doing all right. I mean, I'd had some trouble with my back off and on, but nothing up until August. (T. 25).

Claimant denies that during the afore period he had problems with his back which required him to take time off from work, however he acknowledged that he took prescription medication for his back. Claimant treated with Dr. Randall Hunt, a local physician, who prescribed muscle relaxer and/or pain medication. Claimant took medication as needed.

Regarding the August 2001, back injury in the employment of respondents #1, claimant's testimony reflects:

I was lifting a - - a customer come in with a engine - - bought an engine, and it was raining. The other guy was on a delivery, and we had to lift the engine up. He didn't have a pallet. So we had to lift the engine up out of the back of his truck and set it on the pallet, and it was wet. We lifted it up, and the customer - - it slipped out of his hand. (T. 27).

Claimant treated with Dr. Savu, a Jonesboro pain management physician, for the August 2001, back injury.

Claimant was provided medication and continued working until November 25, 2001.

Claimant sustained another injury to his back on November 25, 2001, while pulling a large heavy battery off the counter. Claimant is 5'8" tall. The counter from which the battery was removed chest high. Claimant noted that in jerking the battery the problems he experienced in his back:

Just popping. It was - - it just went out.

Yeah, I mean, I hit the floor. (T. 29).

Claimant's medical treatment relative to the November 25, 2001, injury included treatment under the care of Dr. Hunt, Dr. Ronald Williams, a Little Rock neurosurgeon, and Dr. Steven Cathey, who performed surgery on January 3, 2003. Claimant was provide a release on March 3, 2003. Claimant did not return to work until May 2003.

Claimant worked for respondents #1 from May 2003, until March 2, 2004. Regarding his work situation during the afore, the claimant testified:

AutoZone will tell you they do not have light duty for anything, and - - which I had a manager that tried to help me there at the first, and he stepped down, and they got another manager that was - - (T. 31).

The store manager, David Munday, who was accommodating the claimant, stepped down in

July/August 2003. Mr. Munday would assure that the claimant did not have to lift heavy merchandise:

Well, I mean, everything that was - - had any weight to it such as batteries or anything, it was seen to that, you know, I didn't lift it.

\* \* \*

Exactly, and he just tried to accommodate with what the doctor was going by. (T. 32).

Claimant described Mr. Munday's successor, Barry Blackwell:

No, he was very gung ho. He was all company, and he - - his theory was more or less - - kind of like everyone else's, if you can't do the job, we'll find someone more or less. (T. 32).

As a consequence of the afore, claimant's testimony reflects that when his job duties required the lifting of heavy batteries he just had to do it. Claimant explained that the reason he stopped working on March 2, 2004, was because he was going back and forth to the doctor as he was continuing trying to work and he was always in pain. Claimant testified that it reached a point that he just could not "go anymore".

Following a prior hearing before the Arkansas Workers' Compensation Commission, claimant has a pain pump installed on December 15, 2005, by Dr. Calhoun. Claimant is also being seen by Dr. Garlapati, a pain management physician. While the pump provides pain medication into the claimant's lower back area, he still has to take oral pain medication, the pump having not completely alleviated the necessity of taking prescription medication. Claimant noted that he takes less oral prescription pain medicine because of the pump. Claimant takes muscle relaxer and pain medication in addition to the morphine pump use.

The morphine pump requires maintenance, to include having it refilled every 62 days. For the last six (6) months claimant has had to go for a monthly visit to have the pump tuned up and adjusted. Claimant noted that amount of times between having the pump refilled has decreased from 82 day to 62 days. The refills are performed in the office of Dr. Garlapati. Claimant will also have to the batteries in the pump replaced every seven years which will entail taking the pump out. Claimant has had two surgeries relative to the pump, the first time it was put in backwards.

In 1996, claimant had gastric bypass surgery. The afore was had after claimant had undergone the earlier back surgeries. While the claimant thought that the gastric bypass surgery would aid in eliminating some of the symptoms regarding his back such was not the case. Claimant's testimony reflects that he still has pain every day in spite of the fact that he takes medication and has a morphine pump in place. In describing his residual problems, claimant testified:

It's nothing really. It's like a light headache for me now.  
It's something that I can deal with. It's just a, like I say, like a light  
headache - -

As far as my back and legs go - - my legs, I don't have pain,  
but I have some numbness and the same with the back. (T. 39).

Claimant explained that he does not have headaches, but rather the pain that he has in his back is akin to light headache by way of description. The aching pain is in the claimant's lower back, while the numbness is in his legs.

Claimant testified that while employed by respondents #1 he earned \$9.33, per hour for a 40-hour work week with an average of 5 hours per week of overtime. Claimant's testimony

reflects that when the store manager, Mr. Blackwell, was wanting him to do things that he could not physical do due to the injuries, he had communication with the corporate personnel of respondents #1:

Well, I called them. I sent them letters, and they'd say, you know, they'd see what they could do. (T. 41).

Claimant noted that he had last had contact with the Memphis corporate office of respondents #1 in February 2004, at the time he ceased working in March 2004. Claimant has not had any communication with respondent-employer #1 since he last work relative to an offer of a job or rehabilitation. As a consequence of the afore, claimant maintains that he applied for Social Security disability benefits.

Claimant is married and has two children, a daughter 16 years of age and a son 14 years of age. Claimant's wife Mary, is employed at Medallion Foods. Claimant receives Social Security disability benefits in the amount of \$833.00, per month. During a typical day, claimant is up to see the children off to school. Claimant's wife works the night shift. After getting the children off to school, claimant testified regarding his routine:

I try to clean up what they've messed up in the morning. They just started school this Monday. Prior to that, I was having to fix them lunch and, like I say, just clean up. Two kids that age, especially that 16-year-old daughter, bless her heart, it takes her two hours to get ready for school. (T. 43).

Claimant resides in a three bedroom house that sets on almost an acre of property. Claimant notes that he limits the amount of lifting that he does. Claimant explained that he does not try to lift a skillet. Regarding lifting other items or grocery:

Depends. If I'm having a bad day and my back's really hurting, I won't lift it. My son will. If they're not there, then I don't get no milk. (T. 44).

Claimant's lifting is done in moderation, as is any bending or stooping. In distinguishing between a "good day" and a "bad day", claimant's testimony reflects that on a bad day he won't get out of bed because of severe back pain. Claimant categorized at least eight (8) days out of a month as bad days. Claimant's testimony reflects that a "bad" day is not predictable but rather sporadic. Regarding a "good" day, claimant testified:

Yes, sir, when we got yard work. What I do is take and - - well, we've got two dogs, get them put up. They stay out in the yard - - get them put up in the fence and look around in the yard and see if I see any small limbs, and if I do, I pick those up. There's very few limbs. Our lot is almost bare, but that's really about it. He does all the rest of it. (T. 46).

During cross-examination, claimant testified that to his knowledge Dr. Cathey did not increase his lifting limits above 50 pounds following he January 2003, surgery. The testimony of the claimant reflects that following his second surgery by Dr. Cathey in January 2003, upon returning to work respondent-employer #1 accommodated him by allowing him to sit on a stool up front while working at the computer. Once the new store manager assumed duties the stool was taken away and it became increasingly difficult for the claimant to continue performing assigned job duties.

The testimony of the claimant reflects that at the time he was interviewed and hired by respondents #1, he was not taking pain medication relative to his back. Claimant acknowledged that in his employment with respondents #1 he used a computer to order parts and determine appropriate brands for the customers' needs. Claimant's testimony reflects that due to his superior knowledge regarding automotive parts he supervised other employees in his employment with respondents #1. Claimant also operated the cash register when making a sale.

Claimant has a computer at home, however testified that he uses it very little. Claimant's

testimony reflects that if there was an employment position which required use of a computer or cash register, however allowed him to sit down and stand as needed he would do his best to try to perform it. Though not offered by respondents #1, claimant testified that he is interested in rehabilitation training:

Anything that I can take as long as I can get back to work and make a living for my family, I'll do it. (T. 53).

Regarding the extent of his computer knowledge and skills gained during his employment with respondent-employer #1, claimant's testimony reflects:

No, no, our computer system for AutoZone is set up - - it's nothing on the web, nothing like that. You go in, and it says No. 1, alternator; No. 2, air filter; No. 3, air flow meter, and you've got nine sections. If you choose alternator, it will bring up the years. All right, 2004, okay, for Acura. You go to your Acura and so on and so forth. It's nothing as far as - -

\* \* \*

Yeah, just looking at the books, just like the old way. (T. 54).

Claimant's job with respondent-employer #1 was the first time he used a computer in discharging his employment duties.

The medical in the record reflects that on November 9, 1994, claimant underwent a L5-S1 laminectomy with discectomy on the left for a diagnosed HNP at L5-S1 on the left with S1 nerve root entrapment under the care of Dr. Steven L. Cathey, an North Little Rock neurosurgeon, growing out of a July 25, 1994 work-related injury at Capital Wire Company. Claimant was released to return to work effective February 6, 1995, with a permanent lifting restriction of nothing greater than 50 pounds without assistance, and also assessed with a 10 % whole person permanent partial impairment. (CX. #2, p. 1-7).

The claimant suffered recurrent lower back pain while pushing a skid at work approximately six weeks prior to a June 20, 1995, return visit to Dr. Cathey. On December 1, 1995, claimant was admitted to St. Vincent Infirmary Medical Center under the care of Dr. Thomas M. Fletcher, a Little Rock neurosurgeon, and underwent surgery for a lumbar disk herniation at L4-L5 and recurrent lumbar disk protrusion at L5-S1 associated with scarring and adhesions. (R#2, X#1). An impairment rating was not generated by Dr. Fletcher in connection with the December 1, 1995, surgery.

Following the August 10, 2001, work-related injury to his back while assisting in moving an engine, claimant received medical treatment under the care of Dr. Calin Savu, to include an MRI scan on September 4, 2001, at St. Bernards Medical Center. On November 25, 2001, while lifting a battery at work claimant suffered another work-related injury to his back. Claimant was referred by his primary care physician, Dr. Randall Hunt, to Dr. Ronald N. Williams, a Little Rock neurosurgeon. A December 6, 2001, report of Dr. Williams to Dr. Hunt provides a summary of the claimant's low back injuries and medical treatment:

. . . . He had a laminectomy by Dr. Steve Cathey in 1994 and by Dr. Tom Fletcher in 1995 for pain radiating into the right leg. He did quite well until he lifted a battery at work on 11/25/01 and that has been followed by back pain radiating into the left leg as far as the knee. It is aggravated by activity and by cough and sneeze. He brings along a MRI of the lumbar spine that shows a central bulging disc at L2-3 and L4-5 and a laterally placed disc bulge at L5-S1 on the left.

On examining him today, he is alert, but in a great deal of discomfort. Range of motion in the back is markedly restricted. Straight leg raising is positive at 10 degrees on the left and is not influenced by flexing the knee. Reflexes are equal with the ankle jerks being absent bilaterally. There is no motor or sensory deficit.

Randall, it is probably going to take a lumbar myelogram to sort all this

out and I am trying to get that done. In the meanwhile, I am going to try to get his old op reports to see exactly where he has had surgery. (R#2,X#1,p.127).

A March 5, 2002, lumbar myelogram, which was had pursuant to the directions of Dr. Williams, reflects the conclusions that L4-5 appeared to be narrowing the disc space, anterior extradural defect secondary to disc bulge and spur indents the thecal sac as well as minimal disc bulge at L2-3. (R#2,X#1).

On December 2, 2002, claimant was again seen by Dr. Cathey. The clinic note relative to the afore visit reflects, in pertinent part:

Bobby returns today after a long hiatus. He has been experiencing intractable lower back pain with radiation to both lower extremities since August of 2001. He says his trouble began after he was helping a customer lift an engine at his place of employment. He suffered another setback in November of 2001, again, after doing some lifting at work. For well over a year now, the patient has been treated with epidural steroids, medication, etc. with little or no benefit. He was evaluated by Dr. Ron Williams after an MRI scan of the lumbar spine in November of last year showed what appeared to be a recurrent disc herniation at L4-L5. A subsequent CT myelogram, however, was performed and Dr. Williams did not recommend any type of operative treatment. The patient says he was fired since he couldn't come back to work. His family physician has been prescribing OxyContin 120 mg per day for management of his chronic benign pain.

Since his evaluation in 1995, the patient says he had another lumbar disc procedure performed by Dr. Tommy Fletcher. Although I don't have these records available for review, Mr. Emery says he had lumbar disc surgery at L4-L5 on the left. He did well until the lift injury sustained in August of 2001.

**PHYSICAL EXAMINATION:** On examination, Bobby has lost a lot of weight since his last evaluation here back in 1995. He says he had a gastric bypass procedure that has helped him lose weight. His neurological examination is otherwise negative. He specifically has no sign of lumbar radiculopathy. . . .

I have reviewed the patient's MRI scan, as well as the subsequent CT myelogram performed in March of this year. He does appear to have a recurrent disc herniation in a right paracentral location at L4-L5. Surgical changes are noted at both L4-L5 and L5-S1 on the left. Generalized degenerative disc disease is noted at multiple other levels.(R#2, X#1, p.164).

The claimant was again seen by Dr. Cathey on December 16, 2002. The clinic note relative to the visit reflects, in pertinent part:

**HISTORY:** Bobby returns today for follow-up. He has been able to tolerate the reduction in his OxyContin, although he is still using the Mepergan Fortis for "breakthrough pain". The pain is still centered primarily in the low back, and he denies any sciatica, radicular leg pain, etc.

Today's MRI scan shows operative changes at L4-L5 and L5-S1. At L4-L5 there appears to be a right paracentral disc herniation that produces mild to moderate canal stenosis. Mild and less pronounced degenerative changes are noted at other levels.

**ASSESSMENT/PLAN:** Based on the fact that the patient's chronic lower back pain has thus far been refractory to trials of conservative treatment, and he continues to require OxyContin on a regular basis for this chronic benign pain (although at least on a somewhat reduced dose from his initial visit), I am going to go ahead with bilateral lumbar decompression, exploration of the lumbar canal and posterolateral interbody fusion at L4-L5 utilizing Ray implant cages and autologous bone on January 3, 2003. (R#2,X#1 p.166).

The claimant underwent the surgical procedure as outlined above on January 3, 2003, under the care of Dr. Cathey. A March 3, 2003, clinic note of Dr. Cathey relative to the claimant reflects, in pertinent part:

**ASSESSMENT:** I believe the patient has reached maximal medical improvement with regard to his recent lumbar laminectomy and discectomy as well as the posterolateral interbody fusion at L4-L5. According to AMA Guidelines, I would now assess his overall impairment at 15 % to the whole person.

**PLAN:** I am going to go ahead and release Bobby to resume a full and

active lifestyle. I believe he will have a difficult time lifting objects weighing more than 50 pounds without assistance in the future. Although I have not scheduled a follow-up visit for the patient, I have left the door open for him to return here should new problems arise.(R#2,X#1, p. 179).

In an April 15, 2003, correspondence to the attorney for respondents #1, Dr. Cathey relayed that of the 15% permanent partial impairment assessed the claimant, 5% of the rating was directly related to the claimant's November 25, 2001, occupational injury and surgical procedure that was ultimately required. (R#2,X#1, p. 186).

Due to residual complaints the medical in the record reflects that the claimant continued to followup with Dr. Cathey subsequent to the January 3, 2003, surgical procedure. In a July 28, 2003, clinic note, Dr. Cathey recorded:

**ASSESSMENT/PLAN:** I am certainly disappointed with Mr. Emery's long-term outcome with regard to his most recent lumbar decompression/PLIF at L4-L5. Unfortunately, I don't believe he is a candidate for any additional spinal surgery or other neurosurgical intervention. I had discussed with him a variety of chronic pain coping mechanisms and have also arranged for him to see Dr. Butch Garlapati for consideration of epidural steroids, trigger point injections and other comprehensive pain management. (R#2,X#1,p.186).

Following a December 9, 2004, hearing before the Commission, respondents #1 were directed to pay the cost of the claimant's medical treatment under the care of Dr. Butchaiah Garlapati, to include the morphine pump.(CX #1).

In correspondence dated June 5, 2006, respondent #2 acknowledged that it had been joined a party to these claims and submitted discovery to the other parties. On June 27, 2006, a pre-hearing conference was conducted with all of the parties, and the August 23, 2006, hearing scheduled. Respondent #2 was still conducting discovery at the time of the pre-hearing conference. (Commission Exhibit #1). In correspondence of August 16, 2006, respondents #1

submitted copies of discovery responses to both respondent #2 and respondent #3. (R#2,X#1). In correspondence of August 21, 2006, respondent #2 acknowledged receipt of the discovery responses of respondents #1, and based upon its review of same, accepted liability for a 30% wage loss.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witness, review of the medial reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 10, 2001, and November 25, 2001, the relationship of employee-employer-carrier existed among the parties, claimant and respondents #1, and the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$252.00/\$189.00, for total/permanent partial disability.
3. On August 10, 2001, and November 25, 2001, the sustained injuries to his spine arising out of and in the course of his employment.
4. At this juncture there is not a dispute regarding the payment of temporary total disability or medical benefits in these claims. Respondents #1 have paid indemnity benefits to correspond with the claimant's 5% whole person impairment growing out of these claims, when the claimant reached the end of his healing period on March 3, 2003.
5. On August 21, 2006, respondent #2, the Second Injury Fund, acknowledged liability in these claims, and accepted a 30% wage loss/permanent partial disability relative to the claimant.

6. When the claimant's age, education, work history, permanent restrictions and limitations are considered, the preponderates that the claimant has been rendered permanently and totally disabled from engaging in gainful employment as of March 1, 2004.

7. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injuries of August 10, 2001, and November 25, 2001.

8. Respondent #2 has controverted the payment of permanent total disability benefits to claimant in excess of 30% wage loss disability.

### **CONCLUSIONS**

\_\_\_\_\_Neither the compensability of the claimant's August 10, 2001, and November 25, 2001, injuries nor the liability of respondent #2, the Second Injury Fund, is disputed. The claimant asserts that as a result of the afore compensable injuries he has been rendered permanently and totally disabled from engaging in gainful employment. Further, claimant contends that the afore benefits have been controverted, thereby entitling the payment of controverted attorney fees. Respondent #2 denies that the claimant has sustained wage loss disability greater the 30%, for which it has accepted liability. Respondent #2 further denies that it has controverted the afore accepted wage loss.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to additional workers' compensation benefits as a result of injures having been sustained subsequent to the effective date of the afore provisions.

With a date of birth of June 20, 1969, the claimant is only 37 years old, and has a high school education, as well as a degree for completing a year of vocational technical training in the automotive repair field. Prior to his November 25, 2001, compensable injury in the employment

of respondent-employer #1, claimant had a consistent employment history which primarily entailed manual labor. During his employment with Capital Wire claimant sustained two separate compensable injuries to his low back which resulted in two separate surgical procedures. Claimant was assessed with 10 % whole body impairment relative to the first surgical procedure, which was performed by Dr. Steven Cathey. The second surgical procedure by Dr. Thomas M. Fletcher entailed a HNP at L4-L5 and recurrent L5-S1. While a permanent impairment rating was not generated by Dr. Fletcher regarding the afore, a review of Table 75, of the Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition, reflects that a rating in the range of 7%- 11% to body as a whole would have been appropriate in light to the new herniation and recurrent that were involved second surgical procedure as well as medical documented pain and rigidity.

After the first surgical procedure Dr. Cathey placed a 50 pound lifting restriction of the claimant. Following the second surgical procedure the claimant's employer, Capital Wire, provided work within the 50 pound lifting restriction for the duration of his employment. After Capital Wire ceased operation claimant secured employment in the automotive department of the Newport Wal-Mart. At the time of claimant's employment with respondent-employer #1 in 1998, his prior back injuries and surgeries were disclosed to appropriate supervisory personnel. The compensability of the claimant's two separate injuries in the employment of respondents #1 is not disputed. Claimant underwent a third surgical procedure relative to his back as a result of the afore and was assessed with an additional 5% whole body impairment as a result of same.

While the claimant reached maximum medical improvement relative to the 2001 injuries on March 3, 2003, he last discharged employment duties on March 1, 2004. The credible evidence discloses that for a period of time accommodations were made for the claimant by

respondent-employer #1 which allowed to claimant to continue working. Following a change in supervisory personnel the accommodations were withdrawn and claimant was unable to continue working. Claimant ultimately underwent the placement of a morphine pump to address the symptoms/residuals of his compensable injury.

The credible evidence reflects that although the morphine pump has been helpful in the treatment of the claimant's residual pain it has not eliminated same. Claimant also takes oral medication to address his pain. During the course of a month (30 day period) claimant suffers such severe debilitating symptoms or "bad days" that he is in bed for eight (8) days. In addition to the 50 pound lifting restriction, which was not lifted or modified by Dr. Cathey following the January 2003, surgery, claimant his physical restriction on the activities of bending, squatting, standing and walking.

In addition to the three surgeries that he has had in connection with compensable work related injuries, claimant has also undergone two surgical procedures in connection with the morphine pump. The evidence reflects that refills of the pump are performed periodically and that the battery will need to be replaced every seven (7) years which will entail the pump being taken out. The claimant's medication, severe symptoms, and physical restrictions renders him an unreliable employee for a prospective employer.

Ark. Code Ann. §11-9-519 (e)(1) defines permanent total disability as the inability, because of a compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. The evidence disclosed that any computer skills that the claimant has is "job specific" having grown out of his employment in the automotive department of Wal-Mart and with respondent-employer #1. Although the claimant indicated an interest in vocational

rehabilitation during the hearing, respondents #1 did not offer a program neither did the claimant pursue one on his own. The claimant's failure to request or pursue a program of rehabilitation does not prevent an award of permanent disability benefits in excess of his permanent impairment rating. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998). The evidence reflects that the claimant continued to work until March 1, 2004, when he was no longer physically capable. The claimant has sustained his burden of proof by a preponderance of the evidence that he has been rendered permanently and totally disabled, within the preview of the Arkansas Workers' Compensation Act, as a result of the November 25, 2001, compensable injury when combined with his pre-existing impairment and disability.

While the claimant begin pursuing his claim for permanent total disability benefits with his April 27, 2006, hearing request, respondent #2, the Second Injury Fund, was not made a party until June 2006. The evidence discloses that once respondent #2 received responses to its discovery on August 16, 2006, it accepted liability for a 30% wage loss on August 21 2006. Respondent #2 has controverted the claimant's entitlement to permanent disability benefits in excess of the 30% wage loss.

### **AWARD**

The claimant has been rendered permanently and totally disabled as a result of the compensable injuries of August 10, 2001, and November 25, 2001, in combination with his pre-existing impairment. Respondent #2 is herein ordered and directed to pay to the claimant permanent total disability benefits at the weekly benefit rate of \$252.00, commencing March 4, 2004. Respondent #2 may claim credit for sums heretofore paid toward the discharge of the afore obligation. Said sums accrued shall be paid in lump without discount.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

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**Andrew L. Blood, ADMINISTRATIVE LAW JUDGE**