

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F110527

BERTRAM E. MILLER, EMPLOYEE	CLAIMANT
MILK TRANSPORT SERVICES, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, CARRIER	RESPONDENT

OPINION FILED MAY 23, 2006

A hearing in this case was conducted on October 24, 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.

Respondents were represented by Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held in this claim on June 7, 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. Six of these stipulations are listed in the Prehearing Order, and after modifying the fifth stipulation, were confirmed at the hearing. The parties agreed to the seventh stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on September 13, 2001 and at all other relevant times.

2. Claimant sustained compensable injury to his head, neck, and back on September 13, 2001.

3. Claimant's healing period ended on December 12, 2002 with regard to his neck and back injuries; his healing period ended on March 16, 2005 with regard to his head injury.

4. Claimant's temporary total disability rate is \$410.00; his permanent partial disability rate is \$308.00.

5. Claimant has been assigned an 11% permanent impairment rating to the body as a whole for his neck and back injuries.

6. Respondents have paid Claimant's 11% permanent impairment rating in full.

7. As of September 22, 2005, Respondents began paying permanent partial disability benefits for an impairment rating to Claimant's head.

At the October 24, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. Claimant reserved the first and second issues; by agreement of the parties, the third issue listed in the Prehearing Order was amended. The parties then agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant is entitled to benefits based on his 49% permanent impairment rating.

2. Whether Claimant is entitled to wage-loss disability benefits.

3. Whether Claimant is entitled to payment for nursing services provided by his wife from January 2, 2002 to April 13, 2003, pursuant to Ark. Code Ann. § 11-9-508(a).

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

Claimant specifically reserved issues regarding his entitlement to temporary total disability benefits from December 13, 2002 to June 17, 2003; his entitlement to temporary partial disability benefits from June 18, 2003 to March 16, 2005; his entitlement to a late payment

penalty on the permanent disability benefits; and his entitlement to any future home care or nursing services.

POST-HEARING BRIEFS

At the conclusion of the October 24, 2005 hearing, the parties were invited to submit briefs on the issues thirty (30) days after the hearing. The parties were instructed that filing a brief was optional and that they were not expected to respond to each other, but that there was a thirty (30) day deadline for filing. Respondents' Post-Hearing Brief was hand delivered to the Commission on November 23, 2005, the thirtieth day if the date of the hearing is not counted. Without previously seeking an extension or otherwise arguing good cause, Claimant's Post-Hearing Brief was received by fax on January 17, 2006. By letter dated January 18, 2006, Respondents requested that the Commission "strike and/or disregard the Claimant's untimely post-hearing brief and arguments, in reaching [its] decision in this matter."

I find that Respondents' Motion should be, and hereby is, granted. In reversing an Administrative Law Judge and excluding evidence entered contrary to statute and a Prehearing Order, the Commission recently noted that its "rules of procedure in claims must be applied equally to each and every party." Meachum v. Cross County Sch. Dist., Full Workers' Compensation Commission Opinion filed April 12, 2006 (F501662, F501663, and F501072). Here, without an extension or good cause shown, the thirty-day deadline announced at the end of the hearing must be applied equally to both parties. Therefore, Claimant's Post-Hearing Brief will not be considered in the preparation of this opinion.

Nonetheless, it is appropriate to allow Claimant to proffer his brief. See Coleman v. Pro Transp., Full Workers' Compensation Commission Opinion and Order filed March 15,

2005 (F210837). Thus, the following items will be blue-backed and made a part of the record:

1. Respondents' Post-Hearing Brief received November 23, 2005;
2. Claimant's Post Hearing Brief, faxed January 17, 2006 and received by mail on January 23, 2006, as a proffer only; and
3. Respondents' attorney's January 18, 2006 letter, objecting to consideration of Claimant's brief.

DISCUSSION

Claimant described his September 13, 2001 accident that resulted in the stipulated compensable head, neck, and back injuries.

Q. All right. Do you remember - what is your recollection of that wreck?

A. All I can recall is pretty much what the EMT's told me.

Q. Well, I don't want to know what the EMT's told you. What do you recollect of the wreck itself?

A. I just remember the deer coming out.

....

Q. And it's not really in dispute that you got hurt, but your milk truck rolled a few times; did it not?

A. Yes, sir. I was in a 35-mile an hour curve, and I wasn't doing but 22 mile an hour.

Q. But you still rolled?

A. Milk trucks don't have compartments in them like fuel trucks do. The milk trucks have 45,000 pounds on them, and the milk rolls backwards and forwards, surges. I did a little dodge to keep a deer from getting in the cab with me, and the milk got upset and started me into a rollover and rolled me three - they said I rolled three times.

Q. When do you first remember anything after the wreck; did you wake up

in the hospital or at Timber Ridge?

A. It was probably - I woke up in the hospital, but it was a couple of weeks before I knew who I was. I would put it at a couple of weeks.

Q. Okay. Sitting from your perspective, how has this wreck changed you?

A. It changed my whole life.

Claimant's immediately subsequent medical treatment is well summarized in a medical record found on page 1 of Claimant's Exhibit #1.

Mr. Miller was med-flighted to Baptist Medical Center in Little Rock, AR. He was in the intensive care unit for about three days. He was treated for pain and he does not remember this period. He does remember when he was transferred to a private room about three days post injury. A CT scan on 09/13/01 revealed a small amount of subarachnoid hemorrhage in the left parietal region, a small amount of intraparenchymal hemorrhage in the middle cranial fossa on the left in the left temporal lobe, and minimal soft tissue swelling over the right parietal convexity. A repeat scan on 09/15/01 revealed an interval resolution of the left posterior subarachnoid hemorrhage. There were two, small, high attenuation regions in the left middle cranial fossa that were more conspicuous than the previous study. They were interpreted to possibly represent small parenchymal hemorrhages. No underlying mass effect or edema was seen within the middle cranial fossa. Another comparison scan was performed on 10/08/01. The impressions of the report noted interval resolution of the left temporal lobe hemorrhage. Mr. Miller was in the hospital for about two weeks. During that time, he was treated for a number of orthopaedic injuries, which involved a neck and back brace. Once stabilized, he was discharged home, and has been treated outpatient for orthopaedic injuries.

Claimant was then admitted to the day treatment program at Timber Ridge Ranch on January 2, 2002; he discharged from this program on April 23, 2003.

A discharge report prepared by staff at Timber Ridge Ranch begins on page 45 of Claimant's Exhibit #1. Two sections of that report catalog Claimant's progress and remaining barriers as of April 23, 2003.

Overall progress for entire length of stay: Significant increase in orientation, attention, comprehension, short-term memory management and

recall, problem solving, reasoning, speed of information processing, insight, endurance, understanding, and self-expression occurred during Mr. Miller's stay. Significant improvements occurred in overall physical and cognitive endurance. Mr. Miller's ambulation and gait pattern improved to a more normalized pattern, however, he continued to use the cane for support. Mr. Miller demonstrated increased independence in safety awareness during basic self-care, simple meal preparation, light housekeeping, and money management activities. His overall strength improved as well as his endurance to carry out daily activities at home without undue fatigue if given appropriate mental and physical rest breaks. Mr. Miller demonstrated improvements in the following areas of self-care: simple meal preparation and light housekeeping, from minimal assistance to modified independence; money management, from minimal assistance to setup.

....

Barriers: Mr. Miller's level of supervision with meal preparation activities continued to vary. He demonstrates decreased attention to detail. Mr. Miller shows slowed processing with functional activities such as money management. Mr. Miller continues to experience some difficulties in the areas of meta-cognitive awareness and TBI adjustment and management. He continues to require peer support, education, and blatant examples of implications, coping, counseling, and team support to manage the implication of his TBI on a day-to-day basis. Mr. Miller does not function at a competitive level of employment. Ongoing deficits require prescribed and modified work duties. Driving is not recommended at this time.

The discharge report noted that Claimant would begin "to establish a gradual reentry to the vocational world of work which will allow accommodations for his deficits." Further treatment to address Claimant's cognitive issues was recommended.

The record in this matter consists of three volumes. It is not necessary to summarize all of this record in order to address the issues raised above. This opinion will address the issues in turn, summarizing that portion of the record necessary to an understanding and resolution of each issue.

A. Impairment Rating

Claimant seeks benefits based upon a 49% permanent impairment rating assigned by Dr. Reginald Rutherford during his September 7, 2005 deposition. At the start of the

hearing, Respondents indicated their willingness to pay Dr. Rutherford's March 16, 2005 original 39% impairment rating for Claimant's head injury. Respondents note that Dr. Barry Baskin also assigned a 39% impairment rating for this injury on September 27, 2005. Indeed, the parties stipulated that, as of September 22, 2005, Respondents began paying permanent partial disability benefits for an impairment rating to Claimant's head.

Several studies document Claimant's September 13, 2001 head injury. A CT scan of Claimant's brain on that date revealed a small amount of subarachnoid hemorrhage in his left parietal region; a small amount of intraparenchymal hemorrhage in the middle cranial fossa on the left in Claimant's left temporal lobe; and minimal soft tissue swelling over the right parietal convexity. A CT scan of Claimant's brain taken two days later revealed resolution of the left posterior subarachnoid hemorrhage but revealed two small high attenuation regions in the left middle cranial fossa not previously appreciated. A final CT scan of Claimant's head on October 8, 2001 revealed interval resolution of the left temporal lobe hemorrhage; this CT scan was otherwise negative.

Drs. Katherine Pope and A. J. Zolten performed a neuropsychological evaluation of Claimant over the course of two days, October 31 and November 1, 2001. Claimant and his wife reported cognitive, sensory-perceptual, emotional, and behavioral changes since his injury. After describing the tests administered to Claimant and their results, the doctors noted that "[n]europsychological testing results are consistent with significant traumatic brain injury secondary to a motor vehicle accident." Their findings were "generally consistent with brain imaging results obtained on 09/13 and 09/15/01, particularly bilateral parietal damage." They observed that Claimant "displayed significant cognitive deficits secondary to brain injury in the areas of executive functioning, processing speed, memory,

and sensory-perceptual functioning. In addition, he displayed debilitating anxiety, as well as depressive symptoms, that are significantly impacting and interfering with everyday functioning.”

Dr. Rutherford first examined Claimant on December 7, 2001, to address possible post-traumatic seizure disorder. Upon examination, Dr. Rutherford observed that Claimant “has clearly sustained significant head trauma. This is evident from his imaging studies, neuropsychological testing and present examination.” Even though an EEG of that date was normal, the doctor began to treat Claimant for partial seizures.

Claimant underwent a second neuropsychological evaluation, administered by Drs. Zolten and Joyce Fowler, on January 15 and 20, 2003, some sixteen months after his injury. They noted that Claimant “continues to demonstrate cognitive deficits secondary to his brain injury in the areas of executive functioning, processing speed, memory, and sensory-perceptual functioning.” Claimant was functioning in the moderately impaired range of function while in a structured rehabilitative setting. They recommended that Claimant not return to work or drive. They concluded:

It has been approximately 16 months since Mr. Miller’s accident. Present results are likely indicative of long-standing residual deficits that he will continue to experience secondary to his brain injury. He has demonstrated some improvements in adjustment to his deficits while in the structured programming at Timber Ridge Ranch, but we anticipate some regression as this supportive structure is withdrawn.

They diagnosed Claimant with dementia secondary to his closed head injury, post-traumatic stress disorder, major depressive disorder, and adjustment disorder.

Dr. Gary Souheaver administered a third neuropsychological evaluation of Claimant on October 20, 2003. This doctor concluded that “the results of the current

neuropsychological evaluation were abnormal. However, the results were invalid and do not reflect actual abilities or recovery, since the motivation tests and pattern of data strongly indicated a strong negative response bias.” Questioning the validity of the data, Dr. Souheaver declared that he was “unable to determine the presence or severity of any remaining residuals related to this man’s brain injury.” He believed “the best therapy for this man, is going to be a return to the work force, which he has already demonstrated he is capable of achieving.”

At the request of Dr. Rutherford, Dr. Judy White Johnson administered a fourth neuropsychological evaluation of Claimant on February 15 and 16, 2005; her report is dated March 15, 2005. Upon examination and testing, she concluded:

Mr. Millers’ overall ... neurological functioning on this examination compared to previous examinations is relatively consistent. Across examinations on November 2001, January 2003, October 2003, he has shown impairments in executive functions, speed of information processing, conceptual organization, and emotional functioning.

....

Mr. Miller’s overall level of intellectual functioning is Borderline (Full Scale IQ = 73; Verbal IQ = 75; Performance IQ = 75).

....

Review of the records suggests the interactions in Mr. Miller’s case have been marked by an unusual amount of tension, distrust, suspiciousness and doubt. In spite of extensive assessment of his neuropsychological status, it does appear his impairments have not been taken into account with regard to vocational planning, work performance, and interpersonal relationships. Mr. Miller is not a candidate for computer training, community college classes, vocational rehabilitation, etc. From all the data available, it appears he is giving maximal effort and likely cannot do more than he is doing at his current job. Given his range of impairments and the impact of these on his emotional functioning, self-esteem, and self-image he is doing amazingly well. It is likely that much of the time Mr. Miller is in a state of mild confusion, cannot trust his perceptions, cannot trust his judgment and choices, and cannot organize his thoughts, memories and observations to make accurate appraisal and decision. He recognizes his extreme dependence on his wife,

appreciates her and her support, but naturally feels very negative toward himself because of his dependency....

Dr. Johnson diagnosed Claimant with dementia secondary to closed head injury, post-traumatic stress disorder, and personality change due to closed head injury.

Upon review of Dr. Johnson's report, Dr. Rutherford assigned Claimant a permanent impairment rating due to his head injury in a letter dated March 16, 2005.

Employing the AMA, 4th Edition, "Guides to the Evaluation of Permanent Impairment", Mr. Miller would fall into category II for mental status impairment which is found on page 142 of the text. Category II states the following, "impairment requires direction in supervision of daily living activities". This allows for an impairment between 15 to 29% of the whole person. Emotional and behavioral impairments are contained in Table III on the same page. Mr. Miller would fall into Category III which reads as follows, "severe limitation impeding useful action in almost all social and interpersonal daily functions" which provides an impairment of 30 to 49% to the person as a whole. The impairment is derived by choosing the most severe of the categories. Categories are not additive. I would place Mr. Miller at the mid point of Category III for emotional and behavioral impairments. This would yield a whole person impairment of 39%.

The parties subsequently deposed Dr. Rutherford. In the course of that deposition, Dr. Rutherford increased Claimant's impairment rating to 49%.

Q. On March 16th of 2005, I believe, is it correct you opined the claimant sustained a 39 percent whole body impairment rating for mental status impairment category I believe it's three for emotional and behavioral impairments; is that correct?

A. Yes.

Q. And this rating was based upon the AMA Guides to Evaluation of Permanent Impairment Fourth Edition; correct?

A. Yes.

Q. Would you agree, then, Doctor, that the claimant reached maximum medical improvement for his traumatic brain injury as of that date?

A. Well, I think that requires some clarification. I think actually I was in error

there. I think I should have made that 49 percent. And I do believe he was at maximum medical improvement at that time.

Q. Okay. Would you agree your report reflects a 39 percent rating at this time?

A. Well, I think that requires modification.

Q. Okay. And what would you base that modification on, then, Doctor?

A. Well, thinking on this, I mean, Mr. Miller suffered catastrophic injuries; and he has severe behavioral limitations. And, you know, the guidelines are very vague; and they give you ranges. And the ranges don't have any subcategorization to provide you with guidance. And, so, I think really, on reflexion, if you have a person who has serious catastrophic injury, you should give them the max, not midpoint or minimum.

Q. Okay. Well, Doctor, let me just kind of expound on that. It says that -- and if I may read from your report, category 3 which reads as follows "Severe limitation impeding useful action in almost all social and interpersonal daily functions which provides an impairment of 30 to 49 percent to the body as a whole."

....

Q. You're saying now that he should get the full amount of that?

A. I think that would be proper.

Q. Okay. You said severe limitation impeding useful action in almost all social and interpersonal daily functions. What, Doctor, would you say falls into that category of the specific social and interpersonal daily functions?

A. He has severe behavioral problems as a consequence of his traumatic brain injury.

Q. Are there any objective findings which you can specifically point to which you would base this opinion on?

A. Oh, I think it's -- it's clear just from observation. If you've ever met Mr. Miller, I don't think you would disagree with my statements. As you are aware, Mr. Miller went to see Dr. Souheaver for a neuropsychological evaluation and he did not perform well. And Dr. Souheaver was of the opinion that this represented exaggeration on the part of Mr. Miller.

I think that's factually incorrect, and I think it mischaracterizes the situation.

I think when Mr. Miller went for that testing it was a foreign environment. It may have been a difficult environment for him and -- not knowing anybody there and he just -- he just decompensated. He couldn't function at all well. So, that gave the false impression of misrepresentation. And Dr. Souheaver will tell you, if he were here, that with traumatic brain injury, you recover over a period of up to two years. And what you expect is the deficit to be at maximum severity immediately following the accident, improvement over time.

So, this poor performance on the part of Mr. Miller as interpreted from the data alone would suggest that he wasn't giving an honest and full effort; but that's not true. He just couldn't perform well that day because of the new environment in which he was tested. And this is merely a reflexion of his significant behavioral problems from this -- from this injury.

Often with traumatic brain injury behavioral problems are the most predominant and self limiting.

Dr. Rutherford conceded that he had not seen Claimant at work or at home, and that he had not spoken to Claimant's employer concerning Claimant's abilities at work.

Q. Am I correct in stating, Doctor, that the basis of your knowledge of the claimant's actual abilities and his need for supervision in activities is based upon what the patient and his spouse have advised you and your personal observation in the doctor's office?

A. Well, it's based upon my knowledge of his injuries including his imaging studies of the brain, his neurological examination, his neuropsychological examinations and his abilities and behavior on multiple visits in my office. That's what I base my opinion on.

Q. Would you agree, Doctor, that MRIs of the brain and the neuropsychological testing may be accurate as to showing his behavioral patterns and even some of his objective physical findings but may not accurately reflect how he is able to live day by day?

A. Oh, no. I think they are an accurate representation of his day-to-day abilities.

Q. And if Mr. Miller has testified that he is able to do several day-to-day abilities that is not reflected in your report, would you agree that Mr. Miller's testimony as to what he is able to do would be the most accurate?

A. Well ... when one has a brain injury, as Mr. Miller had, insight and

judgment are often lost and never recover. So, Mr. Miller's perceptions of his abilities may be faulty and that's strictly because of his injury.

Dr. Rutherford believes Claimant "needs a lot of assistance."

Respondents then obtained a second opinion evaluation from Dr. Baskin. Upon review of Claimant's records and a physical examination, Dr. Baskin offered the following:

It is my opinion that based on review of this patient and review of his medical records and discussing the patient's functional status with his wife and his current employer, that under mental status impairments, Mr. Miller does have impairment, but ability remains to perform satisfactorily most activities of daily living. He does require some direction, but is able to perform most basic and instrumental or higher level ADL's without constant direct supervision. He would have a 14% impairment rating based on mental status impairment.

Based on emotional and behavioral impairments, I think Mr. Miller has moderate limitation of some, but not all, social and interpersonal daily living functions. I do not believe he is in a severe category, which would indicate limitation impeding useful action in almost all social and interpersonal daily functions. Based on my discussion with his wife and employer, it is my opinion that he has moderate emotion and behavioral impairments and not severe. He would thus have a 29% impairment rating based on emotional or behavioral impairments. Using the combined values chart, combining 29% with 14%, comes out to 39% impairment.

Dr. Baskin noted that Claimant was still under investigation for a possible seizure disorder which could affect his impairment rating.

There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, 115 S.W.3d 823, ____ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or

extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993) (hereinafter "Guides"). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34.

A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 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).

I find that Claimant's September 13, 2001 compensable head injury is the major cause of the impairment at issue. Claimant testified that the injury changed his life; the neuropsychological evaluations all document Claimant's neurological deficits secondary to his head injury. There is no alternative cause for these neurological deficits suggested in the record. Claimant's compensable head injury is the sole, and therefore the major, cause of his impairment at issue.

I next find that objective and measurable physical findings support the determination of the existence and extent of Claimant's physical impairment. The three CT scans, taken on September 13, 2001, September 15, 2001, and October 8, 2001 respectively, all document Claimant's head injury. Such studies have been utilized as objective findings to support impairment ratings issued pursuant to Chapter Four of the Guides. See Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 122, 975 S.W.2d 857, ___ (1998); Greer v. Philip Mitchell Constr., Full Workers' Compensation Commission Opinion filed February 14, 2003

(E906565).

Finally, I find that Claimant is entitled to a permanent impairment rating of 49% to the body as a whole based upon his impairment due to his compensable head injury. I find Dr. Rutherford's opinion credible and entitled to weight for two reasons. First, he is Claimant's treating physician, with a history of evaluating Claimant and his condition. Second, Dr. Rutherford's opinion is corroborated by three of the four neuropsychological evaluations undergone by Claimant; the fourth evaluation, that of Dr. Souheaver, is discredited by Dr. Rutherford's deposition testimony. Dr. Rutherford correctly applied Table 3 on page 142 of the Guides to assess Claimant with a 49% impairment of the whole person. This rating is appropriate based upon the record and the Guides.

B. Wage-loss Disability Benefits

Claimant seeks wage-loss disability benefits. Since he has been assessed with an 11% permanent impairment rating to the body as a whole for his neck and back injuries, and a 49% permanent impairment rating to the body as a whole for his head injury, 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).

At the time of the hearing Claimant was 54 years of age. He began working in his father's traveling carnival business "long before the 11th grade," which was the last grade he completed in school. He does not possess a GED or high school diploma. At some point, his father sold the carnival business to Claimant and his brother.

A good portion of Claimant's work history involves carnivals or theme parks. Initially, he drove diesel trucks to move carnival rides from place to place, oversaw crews assembling the rides, and performed safety inspections on the assembled rides. He

managed personnel and operated equipment such as cranes and track hoes needed to service or assemble the rides.

Some time in the late 1980s Claimant left the carnival business because of the travel required and opened a pizza restaurant in his home town. After operating that business for four years, he began working for different theme parks such as Magic Springs and Dogpatch. He primarily helped to assemble, maintain, and safety inspect equipment at these parks. He estimated that he made \$1,500.00 per week after taxes at this time.

Claimant wanted to be home with his family, so he began driving a milk truck for a small company that was later purchased by the Respondent employer. He had a minor accident in July 2001, but continued to drive and run three routes afterwards. His last day driving a milk truck was the date of his injury; he has not been able to return to that employment because he cannot drive.

Claimant now works three days a week making \$10.00 an hour at Security Shredding; he found this job on his own initiative. His wife takes him to and from work. He does not supervise other employees, but he can train other employees on how to use the shredding machines. He does not service the machines or drive the trucks carrying the mobile shredders. Although he is making less money than when employed by the Respondent employer, Claimant likes his job and tries "to do my best." He would like to continue working as long as physically possible.

On cross-examination, Claimant agreed that his job duties involve overseeing the baling machine and shredding papers.

Q. And Mr. Sutherland [Claimant's boss] will allow you to work three days a week; is that correct?

A. Yes, sir. Three days is about all I can do. I can work a day for him, and it's kind of stressful; and then the next day I kinda rest. I don't do too much the next day.

Q. Would he allow you to work more if you wanted to work more?

A. Yes, sir. I believe he'd put me to work full time if I was able to do it.

Q. So the limit of your amount of work is based on what you think you can do; is that correct?

A. Yes, sir. That's pretty much all I can do.

Claimant did testify to some supervisory ability: "I can take some men with me and kinda point a direction for them. I do that now."

On redirect examination, Claimant expressed some doubt concerning his ability to manage employees constructing or operating an amusement park: "I wouldn't want to attempt to try that and guarantee my work." He testified that that would be stressful. He denied having problems being nervous, tense, or confused prior to his injury.

Over Claimant's objection, Gay Signoff testified for the Respondents as an expert in the field of vocational rehabilitation and consulting. She described her job as working "with a claimant to determine what types of occupations or work activities are appropriate for them, under prescribed guidelines that are usually issued by a doctor." She began working with Claimant in March, 2003; a number of her reports are found in Claimant's Exhibit #6. She described Claimant's duties at Security Shredding as they have evolved over time: painting trucks, taking care of plumbing, operating a baling machine, and operating shredders. Having observed Claimant at work, in her opinion he "was self-confident in what he was doing. He seemed to have the respect of other employees because he knew what he was doing and because he knew the overall operation." She

could not “say that [his position operating the baler] was supervisory, but he was in a lead position.” Based upon her personal observation, she did not believe Claimant required assistance in performing his job functions.

Signoff’s view of Claimant’s work abilities finds some support in the medical records. In his neuropsychology report following Claimant’s October 20, 2003 testing, Dr. Souheaver wrote:

I think the best therapy for this man, is going to be a return to the work force, which he has already demonstrated he is capable of achieving. I am very unclear why he was not allowed to increase, rather than decrease, his work productivity at his current job. He seems to have a very supportive employer, and that is very often not the case, as you know.

On September 27, 2005, Dr. Baskin opined that Claimant “has moderate emotion and behavioral impairments and not severe.”

There are also records that call into question Claimant’s ability to work. Dr. Joyce Fowler provided Claimant with a number of outpatient psychotherapy treatment sessions. On July 31, 2003, she expressed her concern regarding Claimant’s “poor safety judgment, difficulty reporting when he is experiencing problems, and exacerbation of his anxiety” at work. She reiterated these concerns on October 2, 2003 and renewed her recommendation for “written guidelines regarding limitations, supervision, and education/pre-teaching with Mr. Sutherland regarding [Claimant’s] abilities and limitations.”

In her March 15, 2005 report, Dr. Johnson observed:

Mr. Miller is not a candidate for computer training, community college classes, vocational rehabilitation, etc. From all the data available, it appears he is giving maximal effort and likely cannot do more than he is doing at his current job. Given his range of impairments and the impact of these on his emotional functioning, self-esteem, and self-image he is doing amazingly well.

She did not believe Claimant would show improvement in his neuropsychological status.

Dr. Rutherford also offered his opinion on Claimant's ability to work. He characterized some of Signoff's written statements as "ridiculous," although he conceded he had not observed Claimant in his work setting. With regard to Claimant's current employment, Dr. Rutherford opined:

I think Mr. Miller has a very kind and sympathetic employer, and he provides Mr. Miller with the opportunity to go to work. I think under any other circumstances he would be unemployable. I think Mr. Miller's employment is not dissimilar from an intellectually handicapped individual going to a workshop-type environment.

Dr. Rutherford did not believe it was a "smart idea" for Claimant to be working around a shredder and that his job placed Claimant at "increased risk of falling" which could cause further head injury.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Logan County v. McDonald, ___ Ark. App. ___, ___ S.W.3d ___ (April 6, 2005).

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. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss.

McKinney v. Plastics Research & Dev., Full Workers' Compensation Commission Opinion filed November 10, 2004 (E901881)(citations omitted); see Ark. Code Ann. § 11-9-522(b)(1); Logan County, ___ Ark. App. at ___, ___ S.W.3d at ___. In addition, permanent 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); see McKinney, supra. “Major cause” is defined as more than fifty percent of the cause. Ark. Code Ann. § 11-9-102(14)(A). Claimant has the burden of proving his entitlement to wage-loss disability benefits by a preponderance of the evidence. See Ark. Code Ann. § 11-9-704(c)(2).

At the time of the hearing, Claimant was 54 years of age with an 11th grade education. His work history prior to his compensable injury reflects supervisory and technical skills and experience. However, a preponderance of the evidence demonstrates that his compensable head injury limits his ability to his current manual labor. It does not appear from the medical records that his neurological condition will improve.

Claimant’s motivation and attitude in seeking and retaining employment following his head injury are favorable. Claimant is the one who found his job with Security Shredding; he appears to enjoy his work and testified to a desire to keep working. Apart from Dr. Souheaver’s report, which is reasonably criticized by Dr. Rutherford, there is absolutely no indication that Claimant is malingering.

After considering all relevant wage-loss factors, I find that the Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to wage-loss disability benefits in the amount of 30%. I find that there are no impediments in this record to assessing wage-loss; Claimant’s motivation and attitude towards finding work are commendable.

I further find that Claimant’s September 13, 2001 compensable head injury is the major cause of his disability. Claimant could work in supervisory or technical positions, and even drive a milk truck, prior to his injury; he is unable to perform those types of duties or

work activities after the injury. No other cause is identified in, or revealed by, the record. Thus, I find that Claimant's September 13, 2001 compensable injury is the sole cause, and thus the major cause, of his disability.

C. Nursing Services

Claimant's wife of 35 years, Linda Miller, testified that a representative of Respondents, Shawn McNerlin, offered to pay Mrs. Miller to perform certain services for Claimant.

Q. What kind of services were you going to perform in return for being paid \$9 an hour?

A. Take him to and from his doctors' appointments. He had to have a structured and safe environment to live in. He couldn't - his balance wasn't right. His balance was off, and he had to use a cane. So we had to be careful that there wasn't anything in his way because he looked straight ahead and paid no attention to where he was going.

I would dispense his meds and do his cooking for him. Then when he started to work or whatever, I would lay his clothes out and get them ready. Then if he gets up in the middle of the night to go to the bathroom, I have to get up and go with him because he will - he's disoriented if he's not awake really well when he gets up, and he's fallen a couple of times.

Mrs. Miller later specified that Claimant has to have his medications and has to eat at a certain time; if he she did not lay out his clothes, he would not dress appropriately for weather conditions. She confirmed that Claimant will not take his medications by himself.

On cross-examination Mrs. Miller was asked about a "typical day."

Q. On a typical work day - and correct me if I'm wrong - your husband takes a shower. You prepare his breakfast and take him to work. You call your husband around mid-day to find out where he's going to lunch and to make sure he's taking his medication. You pick him up from work, prepare and eat your supper together and then go to bed. Is that a fair description of your typical work day?

A. Correct.

She confirmed that Claimant is able to put on his clothes, feed himself, use the bathroom on his own, walk without a cane, and walk at work without assistance. She testified that Claimant does help her around the house.

Claimant testified to certain changes in his life following the accident: he cannot keep a checkbook, he cannot cook, and he cannot drive himself. His wife drives him to and from work. He confirmed that he is physically able to put on his clothes, eat his own food, and use the restroom. He helps out by doing “a little sweeping.”

Claimant’s Exhibit #3 is a collection of McNerlin’s reports. A report dated November 27, 2001 notes that Mrs. Miller “would be agreeable to accept \$9.00 per hour to care for [Claimant] herself instead of working out of the home, to make sure he gets to the outpatient program and scheduled appointments.” An e-mail dated May 8, 2002 notes that one home care agency would charge \$16.00 per hour to “do most things for the claimant except transportation and give meds”; another agency would charge \$14.00 per hour to provide “[a]ll services ... including transportation to [appointments].” McNerlin concluded, “[a]s far as a cost comparison, we are saving money by using Mrs. Miller at this time.” Claimant’s Exhibit #5 is a set of nursing care services records.

After initially declining to address whether Claimant needs home health services, Dr. Rutherford addressed the issue in a letter dated July 11, 2005.

It is my medical opinion expressed within a reasonable degree of medical certainty that Mr. Miller requires home care services. As you are aware Mr. Miller suffered severe head trauma with resultant severe and significant cognitive and behavioral deficits. He is incapable of functioning in an unsupervised environment. He cannot be trusted to drive, care for himself, prepare meals or take his medication reliably. Mr. Miller’s wife performs these duties for him driving him to work and to appointments, preparing his meals, supervising his medication and supervising his activity within the house so that he does engage in potentially hazardous activity pertaining to

self or others.

At his deposition, Dr. Rutherford made it clear that he was not aware of the requirements for a spouse to qualify for payments for home health care services under the workers' compensation law.

Under Ark. Code Ann. § 11-9-508(a), an employer may be required to provide "such ... nursing services ... as may be reasonably necessary in connection with the injury received by the employee." The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Hamilton v. Gregory Trucking, ___ Ark. App. ___, ___, S.W.3d ___ (March 16, 2005).

While compensation may be awarded for nursing care provided by a relative, compensable nursing services do not include assistance with household and personal tasks which the Claimant is unable to perform. Pickens-Bond Constr. Co. v. Case, 266 Ark. 323, 327, 333, 584 S.W.2d 21, ___ (1979). The services contemplated by the term "nursing services" are those rendered in tending or administering to another in sickness or infirmity. Little Rock Convention & Visitors Bureau v. Pack, 60 Ark. App. 82, 90, 959 S.W.2d 415, ___ (1997) (citations omitted). The Commission notes a distinction between "nursing services" which are compensable, and "custodial services" which are not. Leach v. WBC Constr., Full Workers' Compensation Commission Opinion filed July 13, 1995 (E304749). Nursing services include such things as helping administer medication to an individual or helping with physical therapy; custodial services generally are services which include assistance with household and personal tasks which a claimant may be unable to perform, such as cooking. Id.

I find that Claimant has not sustained his burden of proving an entitlement to

payment for nursing services provided by his wife. Most of the services provided by Mrs. Miller are custodial services and therefore not compensable. As to her dispensation of medicine, I am unable to find testimony in the record indicating exactly how many hours per week she performs this service. In the absence of that testimony, I am unable to determine exactly what compensation, if any, should be rendered for her assistance with Claimant's medication.

D. Attorney's Fee

Since Claimant's compensable injury occurred after July 1, 2001, his request for an attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. See Ballance v. K.C. Contracting, Full Workers' Compensation Commission Opinion filed August 30, 2004 (F204392). Under the statute, 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). The real object of this statute is to place the burden of litigation expenses upon the party which made litigation necessary. Cleek v. Great Southern Metals, 335 Ark. 342, 345, 981 S.W.2d 529, ___ (1998).

The record indicates that Respondents have not contested compensability, nor have they contested Claimant's entitlement to an 11% permanent impairment rating to the body as a whole for his neck and back injuries. Indeed, Respondents paid the 11% permanent impairment rating. The parties stipulated that as of September 22, 2005, Respondents began paying permanent partial disability benefits for an impairment rating to Claimant's head. Respondents now contend that they have not controverted an impairment rating to Claimant's head. Claimant contends that Respondents have controverted all permanent disability benefits beyond the 11% permanent impairment rating previously paid.

I find that Respondents have controverted Claimant's entitlement to a 49% permanent impairment rating for his head injury. It appears from the record that it was necessary for Claimant to employ counsel to obtain Dr. Rutherford's original 39% impairment rating. Although Respondents later began paying this 39% impairment rating, they did not do so for several months, beginning only in September of 2005. Even then, Respondents continued to contest Dr. Rutherford's new 49% impairment rating. If Claimant had not employed counsel to assist him in this matter, it is reasonable to conclude that his head injury permanent impairment rating claims would not have been properly presented and protected. See Cleek, 335 Ark. at 345, 981 S.W.2d at ____.

Likewise, I find that Respondents controverted Claimant's entitlement to wage-loss disability benefits. There is no indication that Respondents ever agreed to these benefits; it was necessary for Claimant to employ counsel to protect his right to these benefits. Therefore, Claimant is entitled to an attorney's fee upon the wage-loss disability benefits awarded herein as well as the 49% permanent impairment rating for his compensable injury to his head.

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 relationship existed on September 13, 2001 and at all other relevant times.
3. Claimant sustained compensable injury to his head, neck, and back on September 13, 2001.
4. Claimant's healing period ended on December 12, 2002 with regard to his neck and back injuries; his healing period ended on March 16, 2005 with regard to his head

injury.

5. Claimant's temporary total disability rate is \$410.00; his permanent partial disability rate is \$308.00.

6. Claimant has been assigned an 11% permanent impairment rating to the body as a whole for his neck and back injuries.

7. Respondents have paid Claimant's 11% permanent impairment rating in full.

8. As of September 22, 2005, Respondents began paying permanent partial disability benefits for an impairment rating to Claimant's head.

9. Claimant is entitled to a permanent impairment rating of 49% to the body as a whole based upon his impairment due to his compensable head injury. The record demonstrates that Claimant's compensable head injury is the sole, and therefore the major, cause of his impairment at issue. Three CT scans document Claimant's head injury and are objective and measurable physical findings. Finally, utilizing the Guides and based upon the record, the 49% impairment rating assessed by Dr. Rutherford is correct. Dr. Rutherford's opinion is credible and entitled to weight for two reasons: he is Claimant's treating physician and his opinion is corroborated by three of the four neuropsychological evaluations undergone by Claimant.

10. Upon consideration of all relevant wage-loss factors, I find that Claimant established a decrease in wage earning capacity equal to 30% to the body as a whole, and that he is therefore entitled to wage-loss disability benefits. His September 13, 2001 compensable head injury is the sole, and thus the major, cause of his disability.

11. Claimant failed to sustain his burden of proving that he is entitled to reimbursement for certain services provided by his wife. These services are primarily

custodial services and therefore not compensable. Further, as to his wife's dispensation of medicine, the record does not reflect exactly how many hours per week she performs this service.

12. Claimant's attorney is entitled to the maximum statutorily prescribed attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 1996). Respondents controverted Claimant's entitlement to a 49% permanent impairment rating due to his compensable head injury as well as his entitlement to wage-loss disability benefits.

AWARD

Respondents are 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 Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996) and Death & 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