

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404094

BILLY PILLOW, EMPLOYEE	CLAIMANT
SANYO MANUFACTURING CO., EMPLOYER	RESPONDENT #1
MITSUI SUMITOMO INS. CO., CARRIER	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED NOVEMBER 8, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 11, 2006, at Forrest City, St. Francis County, Arkansas, and submitted September 1, 2006.

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas, and the HONORABLE CHARLES HALBERT, Attorney at Law, Helena-West Helena, Arkansas.

Respondents #1 represented by the HONORABLE ANDREW M. IVEY, Attorney at Law, Little Rock, Arkansas.

Respondent #2 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 claim to determine the claimant's entitlement to additional workers' compensation benefits.

On June 13, 2006, a pre-hearing conference was conducted in this claim, 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 regarding same. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Billy Pillow, the claimant, Deborah Pillow, and Natalie Parkman along with the September 1, 2006, deposition of Dr. Frank Schwartz, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Billy Joe Pillow, the claimant, with a date of birth of July 29, 1948, has a ninth grade education. Claimant commenced his employment with respondent #1 on April 18, 1967. Claimant has been married to his current wife since 1981.

The claimant present an employment history consisting of farm labor, working at his father's service station, and a short period of employment at a grocery store in Memphis. The predominate work that the claimant has performed has been in the employment of respondent #1. The testimony of the claimant reflects that he commenced his employment with Warwick Electronic on April 18, 1967, and remained in the employment of same after it was acquired by respondent #1 in July 1981. Claimant discharged the duties of forklift driver the entirety of the time of his employment, with the exception of working in production for a short period which was early in his career.

Regarding his job duties as a forklift driver in the employment of respondent #1, claimant's testimony reflects:

I loaded TV's with a clamp hook we, we would call them a clamp or a squeeze truck. And we loaded TV's on trailers for Wal-Mart, various other carriers. (T. 31).

In explaining why he considered the job of a forklift driver in the employment of respondent #1

as a heavy duty position claimant testified about lifting:

Well, some. I've helped unload trailers and stuff like that where you have to physically man-handle, you know, televisions or microwaves or whatever came in on a trailer from time to time. And plus move the sets if I had to in my normal day at work. If I had to cut out one that was damaged, the box set or whatever, our boss told us, just to go on ahead, man, and cut it out, take it back. You know get the number off of the serial numbers, and you know, get the numbers off the little sticker that's on the side or whatever they had them on there and keep that. And we would go back and get one out of the warehouse. And we will write that down, and give that to the foreman.

If it was on the bottom or in the middle or wherever on the top, I would have to lift, and you know, to go up and clamp it out from that set or a microwave or whatever. I would lift it up, back to back and set the thing, set the clamp down on the floor because we could not go up under it, you know, to take that set out or whatever. Sometimes if the set was big, you know, a big set, we would, I'd say, hey, I need some help. One of the guys would help me. We would physically take that set off and put another one on. (T. 31-32).

Claimant's testimony reflects that the heaviest product that he lifted on a regular basis was primarily TV's. In addition to TV's and microwaves, the testimony of the claimant reflects other products handled in his employment with respondent #1:

We'd get sewing machines in from overseas. I don't recall what country they come from. All I know is they're from overseas. It might have been Malaysia or Hong Kong. I don't know. But I would go down sometimes. The boss would tell us if we've got so many trucks, well trailers, you know, that we got in out there because they come in constantly, all the time. And sometimes guys that regularly unload trailers, we would - - the drivers, we would go down, you know, and help unload shrinkwrap, man, walk around, you know, shrinkwrap the sewing machines because they weren't too steady. (T. 33).

Regarding his physical condition prior to his April 19, 2004, compensable injury, claimant denies that he had any limitations or restrictions on his physical activities. Claimant's testimony reflects that he was able to perform the requirement of his job duties, to include

manual lifting and operating the forklift.

Claimant was involved in the Caldwell Fire Department for at least 20 years prior to April 2004. Claimant was a certified fire fighter. Claimant performed search and rescue for the St. Francis Sheriff's office:

We would assist deputies if need be to help them, you know, look for people, you know that they had warrants on them or, you know for one thing and another, you know. I would assist them. (T. 35).

Claimant estimates that he performed the afore for about 15 years. Claimant also performed some security work:

I did it for a number of years. I don't recall the actual amount. I mean it could have been 14 or 15 years or whatever. I worked for Harvest Foods here in Forrest City and Food Giant here in Forrest City. And, Mr. Wayne Bonds, he has a Handy Food Store here in town, and I worked for him at his store. (T. 36).

Claimant worked as a security guard and carried a weapon. Claimant testified that his duties with the Fire Department, the search and rescue with the Sheriff's office, and security guard work all ended when he had his April 19, 2004, compensable injury.

Claimant acknowledged that prior to 1981 he received chiropractic treatment, however denies that he has seen a chiropractor since 1981 for his back. Claimant asserts that between January and March 2004, prior to his April 2004, accident he had no restriction on his physical ability to perform hard work. Claimant attributes any neck or back pain that he experienced during the afore period to the usual aches and pains bought on by performing manual labor, however denies having any significant neck or back pain that prevent him from performing any of his job duties for respondent-employer. Claimant worked a typical 40-hour work week for respondent-employer.

With respect to the April 19, 2004, accident, which serves as the basis for the present claim, claimant's testimony reflects:

I was loading a trailer. And I had it, I guess about half way loaded I would suspect. And I was carrying a load of sets into the trailer with my clamp truck or lift truck. And I went down, the trailer went down some. But that just seemed like regular, you know, when you go in and put weight on the back end of it, it went down. And I was just barely in the back end. The next thing I know, the trailer starts moving. And I started hollering and everything. And just kept hollering and everything. And I heard some other people hollering, you know, everything. I didn't know what they were hollering. I guess they was hollering because the truck was going out, and I was still hanging up in there and going off, you know. The truck was literally pulling me.

The next thing I know, the front end went down like this. And then when it lost its footing on the drive wheels in front, it just basically lost it footing on the dock plate and the rear of the trailer there. And next thing I know, heck, I went down like that real fast. And it pulled me down here. Then I started burning, you know, and stinging, you know, stuff. And it radiated down my leg and everything. And then about then the steering wheels, you know, lost their footing on the back, it happened so fast it went like doon (phonetic) just like this, you know, went forward and came back. And hit the dock plate some kind of way. The next thing I know, my head had gone up and hit the overhead of the lift truck. And that's basically about what happened and it started hurting up in here and then down in here. And just bad. (T. 38-40).

Claimant noted the presence of significant pain in his neck, lower back, and leg which he attributed as residuals of the accident, and for which he has been treated by various physicians.

The testimony of the claimant reflects that following the April 19, 2004, accident he was taken to the emergency room, where he received treatment and was admitted for several days. Claimant's testimony reflects that he received medical treatment under the care of Dr. Schwartz during his hospital stay. Claimant noted that the regular workers's compensation physician for respondent-employer was out of town and that Dr. Schwartz was filling in for him. Regarding

the symptoms he complained of during the admission, claimant testified that his back and neck hurt and that he was having headaches which he associated with it. Claimant asserts that he continues to have the headaches, neck pain and back pain. Claimant's testimony reflects, respect to the change in his condition since to accident to the present:

At the time, I couldn't get up too good. And I was assisted in the bathroom, you know and helped get there, you know, sit down, you know. I mean it was demeaning on my part, you know. I've been used to doing this. And it became very agonizing. (T. 44).

Claimant acknowledged that his condition has gotten "some" better. Claimant has not undergone surgery on his neck or back since the accident. Claimant testified that as far as he knows he has been released by all of the physicians who have treated him for his back and neck conditions.

The testimony of the claimant reflects that the only physician that he is still seeing is Dr. Schwartz, his family physician, who he has been seeing for a number of years. Claimant's testimony reflects that the only doctor that he has seen between the time he was married in 1981 and his April 19, 2004, accident has been his family physician, Dr. Schwartz.

Regarding the residuals from his injury, the claimant testified that he can only walk for short distances before having to stop and take a breather. Claimant noted that after walking a short distance he experiences pain in the lower part of his back in the middle, and a stinging sensation down his right leg. Claimant testified that he is unable to sit for a prolonged period of time without frequently moving. Claimant asserts that the afore is only tolerated because the medication he takes, which he takes every so often during the day. Claimant concluded that he is unable to walk or sit for more than 15 minutes at a time. The testimony of the claimant reflects that Ultram or Tramadol, Neurontin, Amitriptyline and Effexor relative to his injury. Prescription

medicines that the claimant takes that are not related to the accident include Glucofoge, Atos for diabetes, Diovan for blood pressure, and Lipitor for cholesterol. Claimant's testimony reflects that he took the four prescription medications for his non-work related ailments prior to the April 19, 2004, compensable accident. Further, the testimony of the claimant reflects that neither his diabetes, high blood pressure or cholesterol limited him in any way in being able to perform his job for respondent-employer.

Regarding the frequency of the medication he takes in connection with his compensable injury, claimant testified:

Twice, well on the bottle it says four times a day. But Dr. Schwartz told me, he said if I get to hurting real bad, I could take two like of the morning when I get up with meals. And of the evening, if need so I go back to one or two. And I take Amitriptyline and Effexor and Neurontin. Effexor, I only take that once a day. (T. 48).

Claimant's testimony reflects that when he is taking his medication during a typical day he is not able to fully concentrate on things he needs to do, that the medication adversely affect his memory and attention span. Claimant testified that despite the side affects of the medication he needs to continuing taking them to address his pain.

Claimant testified that he does not feel that he could go back and perform his job with respondent-employer because of the residuals of his injury. Claimant's testimony reflects that he is unaware of any job that he could perform now in light of his physical condition and the side effects of his medication. Claimant testified:

I've tried to think, you know of several jobs. But all of it involves heavy this and sitting or walking or standing, you know, for long periods of time. (T. 49).

The claimant was awarded Social Security disability in October 2004.

During cross-examination, claimant testified that he took several classes in order to keep his certification for hazmat, as well as refresher on auto extrications and wild lands suppression, and forest fires. In addition to working as a part-time security guard for several supermarkets in the Forrest City area, claimant also served as a constable from 2002 to 2003 after being appointed to the position following the death of a friend, who was the previous constable.

Claimant acknowledged that he received medical treatment for his April 19, 2004, compensable injuries under the care of Dr. Parison and Dr. Autry, and that he obtained a one time change of physician to Dr. Robert Abraham, a Jonesboro neurosurgeon, from the Commission which was granted. Claimant was referred by Dr. Abraham to Dr. Braden for pain management. Regarding the October 2005, release to full duty by Dr. Braden with a 6% rating for a herniated disc in his neck, claimant's testimony reflects:

He just released me. The way I understand it, when me and my wife were sitting in his office, not his office but in the examination room, he stated to us other than that one medicine, I believe it was Effexor or whatever the medication was at the time, rather than coming up to there, coming up to Jonesboro to get one prescription and the other two, he said, well, I'm just going to refer you back to save you some time and money on gas. And we will - - says that we'll - - I will refer you back to Dr. Schwartz, your GP in Forrest City to administer these medications. And I understand that the medications were approved. And Dr. Schwartz to sign the prescription or to sign off on those. (T. 52-53).

While acknowledging that the nurse case manager provided him a slip releasing him to return to full duty work without restrictions, which was authored by Dr. Braden, claimant denies that Dr. Braden told him that he was released without restrictions. Claimant asserts that he informed the nurse that he could not return to work while taking the prescribed medicines for his injury.

Claimant acknowledged that following his treatment by Dr. Braden he sought a second opinion

from Dr. Boals without respondent's knowledge or consideration of whether it would accept it. Claimant did not return to work for respondent following the October 12, 2005, release by Dr. Braden.

Claimant was a member of the union during his employment by respondent. Claimant concedes that in the union contract there are annual increases in wages, usually in March. Claimant was aware that there was an increase in the wage rate of his employment position between the date of his April 19, 2004, injury and his October 12, 2005, release by Dr. Braden, to which he would have been entitled had he returned to work. Claimant also acknowledged that he was informed by respondent-employer that he had to report for work in accordance with the October 12, 2005, release of Dr. Braden or else provide an additional off work slip within five (5) days.

Claimant was taken off work by his family physician, Dr. Schwartz, from October 12, 2005 until October 19, 2005, with a return to work date of October 20, 2005. On October 21, 2005, claimant was advised by respondent-employer that he needed to produce an additional off work slip within five days or by October 27, 2005. The claimant's wife signed for receipt of the letter containing the afore on October 22, 2005. Claimant explained that his failure to return to work by October 25, 2005, or to produce an additional office work slip by the October 27, 2005, deadline was due to the fact that his doctor was not available at the time to do it. Claimant did not notify respondent of the afore and did not produce to off work slip until October 28, 2005. As a consequence of the afore, the claimant's position was terminated by respondent-employer. (T. 57).

On July 31, 2006, a grievance hearing about the circumstances surrounding the claimant's

termination was held, and resulted in an agreement between the union and management reinstating the claimant's position. Claimant was advised that he could return to work as of July 31, 2006. Claimant did not return to work but rather secured another off work slip from his family physician. Claimant maintains that with his injury he has no plans to return to work at respondent anytime soon.

The testimony of the claimant reflects that he did discuss the requirement of his job duties at respondent with Dr. Braden. Although he occasionally lifted damaged merchandise, claimant concedes that his primary job duties in his employment with respondent-employer was driving forklifts.

The testimony of the claimant reflects that in addition to the 6 % impairment for the herniated cervical disc, claimant testified that he is aware that Dr. Braden referred to all of his other findings as more related to degenerative changes as well as a diagnosis of sensory neuropathy that is not related to the compensable injury. Specifically, the low back and right leg complaints were characterized by Dr. Braden as being degenerative and unrelated to the accident.

Claimant testified that he had been told a lot of different things concerning his complaints by a number of different physicians. Specifically, in April 2005, claimant noted that he was seen by Dr. Autry who assessed a cervical herniation, lumbar degenerative disk disease, and facet arthropathy. In June 2005, when seen by Dr. Abraham, claimant was diagnosed with disk bulges in the cervical area and bulges in the lumbar area. Finally, claimant noted that Dr. Braden assessed a herniated disc in the neck. Claimant maintains that when he saw Dr. Boals he was attempting to get an objective straight forward answer regarding his injury and what was causing his pain.

Claimant testified that Dr. Boals was of the opinion that at the least his pre-existing low back condition was aggravated by the April 19, 2004, accident.. Claimant also noted that Dr. Boals placed limitations on his future employment activities. Claimant testified that Dr. Boals assessed his permanent physical impairment at 20 % to the body as a whole.

Claimant attributes his inability to return to work to the pain in his neck, back, and headaches. Regarding his desire to work, claimant's testimony reflects:

Yes, sir. When you see things that need to be done, and it's Demeaning for me to ask my son or wife to get out and do what I was accustomed to doing, like yard work, cutting the yard, and raking, first one thing then another. You know normal duties outside, helping plant flowers, to her satisfaction you might say, digging holes for those plants, and tilling, you know, and first one thing and another. (T. 63).

Claimant noted that he has driven an automobile since his April 19, 2004, compensable accident:

No sir. I have not driven an automobile since the day of the accident. The last time I drove my Dodge was that day. And this medicine keeps me so loopy and everything, they told me don't drive. (T. 64).

In light of the effect of the medications that he takes relative to the compensable injury, claimant testified that he do not believe he could drive a forklift at work. Claimant explained, regarding the afore:

Well, we would have to go in and bend over, way over to load sets, make sure we didn't hang the sets on the walls of the trailers and stuff like that. It may be the trailer might have a loose board or a piece of metal sticking out of it. We would stick some cardboards, you know, up there to stop, you know, for this specific operation, you know. We tore up - - just normally we got told about it. (T. 64-65).

Claimant noted that his job as a forklift driver also entailed walking, stooping, squatting, bending, and climbing.(T. 65). The testimony of the claimant further reflects that in driving the forklift he used his neck to look from side to side:

Yes, sir. We would have to do that when we would, sometimes we would have to take sets off of the production, I mean not the product - - well, we went out occasionally when the lines were out, and getting sets out there. And we worked in close quarters. And we had to look around, lean over a lot, you know, and look around when we would start setting sets up on top of one another, you know, to make sure that we didn't hit that overhead out on the production floor. We would have to go out there when the lines were broken down. We would have to look around that and taking sets to Q.A., or quality assurance. We would have to pick them up and look around and make sure that when they put the cart up under it, whoever was handling the cart, that they were positioned up under there. So they would say well, we've got it up under there, and you can sit the sets down. And we had to look behind us, you know, turn a good distance around to see if anybody was back behind us. We would have to blow out horns periodically at intersections and, you know, first one thing and another.

Yes, sir. You would have to turn around, you know, and look behind you. You would almost have to do a, I guess 180 or whatever you call it to turn around to where that you could see back behind you. You couldn't sit just like this and look. You had to turn your body to do that. (T. 66-67).

Claimant testified that at the time he underwent a functional capacity evaluation in April 2005, he was using a walker. Claimant added that he still has the walker. At the time of the hearing claimant was using a cane to assist him in walking. Claimant receives \$714.00, monthly in Social Security disability benefits.

Ms. Deborah Catherine Pillow, the claimant's wife of twenty-five years, testified that the claimant was working for respondent-employer at the time that they were married on July 29, 1981. Claimant worked as a forklift driver at the time. The testimony of Mrs. Pillow is corroborative of that of the claimant regarding his activities away from work and physical capabilities prior to April 19, 2004. Regarding a typical day of the claimant since his April 19, 2004, accident, Mrs. Pillow's testimony reflects:

He gets up, he will eat breakfast, he eats lunch, he may lay down for a while. He usually just lays or sits around most of the day

watching TV or, you know just sitting and reclining most of the time.

* * *

Oh, he'll make statements like that his back is bothering him he wants to lay down for a while. He'll lay down for a little while, and then he'll say, I've got to get up, my back is bothering me laying down. Or he'll talk about if he's walking around the house that his back is bothering him, that his neck is bothering him. (T. 19).

Mrs. Pillow has been employed outside of the home with the Forrest City School District for fourteen (14) years, as an instructional assistant at the computer lab. Mrs. Pillow testified that during the school year when she is unavailable to help the claimant take care of himself, if her son is available he renders assistance to the claimant. Otherwise, the claimant waits until either she or her son get home to help.

Mrs. Pillow testified that at the time of the claimant's April 19, 2004, accident he earned \$13.00 or \$14.00, per hour. Additionally, the testimony of Mrs. Pillow reflects that it is her understanding that the claimant is not going to be able to go back to work.

Ms. Natalie Parkman, the Human Resource Specialist for respondent-employer, testified that she has been employed by respondent-employer since July 16, 2001, and that she reports directly to Ms. Sandy Cook, the Director of Production Resources. In describing her job duties, the testimony of Ms. Parkman reflects:

I do anything and everything pertaining to any hourly employment, whether it be the hiring process, discipline, termination, anything, any movement of the people like laying off, and moving from position to position, and anything in between. (T. 72).

With respect to the claimant, Ms. Parkman testified that his released date to return to work was October 12, 2005, however he did not return on or after that date. Ms. Parkman testified

regarding an October 2005, letter that was sent certified mail to the claimant. Claimant acknowledged receiving the October 2005, letter. Ms. Parkman noted that the termination of the claimant's employment which was cited in the October 2005, letter had nothing to do with his workers' compensation claim, but rather was strictly from the procedures and policies and the collective bargaining agreement between the union and respondent-employer.

Ms. Parkman testified that has the claimant reported for work following his October 12, 2005, release date he would have been returned to his previous job as a forklift driver, which was being held open for him. Ms. Parkman, in referring to the collective bargaining agreement, testified that when the claimant went out in April 2004, due to the compensable injury, he was making \$11.56, per hour, and in March 2005, the hourly rate increased to \$11.91. The hourly rate for the claimant's employment position at the time of the hearing was \$12.15.

Ms. Parkman testified that she learned of the claimant's release by Dr. Braden to return to work from the plant nurse. Ms. Parkman was unaware that Dr. Braden suggested that the claimant followup with his family physician, Dr. Schwartz, for medication. Ms. Parkman noted the October 20, 2005, release by Dr. Schwartz of the claimant was full duty. Ms. Parkman noted that if the limitations placed on the claimant's employment activities by Dr. Boals were appropriate, the claimant he would not be a candidate for the forklift driver job. (T. 83).

Ms. Parkman testified:

I receive, we have a list of all the employees with restrictions, and I have to look at those restrictions on everybody periodically to make sure they can do that job with those restrictions. Now, I don't decide if they can do the job or not. I get the plant nurse, she's a medically certified person to go out and to witness this job happening to see if they can do this job with those restrictions. (T. 84).

Based on the releases authored by Dr. Braden and Dr. Schwartz, Ms. Parkman noted, the claimant did not have any physical restrictions on his employment activity, to include the job of forklift driver. Ms. Parkman's testimony reflects that the report of Dr. Boals was not something that went into consideration by respondent-employer regarding returning the claimant to work. The testimony of Ms. Parkman reflects that Dr. Schwartz has taken the claimant completely off work.

On April 4, 2005, the claimant underwent a functional capacity evaluation at Functional Testing Centers, Inc., pursuant to the direction of Dr. Autry J. Parker. The FCE concluded that the claimant put forth very inconsistent effort and demonstrated inconsistencies in his responses. According, the FCE determined that claimant's true functional limitations remained unknown due to the unreliable results. (RX. #1, ex.1, p.1-11). The April 19, 2005, clinic note of Dr. Parker relative to the claimant reflects, in pertinent part:

Mr. Billy Joe Pillow comes for re-evaluation. We were able to review his functional capacity evaluation and we concur with the conclusion that he is capable of sedentary work. We do believe Mr. Pillow has reached maximum medical improvement. His diagnoses include cervical disk herniation, lumbar degenerative disk disease, and facet arthropathy. He has responded to long-acting opiates and currently is on 60 mg Avinza per day, but still describes a baseline pain that is essentially unchanged that is at 9 on a 10-point scale. . . . (CX. #1, p.)

Claimant was seen by Dr. Robert E. Abraham, a Jonesboro neurosurgeon, on June 30, 2005, pursuant to a Change of Physician Order which was entered by the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission. The June 30, 2005, report recites the history of the claimant's injury and medical treatment in connection therewith:

Mr. Pillow is a 57 yo WM who has neck and lower back pain approx. 14 mo ago. Patient had an OTJ injury when he fell off a loading dock while driving a lift truck. He fell approx 4 to 5 feet. He was buckled in to the lift truck. He injured his neck and lower back with R leg pain. He has seen Dr. Swartz Dr. Parisson Dr. Parker and Dr. Benjaih. He has had multiple injections in his neck and lower back. He had minimal relief. PT was used without relief. (CX. #1, p. 2).

Dr. Abraham, following his examination of the claimant and review of diagnostic studies, concluded that the claimant had bulges of lumbar and cervical discs, and assessed his complaint as cervical and lumbar spine pain. Claimant was ultimately referred by Dr. Abraham to Dr. Terence P. Braden, D.O,

The October 11, 2005, office note of Dr. Braden relative to the claimant reflects, in pertinent part:

Mr. Pillow comes in today for a visit. He is accompanied by his wife. He reports he has been utilizing the medication that has been ordered. He is now taking Effexor XR, 150 mg orally a day and Neurontin, 800 mg orally three times a day. He has not taken Amitriptyline for two weeks.

* * *

He continues to have a multiplicity of complaints with his pain, which covered the entire spine as well as his cervical, thoracic, and lumbosacral spine included.

Summary: Mr. Billy Pillow is a 57-year-old, white male who sustained an injury on 04/19/04. He has had chronic pain since that time. He has participated with multiple physicians and has had multiple medications. He has had spinal injections done and has been seen by Neurosurgery.

His objective findings are a left-sided paracentral disc herniation at C5-6. He other findings that have been had in his other testing are more related degenerative changes.

He has a diagnosed sensory neuropathy that is not related to the injury that he reports to have sustained.

Mr. Pillow has reached Maximum Medical Improvement from the injury that he reports to have sustained.

He is being released back to his regular work duties without restrictions. In my experience, though, individuals such as Mr. Pillow do not return to work and are very involved with their pain.

His Impairment, based upon the AMA Guides to Evaluation of Permanent Impairment, 4th Edition, is 6 % impairment to the whole person, Based on Table 75, Page 113, of the Guides.

His medications are stable as they are written. He should remain on the Effexor XR, 150 mg orally a day and the Neurontin, 800 mg orally three times a day. Addition of the Amitriptyline, 25 to 50 mg orally at bedtime, has been done at his request.

There is no need for him to see me further for a Physical Medicine Rehabilitation standpoint. He can follow with his family physician, Dr. Frank Schwartz, for renewal of his medications. (CX. #1, p. 5).

The October 11, 2005, office note of Dr. Braden reflects that a copy of same was provided to the nurse case manager assigned to the claimant's claim and to respondent-carrier.

On March 14, 2006, the claimant was evaluated by Dr. Joseph C. Boals, III, a Memphis specialist. The March 14, 2006, report of Dr. Boals reflects the claimant's past pertinent medical history, which includes diabetes, high blood pressure, and bilateral carpal tunnel release. After noting the medical treatment that the claimant received in connection with his April 19, 2004, accident, as well as his continuing symptoms, the March 14, 2006, report of Dr. Boals reflects:

. . . He complains of ongoing pain in the back radiating down the right leg with numbness of the middle three toes. He also complains of neck pain with burning in both hands and numbness that occurs while turning his neck. Mr. Pillow continues to take Neurontin, Tramadol, Effexor and Antriptyline. He did not return to work after his release.

PHYSICAL EXAMINATION: Exam shows pain on motion in both the neck and back. Neurological exam is within normal limits.

X-RAYS: AP and lateral cervical spine show multilevel degenerative changes with straightening. AP and lateral lumbosacral spine show multi-level degenerative changes with some slight degenerative spondylolisthesis at L4-5.

REVIEW OF MEDICAL RECORDS: MRI of the neck 5-11-04 showed multilevel degenerative change. MRI of the back 5-11-04 also showed multi-level degenerative change. Bone scan 6-16-04 showed facet joint disease at the L5-S1 level. EMG 6-17-04 showed evidence of a severe sensory neuropathy involving the right lower extremity suggestive of an S1 radiculopathy.

DIAGNOSIS: 1. Residuals from injury to the neck aggravating pre-existing arthritic change with ongoing symptomatology.
2. Residuals from injury to the back aggravating pre-existing arthritic change with ongoing S1 radiculopathy.

* * *

. . . Mr. Pillow should avoid overhead work, work away from the body and work requiring repetitive flexion, extension or rotation of the neck. He should eliminate prolonged walking, standing, stooping, squatting, bending, climbing, and excessive motion in the back. Due to the radiculopathy in the lower extremity and severe back pain he should continue to use a cane for short distance ambulation and a walker for long distance ambulation. In my opinion the cannot return to any type of factory work. If employable it would require numerous handicap aides and a sitting job with the ability to change positions often. (CX. #1, p. 7-8).

In a March 27, 2006, correspondence to one of the claimant's attorneys, Dr. Boals recited the basis for the claimant's impairment rating:

At the time I saw Mr. Billy Pillow on 3-14-06 his rating was assigned using the AMA Guides Fifth Edition. If that rating were provided using the Fourth Edition impairment would be assigned for the neck injury of 5% of the body as a whole under DRE Cervical Category II page 102. An additional 3% impairment would be assigned for the ongoing radicular pain in both hands. This impairment is assigned using general instructions of the Fourth Edition on page 8 under 2.2 "Rules for Evaluations". The total impairment would also be 8% of the body as a whole.

The impairment for the S1 radiculopathy from the back injury would be assigned of 10% of the whole person under DRE Lumbosacral Category

III page 102. An additional 3% would be assigned for the increased symptoms of pain which have required Mr. Pillow to take multiple pain medications. The impairment would equal 13% of the body.

The overall total body impairment remains the same at 20% of the body as a whole. . . . (CX. #1, p. 9).

The record reflects a May 19, 2005, vocational assessment relative to the claimant which was performed by Mr. Bob White, a vocational specialist with White & Rowland, Limited.

Claimant underwent the assessment with Mr. White on May 17, 2005, with an interview time of one and one-half (1 ½) hours duration. The May 19, 2005, report reflects, in pertinent part:

SUMMARY

Objectively we have a 57 year old male (considered advanced age) with a 9th grade education (marginal) and work history of 38 years as a lift driver. He suffered an industrial accident with subsequent vocational handicaps affecting return to work.

CONCLUSIONS

Quoting “A Guide To Rehabilitation”, a Matthew Bender Publication, “Impairment - Herniated Nucleus Pulposus, Disc Derangement, Spondylitis, Spondylosis Vocational Handicaps - Often accompanied by Chronic Pain. Restrictions on: Lifting, standing, walking, bending, twisting, physical stamina and endurance are customary. Avoidance of uneven terrain, unprotected heights, climbing and work in awkward positions is usually necessary”.

Further, it should be noted Billy will not be competing against other 57 year old handicapped individuals for jobs in the local economy but with all students who drop out of high school, vocational technical school or college and directly enter the labor movement, individuals who completed high school but choose to enter the labor force instead of continuing their education, and all workers who have been fired, quit, or laid off from jobs and thrown back into the labor pool, regardless of age or gender.

Finally, all jobs require persistence and pace to complete specific job tasks - all jobs require dependability and reliability (worker traits) and the ability to complete the normal eight hour work day and 40 hour work week. All jobs have on going work processes (requiring an individual to be in a set position for a specific period of time to complete specific work tasks) with

time dependent schedules.

The issue is not can Mr. Pillows return to work for a few days or even a few weeks, but can he perform the specific essential functions of a job over a period of months and years as a reliable, dependable employee.

* * *

Mr. Pillow is worn out. At age 57 he has given his entire life in one occupation with three employers. He has no skills to offer an employer, no education and in fact has had only his ability to perform hard physical work and be a reliable dependable worker.

His had objective test which support his pain complaints and his physical limitations. He does not meet the criteria to perform sedentary or light work as those terms are defined and it is unlikely there is anything else to offer him medically.

There is no vocational issues in my opinion and I have nothing to offer Billy. He should diligently, however, work in controlling his weight, exercise within limitations and work on family dynamics, as this can deteriorate easily in chronic pain cases. (CX. #2, p. 5-6).

On September 1, 2006, the parties obtained the deposition of Dr. Frank R. Schwartz, the claimant's family physician. The deposition is designated a part of the record as a Supplemental Exhibit. Dr. Schwartz specializes primarily in internal medicine. Dr. Schwartz has and continues to serve as the primary care physician for the claimant relative to his diagnosed diabetes and general health problems. Dr. Schwartz has treated the claimant as a primary care physician since December 4, 2002.

The testimony of Dr. Schwartz reflects that his examination of the claimant relative to the April 19, 2004, work-related accident resulted in an April 20, 2004, report with an assessment of the claimant's injuries as multiple contusions secondary to accident in addition to his pre-existing hypertension, diabetes, and hypercholesterolemia. The claimant's April 21, 2004, discharge

report from Baptist Memorial Hospital in Forest City, reflected and assessment of acute musculoskeletal strain and contusions secondary to a fall.

Dr. Schwartz testified that physically the claimant may be able to do some work, based on his August 7, 2006, examination, however, mentally he did not think that the claimant would ever be able to hold down a job. Dr. Schwartz's testimony reflects, regarding an nexus between the claimant April 19, 2004, accident and his present residual complaints:

First, I don't think you can necessarily connect the cervical spine bulge, because you don't have anything that says it wasn't there before. It's relatively small and could be preexisting.

Secondly, his degenerative changes were there before the injury. And he didn't have the type of problems that he has, so I don't think you can necessarily say that they are the root cause of all that preexisting condition. The sensory neuropathy that you see in diabetes more typically affects the extremities and is usually a burning sensation and tingling sensation. I don't think it's related at all to his pain. (Supplemental Exhibit, p. 24).

Dr. Schwartz conceded that he did not evaluate the claimant from an orthopedic standpoint, and would defer to an orthopedic, neurologist, or neurosurgeon on issues in that specialty.

The testimony of Dr. Schwartz reflects that his treatment of the claimant prior to April 2004, did not entail any sort of complaints of pain, to include any relating to his neck or disk herination. Further, the testimony of Dr. Schwartz reflects that nothing the claimant's medical records prior to April 19, 2004, suggested a symptomatic degenerative problem in the claimant's back or neck. Claimant has consistently complained of pain in the afore areas since the April 19, 2004, accident. Dr. Schwartz re-affirmed his opinion relative to the claimant as reflects in the August 7, 2006, report.

After a thorough consideration of all of the evidence in this record, to include the

testimony of the witnesses, review of the medical 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 April 19, 2004, the relationship of employee-employer-carrier existed among the claimant and respondents #1.
3. On April 19, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$311.00/\$233.00, for total/permanent partial disability.
4. On April 19, 2004, the claimant sustained an injury to his neck arising out of and in the course of his employment.
5. The claimant has been paid appropriate temporary total disability by respondents #1, and respondents #1 have paid appropriate medical benefits on behalf of the claimant as a result of the April 19, 2004, compensable injury.
6. On October 11, 2005, the claimant reached the end of his healing period and maximum medical improvement relative to his April 19, 2004, compensable injury with a residual permanent physical impairment in the amount of 8% to the body as a whole.
7. When the claimant's age, education, employment history, permanent restrictions and limitations are considered, the evidence preponderates that he has been rendered permanently and totally disabled from engaging in gainful employment, pursuant to Ark. Code Ann. §11-9-519 (e).
8. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of the injury of April 19, 2004.

9. Respondents #1 have controverted the payment of permanent disability benefits in excess of 6 % to the body as a whole.

CONCLUSIONS

The compensability of the claimant's April 19, 2004, injury is not disputed. Claimant asserts that the afore resulted in an anatomical impairment of 20% to the body as a whole, that he has been rendered permanently and totally disabled, and that he is entitled to corresponding workers' compensation benefits. Respondents #1 deny that the claimant's anatomical impairment is greater than the 6 % whole body impairment they have accepted and paid. Further, respondents #1 deny that the claimant is permanently and totally disabled or that he has sustained any wage loss disability.

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 an injury having been sustained subsequent to the effective date of the afore provision.

The claimant has a ninth grade education, which was assessed by the vocational rehabilitation specialist as "marginal". With a date of birth of July 29, 1948, claimant was fifty-eight years old at the time of the hearing. Prior to his April 19, 2004, compensable injury claimant had been continually employed by respondent-employer or its predecessor since April 18, 1968. In addition to his employment with respondent as lift truck operator, claimant worked as a firefighter with the local fire department, in search and rescue with the St. Francis County Sheriff's Department, and as a security guard for several supermarkets in the county.

Other than the claimant's own testimony regarding chiropractor treatment for low back strain prior to 1981, the record is devoid of any evidence that the claimant sought, or required

medical treatment relative to his neck or low back prior to the April 19, 2004, compensable injury in the employment of respondents. Claimant did not experience any restrictions or limitations on his physical activities prior to the compensable injury in the employment of respondent.

While the claimant had diagnoses of hypertension, diabetes mellitus type II, and hypercholesterolemia prior to the April 19, 2004, accident and took medication relative to same, claimant nevertheless discharged his assigned job duties as well as extra activities as a security guard, firefighter, and with the search and rescue team. There is no evidence to reflect that claimant was prescribed medication for pain or inflammation by his treating physician prior to the compensable injury.

Prior to the April 19, 2004, compensable injury claimant had never registered complaints relative to his cervical or lumbar spine to warrant diagnostic studies in connection with same. Indeed, while the claimant was diagnosed with diabetes mellitus type II prior to the April 19, 2004, accident there is no showing in the medical records that he complained of pain, tingling, or numbness in his lower extremities prior to the compensable accident.

Claimant has not returned to the active employment of respondent-employer since the April 19, 2004, compensable accident. Claimant has a diagnosed herniated disc in his cervical spine as well as bulges in the lumbar spine. Claimant's preexisting degenerative disc disease was asymptomatic prior to the April 19, 2004, compensable injury. The evidence preponderates that the claimant's diagnosed sensory neuropathy is not related to the April 19, 2004, compensable injury, an opinion expressed by the claimant's primary care physician and his treating physician relative to the compensable injury.

On October 11, 2005, claimant was released from the care of his treating physician as having reached maximum medical improvement. Ark. Code Ann. § 11-9-102 (13) defines the healing period as “that period for healing of an injury resulting from an accident”. Claimant was also released by Dr. Braden to return to his regular work duties without restrictions. While releasing the claimant to return to work without restrictions, Dr. Braden surmised that the claimant would not return to work because he was very involved in his pain. The evidence in the record preponderates that the claimant’s “pain” is the product of the April 19, 2004, compensable injury. Indeed, Dr. Schwartz, the claimant’s primary care physician since February 2002, had never prescribed pain medication to the claimant prior to the April 19, 2004, compensable accident. Claimant was directed by Dr. Braden to follow up with Dr. Schwartz for renewal of his medication at the time of the October 11, 2005, release.

The medical in the record recites the amount and frequency of the claimant’s prescribed pain medication in connection with the compensable April 19, 2004, compensable injury. Further, the claimant presents credible testimony regarding the side effects of the medication on his mental and physical capacity. Claimant has not driven a vehicle since his April 19, 2004, compensable injury. The Human Resource personnel of respondent-employer acknowledged that with the restrictions imposed on the claimant’s physical activities as reflected in the March 14, 2006, report of Dr. Boals, claimant would not be considered for hire as a forklift driver, which was his pre-injury job.

Claimant was assessed with a 6 % whole body impairment by Dr. Braden relative to the April 19, 2004, compensable injury. Dr. Boals assessed the extent of the claimant’s anatomical impairment at 8% relative to the diagnosed cervical disc herniation and objective measured

residuals therefrom base upon the appropriate edition of the AMA Guides. In both his March 14, 2006, and March 27, 2006, correspondences, Dr. Boals set forth the basis for the ratings. The evidence preponderates that the claimant has sustained a permanent physical impairment in the amount of 8 % to the body as a whole as a result of this compensable injury of April 19, 2004. Respondents #1 have controverted the claimant's entitlement to permanent physical impairment in excess of 6 % to the body as a whole. While Dr. Boals assessed a 13 % anatomical impairment relative to the claimant's lower extremity complaints, the evidence preponderates that the diagnosed sensory neuropathy was not related to the compensable injury.

Claimant underwent a functional capacity evaluation on April 4, 2005, however the evidence preponderates that at the time he had not reached the end of his healing period or maximum medical improvement. The same was not attained until October 11, 2005. Subsequent to the April 2005, FCE claimant underwent additional medical treatment under the care of and at the direction of Dr. Abraham and Dr. Braden. A May 19, 2005, vocational assessment concluded that there was nothing to offer the claimant from a vocational standpoint. The claimant's primary care physician also concluded that the claimant could not physically return to gainful employment. As previously noted, Dr. Braden concluded that the claimant would not return to gainful employment. Respondent-employer observed that in light of the restrictions imposed on the claimant's activities by Dr. Boals, the evaluating physician, the claimant could not perform his regular job as a forklift driver.

Ark. Code Ann. § 11-9-519 (e)(1) defines permanent total disability to mean the inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment. Claimant has a ninth grade education. The entirety of his adult

employment has consisted of physical, manual, or unskilled labor. There are severe restrictions on the claimant's physical activities, to include bending, stooping, squatting, sitting, walking, and lifting. Due to his compensable injury, claimant is required to take strong narcotic medicines which adversely affects his ability to remain active or to operate machinery, to include an automobile. The evidence preponderates that when the claimant's age, education, permanent restrictions, and limitations are considered, that he has been rendered permanently and totally disabled. Respondents #1 have controverted the payment of permanent disability benefits to the claimant in excess of a 6 % anatomical impairment.

AWARD

Respondents #1 are herein ordered and directed to pay to the claimant permanent partial disability benefits at the weekly compensation benefit rate of \$233.00, to correspond with the claimant's 8 % permanent physical impairment growing out of the claimant's compensable injury of April 19, 2004. Said sums accrued shall be paid in lump without discount. Respondents #1 may claim credit for sums heretofore paid toward the afore obligation.

Respondents #1 are further ordered and directed to pay to the claimant permanent total disability benefits at the weekly rate of \$311.00, as a result of the April 19, 2004, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondents # 1 are further ordered to pay all reasonably necessary medical, hospital, nursing and other apparatus expenses growing out of the April 19, 2004, compensable injury of the claimant, to include medical related travel.

Maximum attorney fees are herein awarded to the claimant's attorneys on the controverted portion of this award, 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.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE