

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603594

ROBERT MAULDING, EMPLOYEE	CLAIMANT
PRICES UTILITY CONTRACTORS, INC., EMPLOYER	RESPONDENT NO. 1
CINCINNATI INDEMNITY COMPANY, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

**OPINION FILED DECEMBER 12, 2007**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE DIANA MAULDING, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 were represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 waived appearance at the hearing.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on July 24, 2007, July 25, 2007, and September 14, 2007. A Prehearing Order was entered in this case on February 14, 2007. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this

Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the Prehearing Order and are hereby accepted:

1. The employee-employer-insurance carrier relationship existed on April 3, 2006, when the claimant sustained a compensable back injury.
2. The claimant reached maximum medical improvement and the end of his healing period on July 21, 2006.
3. The Second Injury Fund has controverted any benefits for which the Second Injury Fund would be found liable.

By agreement of the parties, the issues to be litigated and resolved at the present time are as follows:

1. The claimant's correct average weekly wage pursuant to Ark. Code Ann. § 11-9-518, and whether the claimant has previously been paid temporary disability benefits and permanent disability benefits for anatomical impairment at an incorrect rate.
2. Whether Respondent No. 1 is bound by their prior acceptance of a 13% anatomical impairment, and if

not, whether the claimant's correct anatomical impairment is 10% to the body as a whole or 13% to the body as a whole.

3. Rehabilitation (the claimant has withdrawn any request that the respondents be liable for a program of rehabilitation at this time).
4. The Second Injury Fund contends that the extent of disability is a premature issue until the vocational rehabilitation process has been completed.
5. Permanent and total disability, or in the alternative, wage loss disability in excess of the claimant's permanent anatomical impairment.
6. Second Injury Fund liability.
7. Evidentiary issues which arose during the course of the hearing.

The record consists of eight volumes of transcript and exhibits from the hearing conducted on July 24, 2007, July 25, 2007, and September 14, 2007. In addition, I have "blue-backed" to designate as a ninth volume of the record the Claimant's Post-Trial Brief filed on October 26, 2007, Respondent No. 1's Trial Brief filed on November 13, 2007, Respondent No. 2's Trial Brief filed on November 8, 2007,

the Claimant's Reply Brief to the Second Injury Fund filed on November 16, 2007, and the Claimant's Reply Brief to Respondent No. 1's Brief filed on November 16, 2007. The testimony transcript from July 24-25, 2007, will be cited herein as "Vol. I." The testimony transcript from September 14, 2007, will be cited herein as "Vol. II."

### **DISCUSSION**

#### **ISSUE 1: EVIDENTIARY OBJECTIONS**

##### **A. Hearsay Objections**

I note that the Arkansas Supreme Court has previously explained in St. Paul Ins. Co. v. Touzin, 267 Ark. 539, 592 S.W.2d 447 (1980):

First, the compensation law provides that the Commission is not bound by technical rules of evidence or procedure, but may "conduct the hearing in a manner as will best ascertain the rights of the parties." [Citation omitted]. Professor Larson discusses at length the cases construing such provisions in workers' compensation statutes. He concludes that the factfinders are expected to adhere to basic rules of fair play, such as recognizing the right of cross examination and the necessity of having all the evidence in the record. On the other hand, a compensation commission undoubtedly has expertise much superior to that of a jury in the weighing of testimony and should therefore be left to determine the probative value of hearsay testimony and other proof that

might not be admissible in a court of law. Larson, Workmen's Compensation Law, 79.00 and 79.80 79.84 (1976).

Mr. Frye objected in Volume I, pages 84 and 86, as a continuing objection, to the claimant's attorney's questions regarding what doctors told the claimant. I find that Mr. Maulding's answer on page 85 of the transcript, which specifically refers to page 544 of the Claimant's Exhibit 12 and which does not stray from that exhibit, is accepted into the record in his answer at line 13. However, Ms. Maulding's question on page 87, line 8, and the claimant's answer beginning on line 9, call for hearsay which was not correlated with any medical reports in the record. This question and answer will not be considered in rendering a decision in this case.

For the same reasons, I am excluding from consideration, the claimant's attorney's question in Volume I, page 91, line 12, the claimant's response at line 14, and that portion of the claimant's response on line 19 of page 90 where the claimant testified what doctors at the VA had told him.

On pages 145-149 of Volume II, the respondents' attorneys made various discovery/hearsay/due process/

relevance arguments regarding the claimant answering a question as to how he filled out employment applications. I do not perceive that the claimant's testimony identifying what he wrote on employment applications as to why he left his last job presents a discovery problem, a due process problem, a hearsay problem or a relevance problem. I note that the claimant identified application recipients in Supplemental Responses to Interrogatory No. 44 contained in Claimant's Exhibit 8, and the respondents have failed to establish that the claimant's attorney did not comply by turning over all pertinent documents *in her possession* in response to Request for Production of Documents No. 10. The claimant was available at the hearing to testify as to what he wrote on job applications, and his answers on those applications is relevant to his attempt, or lack of attempt, to seek re-employment.

The respondents also object as hearsay in Volume I at page 181 to Claimant's Exhibit No. 29, a February 20, 2007, letter that the claimant's attorney addressed to Ms. Heather Taylor. I find that this letter is admissible to establish that the claimant through his attorney attempted to contact Ms. Taylor after their meeting on February 5, 2007.

**B. Personnel File Objections**

On page 41 of Volume I, Mr. Frye objected to inclusion of a First Report of Injury into the hearing record; and on page 50, Mr. Pake objected to the admission of a letter purportedly prepared by Melissa P. Kumpe, Owner/President of Prices Utility Contractors, Inc., dated August 7, 2006. I find that the Commission Form 1 was promulgated pursuant to the requirements of Ark. Code Ann. § 11-9-529 and as such, "shall not be evidence of any fact stated in the report in any proceeding with respect to the injury or death on account of which the report is made." I will therefore not consider that report in rendering a decision. With regard to Ms. Kumpe's letter, I find from the claimant's testimony in Volume I, pages 76 and 77, that he asked Melissa for a letter stating that there was no light duty and that he watched her sign the letter. Absent any evidence to the contrary, I find that the claimant has established by a preponderance of the evidence the authenticity of Ms. Kumpe's August 7, 2006, letter proffered at the hearing.

**C. Witness Opinions**

On page 117 of Volume I, Mr. Pake objected to the claimant's testimony - as speculation - that he probably could not pass requirements to obtain a CDL (Commercial

Driver's License). I note that Ms. Heather Taylor, a vocational professional, unequivocally indicated on pages 287-288 of Volume I that Mr. Maulding could not qualify for a CDL because of his blindness in one eye. In light of Ms. Taylor's testimony, I find moot the respondent's speculation objection to Mr. Maulding's testimony regarding his ability to obtain a CDL.

The claimant challenges the qualifications of Heather Taylor as an expert witness in this case. Ark. Code Ann. § 11-9-705(d) provides:

Expert testimony shall not be allowed unless it satisfies the requirement of Federal Rule of Evidence 702 with annotations and amendments, that is, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1997).

Federal Rule of Evidence 702 provides:

Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied

the principles and methods reliably to the facts of the case.

In the present case, Ms. Taylor obtained an undergraduate degree in social work from Arkansas State University in 1996 and a Master's Degree in Rehabilitation Counseling from Arkansas State University in 1999. In addition, she has been a certified rehabilitation counselor since 1999 and has been employed as a rehabilitation counselor since that time. (Vol. I p. 189) Her graduate degree program was geared towards persons with physical, mental, or developmental disabilities. She has primarily worked since then in the workers' compensation arena with individuals with physical work-related injuries. As a rehabilitation counselor she performs vocational evaluations and transferrable job skills analyses involving various occupations. (Vol. I p. 192) In a lot of situations, she may only be providing an opinion on job possibilities based on prior work experience. (Vol. I p. 193)

I find based on the evidence before me that Ms. Taylor is qualified based on her education and experience to render an expert opinion on re-employment issues. The Claimant's Post-Trial Brief argues that Ms. Taylor's opinions lack reliability because she has no specific training or

knowledge as to the claimant's employability as a construction supervisor. In addition, the claimant's attorney takes issue with Ms. Taylor's testimony that a barn is residential construction and with various other statements of fact in Ms. Taylor's documents in the record which the claimant disputes. I find that these arguments certainly go to the weight to be accorded Ms. Taylor's opinions, but I will not exclude as inadmissible any opinions in the record on re-employment issues presented in this case by Ms. Taylor.

**D. Other Evidentiary Objections**

On page 231 of Volume I, the claimant's attorney objected as speculation to Ms. Taylor testifying as to actions that Ms. Taylor would have taken had the contact between the parties not essentially broken off when it did. As I indicated at the hearing, I will treat her answer on page 231 as a statement of her standard operating procedure and will accept her answer into the record.

On page 240 of Volume I, Ms. Maulding objected to Mr. Pake asking Ms. Taylor whether or not there was anything in Ms. Taylor's report which indicated that the claimant could not do restoration work because of a visual problem. I find that Mr. Pake's question as to what was or was not contained

in Ms. Taylor's report to be a proper question for Ms. Taylor to answer, and her answer will be accepted into the record.

On page 242 of Volume I, Ms. Maulding objected to Mr. Pake asking Ms. Taylor about a possible disincentive for an individual to return to work under circumstances where the individual can bring home almost as much money by not working as the individual can bring home working. The claimant's attorney objected to the question on the grounds that Ms. Taylor does not have the background to know Mr. Maulding's expenses or his financial motivation. I find that the question was properly framed in terms of income, not expenses, and I find that the question is appropriate for an expert opinion from a re-employment professional. Ms. Taylor's answers on page 244 and 245 will therefore be accepted into evidence.

On page 331 of Volume I, the respondents objected to the admissibility of the Claimant's Exhibits 37, 38, and 39, which appear to be print-outs of job listings which the claimant's attorney/wife obtained from the internet. I note that the claimant lacked sufficient knowledge to authenticate the documents or to determine the accuracy of the information that his wife generated using the internet.

I will therefore not consider the content of the documents as probative of the information contained therein. I will, however, consider the claimant's testimony regarding his review of the documents, and I will accept the documents as lists of purported job openings that the claimant reviewed regarding possible re-employment.

I find from Claimant's Exhibit 9 that the attorneys did not enter into any stipulation related to Dr. Akin's deposition taken December 12, 2006. The purported stipulation on page 3 of Claimant's Exhibit 11 is therefore hereby stricken and disregarded for purposes of the deposition's introduction into evidence and review by this Commission.

Finally, the claimant contends that the Mr. Frye had inappropriate contact with Ms. Taylor between July 25, 2007, and September 14, 2007, regarding Mr. Maulding's July 24-25 testimony in violation of Arkansas Rule of Evidence 615. Ms. Taylor testified on September 14, 2007, that she had never seen a transcript of Mr. Maulding's prior testimony. She had not talked with anyone about Mr. Maulding's testimony. According to Ms. Taylor, Mr. Frye asked Ms. Taylor for salary information on medical transcription, and Mr. Frye did not tell Ms. Taylor why he desired the

information. (Vol. II p. 190-191) Under these circumstances, Ms. Maulding's motion to exclude Ms. Taylor's September 14, 2007, testimony as a sanction for an alleged violation of Rule 615 is denied.

**ISSUE 2: AVERAGE WEEKLY WAGE**

An average weekly wage determination is governed by the provision of Ark. Code Ann. § 11-9-518. Section 518(a) provides that compensation shall be computed on the average weekly wage under the contract of hire in force at the time of the accident and shall be based on a full-time work week in the employment. Section 518(c) provides that the average weekly wage may be determined by a method that is just and fair to all parties concerned in exceptional circumstances.

Where the contract of hire provides for part-time employment, an injured worker's average weekly wages should be computed on the basis of a normal part-time week plus any overtime actually worked. Ryan v. NAPA, 266 Ark. 802, 586 S.W.2d 6 (1979). In order to receive benefits based on a forty-hour week, a claimant must either actually have worked at least forty hours per week or be bound by contract to work forty hours if the work is made available. Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993). The claimant has the burden of proving that he was bound by

contract to work forty hours each week if the work was made available. A & C Servs., Inc. v. Sowell, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

The Arkansas Court of Appeals has concluded that the Commission did not err in basing a claimant's wage rate for seasonal work on a full forty hour work week under circumstances where the claimant's contract of hire was for forty hours per week or more whenever the work was available, and the claimant worked less than forty hours per week when her working hours were reduced because of the weather. Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). Likewise the Arkansas Court of Appeals has affirmed a Commission finding that a claimant should not be penalized for missing work for legitimate leave time including personal health reasons and for company convenience when work was not available. Rheem Manufacturing Mfg., Inc. v. Bark, 97 Ark. App. 224, \_\_\_ S.W.3d \_\_\_ (2006).

In the present case, the wage records submitted into evidence indicate that the claimant worked less than forty hours per week on many occasions during the fifty-two week period immediately preceding his injury on April 3, 2006. The claimant explained at the hearing that he wished to work

less than forty hours per week and approached his employer with an arrangement by which he could take time off without pay when he desired to do so. The claimant testified that Prices Utility Contractors agreed with that arrangement as long as the work would be covered and there would be enough people there to perform the work. (Vol. I p. 65) The claimant explained that he had to work a minimum of three days per week in order for his employer to pay the claimant's portion of the claimant's health insurance premiums. (Vol. I p. 64; R2 Exh. 3 p. 59) The claimant testified that there was always work available if he chose to show up for work forty hours per week. (Vol. I p. 80) The claimant testified that he asked Prices Utility Contractors to allow him to take this time off from work without pay "to do some of the stuff I like to do and save my vacation time in case I had to go back to the hospital." (Vol. II p. 23) The claimant testified that he began taking time off from work/reducing his work hours before he began to have heart problems in 2003. (Vol. II p. 24) The claimant testified in his deposition that a lot of the time he took off without pay was for personal things that he wished to do including traveling to street rod shows and

other activities, although some of the time could have been taken off for bad weather. (R2. Exh. 3 p. 58-59)

In summary, the claimant's testimony establishes that the claimant was not expected to work forty hours per week even if the work was made available. To the contrary, the claimant was permitted to cut back on his hours at his own discretion when enough other employees were available to get the work done. In addition, the claimant has failed to present any evidence indicating that he missed time from work for health reasons in the fifty-two week period immediately prior to April 3, 2006. While the claimant could have missed time from work due to the weather, the claimant has failed to present any evidence establishing any days actually missed due to the weather. The claimant's testimony establishes that the majority of the time that he missed from work was for personal reasons. Under these circumstances, I find that the claimant was not a full-time employee. I find that exceptional circumstances are presented in this case, and I find that the respondents correctly calculated the claimant's average weekly wage by dividing his actual earnings for the fifty-two week period immediately preceding the week of his injury by the number of weeks actually worked (fifty-two).

**ISSUE 3: PERMANENT ANATOMICAL IMPAIRMENT**

Various medical reports in the record identify on diagnostic testing either two levels (L1 and L3) or three levels (L1, L2, L3) of vertebral spine fractures in the claimant's lumbar spine following his April 3, 2006, fall at work. Dr. Akin, the claimant's treating neurosurgeon, performed kyphoplasty to treat compression fractures at L1 and L3 on May 15, 2006. (C. Exh. 12 p. 654) On July 20, 2006, Dr. Akin authored a report assigning the claimant a 13% anatomical impairment rating for his lumbar compression fractures. (C. Exh. 12 p. 690) The respondents accepted liability for the 13% anatomical impairment rating and ultimately paid out that rating.

However, in his December 12, 2006, deposition, Dr. Akin took issue with his own prior written impairment rating of 13%, and opined that the claimant's appropriate impairment rating under Table 75 of the AMA Guides should be 10%, not 13%. (C. Exh. 11 p. 32) At least by February 26, 2007, the respondents made known to the claimant's attorney that the respondents contended that the claimant's appropriate anatomical impairment should be 10%, not 13%. (Comm. Exh. 1 p. 23) In his post-hearing brief, the claimant contends that the respondents should nevertheless be bound by their

original acceptance of a 13% rating and that in the alternative, the respondents should be bound by any alleged inadvertent overpayment beyond 10%.

According to my research, the Arkansas Courts have not yet addressed in a published opinion the authority of the Commission to order a reimbursement or a credit against future liability for a purported overpayment of indemnity benefits. The Full Commission has previously found the grant and limit of its authority in Ark. Code Ann. § 11-9-207 and Ark. Code Ann. § 11-9-807. See generally Betty Swem v. University of Arkansas, Full Workers' Compensation Commission, Opinion filed November 2, 2004 (F203675). The Commission in that case concluded that the Commission has authority to direct a respondent carrier to be reimbursed out of any unpaid installment or installments of compensation due the claimant. The Commission has therefore found that a respondent who overpays may receive a credit against future liability, but the Commission does not have authority to order the claimant to reimburse the respondents out of the claimant's own pocket.

The Commission in Curtis Trimble v. Transervice Corporation, Full Workers' Compensation Commission, Opinion filed June 3, 1997 (E107197) identified the following policy

considerations which weigh in favor of providing a credit to the respondents for overpayments of workers compensation indemnity benefits:

If we were to allow claimant to receive a windfall in this case, we would be discouraging employers from accepting claims as compensable with the understanding that if the claim is eventually found not to be compensable, it will be entitled to an offset for other compensation benefits. To allow a claimant to receive a windfall sends a message to employers that they have nothing to gain by accepting a claim as compensable if they are not going to be entitled to a credit if the claim is eventually found not compensable. Here, the respondent was acting in good faith and claimant should not now receive a windfall as a result of the respondent's good faith. To do so will hurt future claimants who would not receive benefits if a respondent fears it will not be entitled to a credit for other benefits.

The Full Commission has recognized the Commission's authority to award a credit against future compensation for overpayment of permanent partial disability benefits in a number of cases. See Larry Butler v. Continental Express, Full Workers' Compensation Commission, Opinion filed July 2, 2007 (F402502); Joe W. Williams v. Drew County Road District, Full Workers' Compensation Commission, Opinion filed May 29, 1998 (E406727); Anthony Jones v. Railroad

Contracting, Full Workers' Compensation Commission, Opinion filed November 2, 1998 (E601298).

In the present case, I find that the respondents gave the claimant timely notice of their intent to controvert any impairment over 10%, and the claimant has failed to produce any persuasive authority or rationale as to why the respondents should not be entitled to a credit against future benefits if the claimant's appropriate anatomical impairment rating is 10% rather than 13%.

After reviewing the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, in light of the entire record before me, I also find that the claimant's appropriate anatomical impairment rating is 10% to the body as a whole. In reaching that conclusion, I again note that some diagnostic test reports in the record indicate that the claimant actually sustained three levels of fracture, not two. Two such reports include the myleogram report prepared by Dr. Rudy VanHemert from an April 24, 2006, examination (C. Exh. 12 p. 645) and a September 18, 2006, radiology report prepared by Dr. Richard Fitzrandolph (C. Exh. 12 p. 710). I note that under Table 75 of the AMA Guides and the combined values chart on page 322, three levels of lumbar

compression fracture would combine for a minimum of 15% impairment to the body as a whole.

However, I am also constrained to note that Dr. Akin on April 27, 2006, indicated that the claimant's X-rays and CT scan at that time indicated fractures at L1 and L3 (with no reference to a possible L2 fracture), and Dr. Akin testified that the claimant's appropriate impairment rating in this case is 10% for two levels of fracture at L1 and L3. (C. Exh. 11 p. 61) Likewise, I note that the January 24, 2007, report of Dr. Jose Dan Escarda, who treated the claimant at the Veterans Administration, indicates the claimant sustained two levels of compression fracture of the lumbar spine at L1 and L3. (C. Exh. 12 p. 788) While a December 22, 2006, note of Dr. Escarda makes reference to a deformity at L2 as well, Dr. Escarda makes no reference to an L2 abnormality in his later January 24, 2007, report.

Since Dr. Akin and Dr. Escarda, the claimant's two treating physicians for his back, each ultimately referenced two levels of compression fracture and not three, and since diagnostic testing studies are obviously subject to some degree of interpretation, I find that a preponderance of the credible evidence establishes that the claimant sustained two levels of lumbar compression and not three levels. As

Dr. Akin has accurately noted, two levels of lumbar compression fractures of less than 25% compression are assigned 5% each under Table 75 and equate to a total of 10% impairment under the combined values chart on page 322 of the Fourth Edition of the Guides.

For the reasons discussed herein, I find that the preponderance of the evidence establishes that the claimant sustained a 10% permanent anatomical impairment as a result of his work-related injury, and I find that the respondents are entitled to a credit against future liability for indemnity benefits to the claimant for any overpayment of benefits beyond the appropriate 10% rating.

**ISSUE 4: RIPENESS OF WAGE-LOSS DETERMINATION / SECOND INJURY FUND LIABILITY / WAGE LOSS**

**A. Ripeness Of Wage-Loss Determination**

During the course of his testimony on July 24-25, 2007, Mr. Maulding testified that Ms. McIver at Arkansas Rehabilitation Services has suggested as a training program to Mr. Maulding that he enroll at UALR, take some computer classes, and then try to work for Baptist Hospital or an insurance company transcribing medical information in his own home. (Vol. I p. 315) Mr. Maulding testified that he had at that time applied to enroll at UALR for the upcoming

semester. (Vol. I p. 316) At the hearing held on September 14, 2007, Mr. Mauldin testified that he is currently going to a computer literacy class on Tuesdays and Thursdays for a little over an hour per day. (Vol. II p. 77)

In light of the information made known to the respondents that the claimant had, in fact, enrolled in a UALR computer literacy class for the fall semester of 2007, the Second Injury Fund has contended that the present hearing for wage-loss determination is premature pending the completion of a program of rehabilitation through the Arkansas Rehabilitation Services. (Vol. II p. 14)

In Sharon Gilbert v. Hempstead Co., Full Workers' Compensation Commission, Opinion filed January 5, 1993 (E021279), the Full Commission concluded that a wage-loss determination was premature under circumstances where the thirty-nine year old claimant had started course work for a degree in secretarial science at her own expense after her work-related injury, but did not complete the training. The Full Commission concluded that the parties and the Administrative Law Judge were being short-sighted under the circumstances of the case in determining permanent wage-loss benefits and concluded that the claimant's employment opportunities would improve if she completed the secretarial

science program that she had begun. Under these circumstances, the Commission directed the respondents to pay for completion of the claimant's secretarial science course.

However, in Walter F. Kriehn v. Piggly-Wiggly, Full Workers' Compensation Commission, Opinion filed October 22, 1996 (E016463), a majority of the Full Commission found that a hearing on wage-loss disability was not premature where the claimant was fifty-two years old at the time of the hearing, he was enrolled in a four-year program of higher education, he had not yet declared a major or determined the length of time anticipated to complete his degree, he was taking very basic course work at the time of the hearing, he had not received any grades as of the time of the hearing, and there was no evidence in the record indicating that completing a Bachelor's degree at the claimant's age would have any appreciable effect on his future wage-earning capacity.

In light of the reasoning of the Commission in Kriehn, I find that a hearing on permanent disability (wage loss) is not premature in the present case at the present time. In this regard, I note that Mr. Maulding is currently sixty-one years old, and Mr. Maulding's original plans for retirement

were either at age sixty-five or sixty-six (R2. Exh. 3 p. 55), Mr. Maulding has previously indicated that he has no interest in computers or sitting and staring at a computer all day (R2. Exh 3. p. 51), and the only course work that Mr. Maulding has signed up for at the present time is a course in computer literacy. (Vol. II p. 77) Under these circumstances, I do not find that Mr. Maulding's computer literacy class that he is enrolled in presently will have any appreciable effect on the claimant's future wage earning capacity.

**B. Second Injury Fund Liability**

The Arkansas Supreme Court indicated the requirements for Second Injury Fund liability as follows in Mid-State Construction Company v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988):

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

In the present case, the parties have stipulated that the claimant sustained a compensable back injury at Prices Utility Contractors. Therefore, the first requirement for Second Injury Fund liability has been established in this case.

The record also establishes that prior to the compensable back injury at Price's Utility Contractors, the claimant has previously had medical problems including kidney stones, a heart stint, and loss of the use of one eye when a piece of metal struck him in the eye in a work-related accident in approximately 1971. I find on the evidence before me that the claimant's prior kidney stones and his 2003 heart stint are neither a pre-existing disability or impairment. In this regard, I note that in order to establish Second Injury Fund liability for a prior impairment "the claimant's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability existed as to the cause of the impairment." Mid-State Construction Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988). Here, the evidence indicates that the claimant has not been hospitalized for kidney stones in several years. The claimant has not been hospitalized for

his heart condition since 2003, has not received any type of impairment rating for either his kidney stones or his heart, and there is no evidence that his kidney stones or his heart stint have in any way limited his job opportunities in the past or at present.

I note, however, that the claimant's total loss of vision in one eye would be of a physical quality such as to be capable of supporting an award for permanent impairment. See Ark. Code Ann. § 11-9-521(a)(14); Mid-State Construction Co. supra. The second requirement for Second Injury Fund liability is therefore met in this case.

With regard to the third requirement, the claimant testified that with his loss of vision in one eye he could not now return to work spray-painting automobiles and that his loss of vision in one eye affects his ability to weld. (R2. Exh. 3 p. 83-84) In addition, Ms. Taylor testified that loss of vision in one eye would prohibit the claimant from obtaining a commercial driver's license. (Vol. I p. 287-288) However, I note that the claimant was never employed as either a welder or a commercially-licensed driver before or after his eye injury, and he used the GI Bill to obtain a forestry degree from Louisiana State University in 1975 after his eye injury in a body shop. He

worked for Price Utility Contractors from 1977 to 2006, and the only limitation that his loss of vision in one eye imposed was that co-workers knew not to throw tools in his direction. (R2. Exh. 3 p. 87)

Since reaching maximum medical improvement for his 2006 back injury, the claimant is limited by the terms of his functional capacity evaluation to light-duty work, and the claimant's principal restrictions appear to me to be limitations in back movement and lifting due to back pain. The claimant's loss of vision in one eye does not prevent the claimant from being able to read or study to be re-trained if he chooses to do so. The loss of vision in one eye does not contribute to the claimant's physical limitations due to back pain and did not affect the outcome of the functional capacity evaluation testing which the claimant underwent.

On the evidence before me, I find that the claimant's loss of vision in one eye, considered in conjunction with his compensable back injury and back-related restrictions, does not cause any greater disability than the disability produced by the back injury considered alone. I therefore find that the Second Injury Fund has no liability in this case for permanent disability. Consequently, I also find

that the Second Injury Fund has no liability for hearing transcription costs pursuant to Commission Rule 099.20.

**C. Permanent and Total Disability / Wage Loss**

For unscheduled injuries, an injured worker's entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which the worker was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider evidence demonstrating the degree to which the worker's anatomical disabilities impair the worker's earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters may include, but are not limited to, motivation, post-injury income, credibility, and demeanor. Glass v. Edens, 233 Ark. 786, 346 S.W.2d 685 (1961); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984). Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, the employee is entitled to compensation for permanent and total disability. Minor v. Poinsett Lumber & Manufacturing Co., 235 Ark. 195, 357 S.W.2d 504 (1962).

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

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

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

"Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14).

I note that the Full Commission has on several occasions rendered published decisions in claims for permanent disability benefits associated with compression

fracture injuries. In Patricia Weber v. Best Western of Arkadelphia, Full Workers' Compensation Commission, Opinion filed November 20, 2003 (F100472), the Full Commission assigned 10% wage loss disability to a claimant who sustained a 3% permanent anatomical impairment from a T3 compressions fracture with 40% - 50% loss of height. The claimant in that case was 61 years old, held a Bachelor of Arts degree in English, was trained as a certified care provider for seniors, and had worked weekends performing housekeeping at a Best Western hotel. The evidence indicated that the claimant had the training needed to get a job. Although the claimant contended that she was totally incapable of returning to work, the Commission noted that the claimant had not been assigned permanent restrictions by any physician.

In Jerry Hampton v. Dee's Construction, Full Workers' Compensation, Opinion filed May 22, 2003 (E801254), the Full Commission assigned 35% wage loss disability to a claimant who sustained a 30% anatomical impairment associated in part with two levels of compression fractures, kyphosis, and spinal fusion. The claimant was 34 years old, had quit school in the 9<sup>th</sup> grade, and had work experience in roofing with no transferrable job skills. A videotape offered into

evidence indicated that the claimant engaged in symptom magnification. However, the Commission recognized that the claimant sustained a serious back injury for which the claimant had required and would presumably continue to require narcotic pain medication in some form in the future.

In Charles L. Hooker v. TTC Illinois, Inc., Full Workers' Compensation Commission, Opinion filed February 15, 2000 (E803120), the Full Commission assigned a 15% wage loss to a claimant who sustained a 5% permanent anatomical impairment for an L5 compression fracture. The claimant was 59 years old, had not completed the 7<sup>th</sup> grade, and had worked previously for 30 years for a tree service. The claimant had gained some supervisory experience with the tree service, although he was still required to engage in labor with his co-workers. The Commission concluded that his post-injury pain limitations and lifting restrictions would not permit a return to that line of work. The Commission also noted, however, that the claimant was self-limiting in a functional capacity evaluation and that a physician had opined that the claimant could safely lift more than 25 pounds if he were motivated to do so.

In Melba Akers v. Acco, Inc., Full Workers' Compensation Commission, Opinion filed November 4, 1999

(E612558), the Full Commission assigned a 15% wage loss to a claimant who sustained a 3% permanent anatomical impairment related to a 30% compression of the T12 vertebrae. The claimant was 64 years old at the time of the hearing, had not completed the 11<sup>th</sup> grade in school, and had a job history of factory work. The claimant was wearing a TENS unit at the hearing, used a back brace riding in a car or in the grocery store, and used aspirin, Aleve or Tylenol. The claimant's functional capacity evaluation returned invalid. She had never required surgery, and the claimant experienced a psychological condition which prevented the claimant from attempting to return to work and therefore impeded the Commission's assessment of her earning capacity.

In the present case, the claimant was 61 years old at the time of the hearing. He earned a forestry degree from Louisiana State University in 1975, although he never worked in forestry after earning the degree.

The claimant's work experience includes service in the Air Force in KC-135 refueling aircraft maintenance. (Vol. I p. 35) The claimant next worked for ArkLa in North Little Rock, then started body school at night and worked in a body shop for three of four years. (Vol. I p. 33) After his

work-related eye injury in the body shop, the claimant went to college and ultimately earned his forestry degree at LSU.

After college, the claimant returned to Arkansas and worked building onto his own house when he could not immediately find work in forestry. The claimant went to work for Bud Price in 1977 and worked there until his injury in 2006. (Vol. I p. 33)

The claimant started at Bud Price as a laborer, but worked his way up to a supervisor over crews. (T. 71) Even as a supervisor, the claimant had to do the actual work with his co-workers. (Vol. I p. 70) At the last, the claimant was over downtown work: rebuilding manholes and utility vaults underground. (Vol. I p. 71) When the company had an Entergy contract, the claimant might lay sod, remodel offices with internal partitions, build vaults, excavate, pour concrete, lay conduit, backfill, or put down asphalt. (Vol. I p. 74-75) The claimant could run a jackhammer, use a shovel or drive a dump truck as needed. (R2. Exh 3. p. 13) The claimant did not operate backhoes very much because he was not interested in doing so. (R2. Exh. 3 p. 14) He would supervise five or six individuals when supervising manhole or vault work. (R2. Exh. 3 p. 15)

In addition to his work history, the claimant testified that he at one time could dismantle cars and rebuild them. The claimant also testified that he built the house he currently lives in. (Vol. I p. 38)

The medical record establishes that Dr. Akin performed kyphoplasty to treat compression fractures at the L1 and L3 levels of the claimant's lumbar spine on May 15, 2006. (C. Exh. 12 p. 654) The claimant testified that after kyphoplasty, "a lot of the pain in my back was gone." (Vol. I p. 62) The claimant testified that he does not use a stimulator, does not use a back brace except sometimes to drive, and does not take any type of pain pills. (Vol. I p. 62, 77; Vol. II p. 139, 182; R2. Exh. 3 p. 66, 67) The claimant testified that his current work limitations are that he cannot sit for long periods of time, cannot bend, and cannot lift much weight. (Vol. II p. 174) The claimant testified that he cannot work in construction because he cannot bend and cannot walk on unlevel ground. (Vol. II p. 154)

The claimant underwent a functional capacity evaluation on July 17, 2006, which was deemed a valid test with 50 of 54 consistency measures within expected limits. The report indicates that the claimant's heart rate measurements

indicated good effort, and the claimant's movement patterns were consistent with his reports of pain. The claimant demonstrated the ability to perform work only into the "light" classification. (C. Exh. 3) Ms. Taylor testified that the claimant's work for Price Utility Contractors would be considered a "heavy" labor occupation. (Vol. I p. 236)

After considering the claimant's age, education, work experience, the nature and extent of his back injury and impairment, and all other relevant factors, I find that the claimant has failed to establish that he is permanently and totally disabled. Although the claimant's demeanor at the hearing, his functional capacity evaluation, and Dr. Akin's observations all persuade me that the claimant has experienced a painful injury and impairment, I also note that the claimant does not use a stimulator, a brace, prescription medication or even over-the-counter pain medication to treat his pain. In addition, although the claimant is persuaded that he could not return to work at any time since his fall and injury on April 3, 2006, I note that the claimant's symptoms have not prevented the claimant from driving or riding to hot rod shows, with some antique shopping. In fact, at his October 10, 2006, deposition, the claimant testified that, *after* his injury in April of 2006,

his wife drove him to a show in Broken Bow, Oklahoma, in May; he drove his own vehicle to Springfield, Missouri, at the end of May; he drove his own vehicle to Louisville, Kentucky, in August; he drove to Van Buren the second week in September; and he drove to Lake DeGray the weekend before the deposition. (D. 22-23).

The Commission's ability to assess the claimant's diminished earning capacity is also somewhat impeded by the claimant's perception that a "meaningful wage" for him is close to the \$16.90 with two weeks vacation and insurance benefits that he made when he fell, the claimant's perception that \$14.64 per hour would not be a meaningful wage, and the claimant's acknowledgment that his cutoff for considering a new job is close to the \$16.90 per hour with benefits that he was making when he got hurt. (Vol. I p. 112, 118; R2. Exh. 3 p. 56)

I find credible Ms. Taylor's identification of several aspects of Mr. Maulding's skills, education, and experience which are transferrable, including his five or six years of management experience at Prices Utility Contractors; his experience, though very limited, bidding jobs; his stable work history; his ability to follow instructions; his ability to learn tasks easily by direction; his experience

performing repetitive tasks without difficulty throughout the day; his experience operating equipment; and his college degree. (Vol. I p. 308)

However, as discussed, the claimant's persistent back pain has been well documented, and the claimant cannot return to his former work in construction due to the heavy nature of the work. After considering the claimant's age, education, work experience, and all other relevant factors, I find that the claimant has sustained a 25% impairment to his wage earning capacity in excess of the 10% permanent anatomical impairment established by the medical evidence.

The claimant's attorney is entitled to a fee on the entire 25% permanent disability controverted and awarded herein, even though the respondents are entitled to a credit against a portion of that liability due to their prior overpayment of the claimant's anatomical impairment rating. Goodwin v. Phillips Petroleum Co., 72 Ark. App. 302, 37 S.W.3d 644 (2001).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-insurance carrier relationship existed on April 3, 2006, when the claimant sustained a compensable back injury.

2. The claimant reached maximum medical improvement and the end of his healing period on July 21, 2006.
3. The Second Injury Fund has controverted any benefits for which the Second injury Fund would be found liable.
4. The claimant has failed to establish by a preponderance of the evidence that he was a full time employee. Specifically, the claimant has failed to establish that he actually worked forty hours per week or that he was expected by contract to work forty hours per week if the work was made available. The respondents therefore correctly calculated the claimant's average weekly wage by dividing the claimant's actual earnings for the fifty-two week period immediately preceding the week of injury by the number of weeks actually worked (fifty two).
5. The claimant's appropriate anatomical impairment for his compensable two level lumbar compression injury is 10% rated to the body as a whole.

6. The respondents are entitled to a credit against future liability for the additional 3% anatomical impairment overpaid to the claimant.
7. The claimant's claim for permanent disability benefits is ripe for determination.
8. The Second Injury Fund has no liability for the claimant's permanent disability.
9. The claimant has sustained a 25% permanent partial disability in excess of his 10% permanent anatomical impairment established by the medical evidence.

**AWARD**

Respondents No. 1 are directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by Respondents No. 1 in accordance with Ark. Code Ann. § 11-9-715; and Death & Permanent Total Disability

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Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463  
(2002).

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge